Michigan. Supreme Court.

MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

August 12, 1986 to December 22, 1986

WILLIAM F. HAGGERTY
REPORTER OF DECISIONS

VOL. 426

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[1] To November 14, 1986.

[2] To October 30, 1986.

[3] From October 27, 1986.

CIRCUIT JUDGES

	Term Expires January 1 of
1. HARVEY W. MOES, Hillsdale,	1991
2. ZOE S. BURKHOLZ, St. Joseph,	1989
CASPER OTHELLO GRATHWOHL, Niles,	1987
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3. MARIANNE O. BATTANI, Detroit,	1987
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4. GORDON W. BRITTEN, Grass Lake,	1989

	Term Expires January 1 of
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5. HUDSON E. DEMING, Grand Ledge,	1989
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6. ROBERT C. ANDERSON, Pontiac,	1987
STEVEN N. ANDREWS, Bloomfield Hills,	1991
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ROBERT LEWIS TEMPLIN, Jr., Birmingham,	1991
JAMES S. THORBURN, Royal Oak,	1989
FREDERICK C. ZIEM, Pontiac,	1987
7. EARL E. BORRADAILE, Flint,	1989
PHILIP C. ELLIOTT, Flint,	1987
DONALD R. FREEMAN, Flint,	1991
JUDITH A. FULLERTON, Flint,	1989
ROBERT M. RANSOM, Flushing,	1991
VALDEMAR LUTHER WASHINGTON, Flint,	1987
THOMAS C. YEOTIS, Flint,	1987
8. JAMES L. BANKS, Ionia,	1991
CHARLES W. SIMON, Jr., Edmore,	1987
9. ROBERT L. BORSOS, Kalamazoo,	1987
JOHN F. FOLEY, Schoolcraft,	1987
RICHARD RYAN LAMB, Kalamazoo,	1989
C. H. MULLEN, Jr., Kalamazoo,	1991
10. FRED J. BORCHARD, Saginaw,	1989
ROBERT S. GILBERT, Saginaw,	1987
ROBERT L. KACZMAREK, Saginaw,	1991
GARY R. McDONALD, Saginaw,	1989
JOSEPH R. McDONALD, Saginaw,	1987
11. WILLIAM F. HOOD, Manistique,	1991
12. STEPHEN D. CONDON, Hancock,	1991
13. WILLIAM R. BROWN, Traverse City,	1991
CHARLES M. FORSTER, Traverse City,	1987
14. R. MAX DANIELS, Muskegon,	1987
JAMES M. GRAVES, Jr., Muskegon,	1989
MICHAEL EUGENE KOBZA, Muskegon,	1987
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15. MICHAEL H. CHERRY, Coldwater,	1991
16. JOHN B. BRUFF, Mount Clemens,	1987
RAYMOND R. CASHEN, Mount Clemens,	1987
ROBERT J. CHRZANOWSKI, Mount Clemens,	1987
GEORGE R. DENEWETH, Mount Clemens,	1989

		Term Expires January 1 of
	KATHLEEN JANSEN, Mount Clemens,	1991
	JOHN G. ROSKOPP, Mount Clemens,	1987*
	KENNETH N. SANBORN, Mount Clemens,	1991
	MICHAEL D. SCHWARTZ, Fraser,	1989
17.	ROBERT A. BENSON, Grand Rapids,	1991
	GEORGE V. BOUCHER, Grand Rapids,	1989
	GEORGE R. COOK, Lowell,	1987
	STUART HOFFIUS, East Grand Rapids,	1989
	ROMAN J. SNOW, Grand Rapids,	1991
	WOODROW A. YARED, Grand Rapids,	1987
18.	WILLIAM J. CAPRATHE, Bay City,	1987
	EUGENE C. PENZIEN, Bay City,	1989
	JOHN X. THEILER, Bay City,	1991
19.	JAMES M. BATZER, Manistee,	1991
20.	CALVIN L. BOSMAN, Grand Haven,	1987
	JAMES E. TOWNSEND, Holland,	1991
21.	PAUL F. O'CONNELL, Mt. Pleasant,	1987
22.	WILLIAM F. AGER, Jr., Ann Arbor,	1989
	ROSS W. CAMPBELL, Jr., Ann Arbor,	1987
	HENRY T. CONLIN, Ann Arbor,	1989
	PATRICK J. CONLIN, Ann Arbor,	1991
	EDWARD D. DEAKE, Ypsilanti,	1991
23.	J. RICHARD ERNST, Tawas City,	1991
24.	ALLEN E. KEYES, Marlette,	1991
25.	RAYMOND J. JASON, Marquette,	1991
	EDWARD A. QUINNELL, Marquette,	1987
26.	ROBERT R. FERGUSON, Ossineke,	1991
	JOSEPH P. SWALLOW, Alpena,	1987
27.	TERRENCE R. THOMAS, Newaygo,	1991
28.	WILLIAM R. PETERSON, Cadillac,	1991
29.	TIMOTHY M. GREEN, St. Johns,	1987
	RANDY L. TAHVONEN, St. Johns,	1991
30.	ROBERT HOLMES BELL, Mason,	1991
	THOMAS LEO BROWN, Lansing,	1987
	JAMES R. GIDDINGS, Lansing,	1987
	MICHAEL G. HARRISON, Lansing,	1989
	PETER D. HOUK, East Lansing,	1987
	JAMES T. KALLMAN, Lansing,	1991
	CAROLYN STELL, Lansing,	1989
31.	JAMES T. CORDEN, Port Huron,	1989
	PETER E. DEEGAN, Port Huron,	1987
	ERNEST F. OPPLIGER, Port Huron,	1991
32.	WILLIAM G. CLOON, Jr., Bessemer,	1991
33.	RICHARD M. PAJTAS, Petoskey,	1991
34.	CARL L. HORN, Standish,	1991
35.	GERALD D. LOSTRACCO, Corunna,	1991
36.	MEYER WARSHAWSKY, Paw Paw,	1991
37.	STANLEY EVERETT, Battle Creek,	1987
	JAMES C. KINGSLEY, Battle Creek,	1991
	PAUL NICOLICH, Marshall,	1989
38.	JAMES J. KELLEY, Jr., Monroe,	1989

[8] Died October 20, 1986.

	Term Expires January 1 of
WILLIAM F. LAVOY, Monroe,	1987
DANIEL L. SULLIVAN, Monroe,	1991
39. KENNETH B. GLASER, Jr., Adrian,	1989
JOHN C. TIMMS, Adrian,	1991
40. NORMAN A. BAGULEY, Lapeer,	1987
MARTIN E. CLEMENTS, Lapeer,	1991
41. FRANCIS D. BROUILLETTE, Iron Mountain,	1993
JOHN D. PAYANT, Kingsford,	1991
42. PAUL J. CLULO, Midland,	1991
TYRONE GILLESPIE, Midland,	1989
43. MICHAEL E. DODGE, Cassopolis,	1987
44. DANIEL A. BURRESS, Brighton,	1987
STANLEY J. LATREILLE, Howell,	1989
45. JAMES P. NOECKER, Centreville,	1989
46. ALTON T. DAVIS, Jr., Grayling,	1993
WILLIAM A. PORTER, Gaylord,	1991
47. DEAN J. SHIPMAN, Escanaba,	1987
48. GEORGE R. CORSIGLIA, Allegan,	1987
49. LAWRENCE C. ROOT, Big Rapids,	1989
50. NICHOLAS J. LAMBROS, Sault Ste. Marie,	1989
51. RICHARD I. COOPER, Ludington,	1991
52. M. RICHARD KNOBLOCK, Bad Axe,	1991
53. ROBERT C. LIVO, Cheboygan,	1987
54. PATRICK REED JOSLYN, Caro,	1989
55. KURT N. HANSEN, Gladwin,	1991

RECORDER'S COURT OF DETROIT

	Term Expires January 1 of
WENDY M. BAXTER,	1987
TERRANCE K. BOYLE,	1987
DOMINICK R. CARNOVALE,	1987
JAMES R. CHYLINSKI,	1991
EVELYN K. COOPER,	1991
GEORGE W. CROCKETT, III,	1989
PRENTIS EDWARDS,	1987
ROBERT L. EVANS,	1987
GERALDINE BLEDSOE FORD,	1987
SAMUEL C. GARDNER,	1987
JOSEPH A. GILLIS,	1987
HENRY L. HEADING,	1991
DONALD LEWIS HOBSON,	1991
THOMAS EDWARD JACKSON,	1989
BEVERLEY ANNE JASPER,	1989
CLARICE JOBES,	1991
VERA MASSEY JONES,	1991
DAVID P. KERWIN,	1987
WARFIELD MOORE, Jr.,	1991
JOHN PATRICK O'BRIEN,	1989
DALTON A. ROBERSON,	1989
JAMES E. ROBERTS,	1987
MICHAEL F. SAPALA,	1989
M. JOHN SHAMO,	1991
LAWRENCE D. SILVERMAN,	1987
CRAIG S. STRONG,	1991
MICHAEL J. TALBOT,	1989
EDWARD M. THOMAS,	1991
LEONARD TOWNSEND,	1987

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Eaton	Charlotte	5
Emmet	Petoskey	33
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing	30
Ionia	Ionia	8
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Isabella	Mount Pleasant	21
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ADMINISTRATIVE ORDER

JUVENILE COURT STANDARDS AND ADMINISTRATIVE GUIDELINES FOR THE CARE OF CHILDREN

Entered on December 2, 1986—REPORTER.

On order of the Court, the provisions of Administrative Order No. 1985-5 are extended in effect as follows: the *Juvenile Court Standards and Administrative Guidelines for the Care of Children* are to remain in effect until May 1, 1988, and the State Court Administrative Office is to provide its report to the Supreme Court by December 30, 1987.

ADMINISTRATIVE ORDER
No. 1986-1

RECIPROCAL VISITING JUDGE ASSIGNMENTS FOR JUDGES OF THE THIRD JUDICIAL CIRCUIT AND RECORDER'S COURT OF THE CITY OF DETROIT

Entered on October 2, 1986.—REPORTER

On order of the Court, the Court having approved a joint local court rule and a joint local administrative order consolidating the criminal dockets of the Third Judicial Circuit and the Recorder's Court of the City of Detroit,

IT IS ORDERED pursuant to Const 1963, art 6, §§ 1, 4, 5, and 23, that, effective October 13, 1986, all judges of the Third Judicial Circuit be temporarily assigned as visiting judges of the Recorder's Court of the City of Detroit and that all judges of the Recorder's Court of the City of Detroit be temporarily assigned as visiting judges of the Third Judicial Circuit.

Further, acknowledging MCR 8.110(G)(3) and MCL 600.564(4); MSA 27A.564(4), IT IS ORDERED that the visiting judges temporarily assigned pursuant to this administrative order shall exercise the powers of the court to which they are assigned; provided, however, that they shall exercise those powers only in cases assigned to them pursuant to the joint local administrative order and joint local court rules consolidating the criminal dockets of

the Third Judicial Circuit and the Recorder's Court of the City of Detroit.

IT IS FURTHER ORDERED that the Executive Chief Judge of the Third Judicial Circuit and the Recorder's Court of the City of Detroit shall summarize the courts' experience with the consolidated criminal docket in written reports submitted to the State Court Administrator at six-month intervals from this date. Additional reports may be submitted by the Executive Chief Judge. Additional reports must be submitted on request by the State Court Administrator.

IT IS FURTHER ORDERED that this administrative order shall not limit the authority of the State Court Administrator to assign judges of the Third Judicial Circuit and the Recorder's Court of the City of Detroit to those or other courts as permitted by the constitution, statute, or court rule.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted December 11, 1986, effective December 12, 1986—REPORTER.

RULE 2.108. TIME.

(A) Time for Service and Filing of Pleadings.

(1)-(5) (Unchanged.)

(6) In an action alleging medical malpractice filed on or after October 1, 1986, unless the defendant has responded as provided in subrule (A)(1) or (2), the defendant must serve and file an answer within 21 days after being served with the notice of filing the security for costs or the affidavit in lieu of such security required by MCL 600.2912d; MSA 27A.2912(4).

(B)-(F) (Unchanged.)

RULE 2.109. SECURITY FOR COSTS.

(A) (Unchanged.)

(B) Medical Malpractice Actions. In an action alleging medical malpractice filed on or after October 1, 1986, the parties must file security for costs or an affidavit in lieu of such security as provided in MCL 600.2912d, 600.2912e; MSA 27A.2912(4), 27A.2912(5). Notice of filing the security or the affidavit must be promptly served on the opposing party. If the opposing party has appeared in the action, the notice may be served in the manner

provided by MCR 2.107. If the opposing party has not appeared, the notice must be served in the manner provided by MCR 2.105. Proof of service of the notice must be promptly filed with the court.

(C)-(D) (Formerly [B]-[C]; redesignated, but otherwise unchanged.)

RULE 2.114. SIGNATURES OF ATTORNEYS AND PARTIES; VERIFICATION; EFFECT; SANCTIONS.

(A) Verification.

(1) (Unchanged.)

(2) If a pleading is required or permitted to be verified, it may be verified by

(a) oath or affirmation of the party or of someone having knowledge of the facts pleaded; or

(b) including the following signed and dated declaration: "I declare that the statements above are true to the best of my information, knowledge, and belief."

In addition to the sanctions provided by subrule (E), a person who knowingly makes a false declaration under subrule (A)(2)(b) may be found in contempt of court.

(B)-(E) (Unchanged.)

(F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2).

RULE 2.116. SUMMARY DISPOSITION.

(A) (Unchanged.)

(B) Motion.

(1) A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule. A party against whom a defense is asserted may move under this rule for summary

disposition of the defense. A request for dismissal without prejudice under MCL 600.2912*c*; MSA 27A.2912(3) must be made by motion under MCR 2.116 and MCR 2.119.

(2) (Unchanged.)

(C)-(J) (Unchanged.)

RULE 2.224. CHANGE OF VENUE IN TORT ACTIONS.

(A) Applicability. This rule applies to tort actions filed on or after October 1, 1986. MCR 2.221-2.223 and 2.225-2.226 apply to such actions except where they are inconsistent with this rule.

(B) County to Which Venue May Be Changed.

(1) If venue is changed because of hardship or inconvenience, the action may be transferred only to the county in which the moving party resides.

(2) If venue is changed because the action was brought where venue was not proper, the action may be transferred only to a county in which venue would have been proper.

(C) Costs. Costs are recoverable under this rule as provided in MCL 600.1629(2); MSA 27A.1629(2), and MCL 600.1653; MSA 27A.1653.

RULE 2.625. TAXATION OF COSTS.

(A) Right to Costs.

(1) In General. Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

(2) Frivolous Claims and Defenses. In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was

frivolous, costs shall be awarded as provided by MCL 600.2591; MSA 27A.2591.

(B)-(I) (Unchanged.)

RULE 3.604. BONDS.

(A)-(C) (Unchanged.)

(D) Affidavit of Surety; Notice of Bond.

(1)-(3) (Unchanged.)

(4) In an action alleging medical malpractice filed on or after October 1, 1986, notice of the filing of security for costs or the affidavit in lieu of such security, required by MCL 600.2912d, 600.2912e; MSA 27A.2912(4), 27A.2912(5), shall be given as provided in MCR 2.109(B).

(E)-(L) (Unchanged.)

AMENDMENTS OF LOCAL COURT RULES

THIRD JUDICIAL CIRCUIT
and
RECORDER'S COURT OF THE CITY OF DETROIT

JOINT LOCAL COURT RULE 6.102

Approved October 2, 1986, effective October 13, 1986—REPORTER.

LC RULE 6.102. PROCEEDINGS ON THE CONSOLIDATED CRIMINAL DOCKET.

(A) Notwithstanding any conflicting provisions in other local court rules, this rule shall govern all cases on the consolidated criminal docket of the Third Judicial Circuit and the Recorder's Court of the City of Detroit, regardless of a case's court of origin.

(B) "Court of origin" means:

(1) Recorder's Court for offenses committed within the corporate limits of the city of Detroit; and

(2) Third Circuit Court for offenses committed elsewhere in Wayne County.

(C) The chief judge of the Third Judicial Circuit shall have the authority to assign judges of the

Third Judicial Circuit to the consolidated criminal docket in such numbers and for such terms as the chief judge deems necessary.

(D) Immediately after a defendant is bound over for trial, the defendant, the defense attorney, and the prosecuting attorney shall be notified of the date, time, and place of arraignment on the information.

(E) The prosecutor or the defendant may request that, after arraignment on the information, only judges elected or appointed to that case's court of origin shall be eligible for the blind draw assignment of that case. The request must be filed in writing within seven calendar days after the magistrate signs the return. A timely written request must be granted. The request shall also control the assignment of any codefendants' cases.

(F) Defendants shall be arraigned on the information before the chief judge of Recorder's Court or a designee on the fourteenth calendar day after the magistrate signs the return. Court holidays shall not be counted in computing time.

(G) At the arraignment on the information, the chief judge of Recorder's Court, or a designee, may accept a plea of guilty and may consider an application for youthful trainee or diversionary status.

(H) The post-arraignment pretrial stage consists of four phases:

(1) The disposition conference for discussing guilty plea possibilities as well as other matters the court may determine to be necessary to expedite the orderly progression of the case.

(2) The calendar conference for setting the calendar of events, reviewing the legal issues, advising the court of any motions, and fixing time limitations on such motions and filings.

(3) Motion and evidentiary hearings.

(4) The final conference for terminating plea negotiations, certifying readiness for trial, and setting a firm trial date.

The defendant, defense counsel, and the prosecutor must attend each conference.

(I) No trial of a case on the consolidated criminal docket shall be adjourned except by the chief judge of the Recorder's Court of the City of Detroit for good cause shown on motion of the party seeking the adjournment, or by the chief judge for good cause.

CONSUMERS POWER COMPANY v ATTORNEY GENERAL

Docket Nos. 79277, 79278. Decided August 26, 1986. On application by the defendants for leave to appeal, the Supreme Court, in lieu of granting leave, affirmed the judgments of the Ingham Circuit Court and the Court of Appeals.

Consumers Power Company and the Detroit Edison Company brought an action in the Ingham Circuit Court against the Attorney General, the Secretary of State, and the Board of State Canvassers, seeking a declaration that MCL 168.472a; MSA 6.1472(1) is constitutional. The court, Robert Holmes Bell, J., sustained the constitutionality of the statute, and the Court of Appeals, R. B. BURNS, P.J., and CYNAR and HOOD, JJ., affirmed (Docket Nos. 94110, 94229). The defendants seek leave to appeal.

In an opinion per curiam, signed by Chief Justice WILLIAMS, and Justices LEVIN, BRICKLEY, CAVANAGH, BOYLE, and ARCHER, the Supreme Court *held:*

The circuit court and the Court of Appeals correctly determined that MCL 168.472a; MSA 6.1472(1) is constitutional. Const 1963, art 12, § 2 clearly authorizes the Legislature to prescribe by law the manner of signing and circulating petitions to propose constitutional amendments. In this case, the Legislature has followed the dictates of the constitution in promulgating the statute. The statute establishes no time limit for obtaining signatures. Rather, it provides that a signature affixed to a petition more than 180 days before the petition is filed is presumed stale and void, a presumption which may be rebutted.

Affirmed.

Justice RILEY took no part in the decision of this case.

Miller, Canfield, Paddock & Stone (by *John D. Pirich* and *Michael J. Hodge*) for the plaintiffs.

Frank J. Kelley, Attorney General, *Louis J. Caruso,* Solicitor General, and *Gary P. Gordon,* Assistant Attorney General, for the defendants.

Amici Curiae:

L. Brooks Patterson and *Michael J. Modelski* for Citizens for Capital Punishment.

Tom Downs, P.C., Eugene G. Wanger, and *Dorean M. Koenig* for Michigan Coalition Against the Death Penalty.

PER CURIAM. In this declaratory judgment action brought by Consumers Power Company and the Detroit Edison Company, the Ingham Circuit Court and the Court of Appeals have determined that MCL 168.472a; MSA 6.1472(1) is constitutional. We affirm the judgments of those courts.

I

In 1973, the Legislature enacted 1973 PA 112 which provides:

> It shall be rebuttably presumed that the signature on a petition which proposes an amendment to the constitution or is to initiate legislation, is stale and void if it was made more than 180 days before the petition was filed with the office of the secretary of state.

The next year, however, this legislation, MCL 168.472a; MSA 6.1472(1) was said to be unconstitutional by the Attorney General in OAG 1973-1974, No 4813, pp 171-174 (August 13, 1974).

II

On June 4, 1986, the plaintiffs filed a declaratory judgment action in the Ingham Circuit Court. They sought a declaration that MCL 168.472a; MSA 6.1472(1), which had never been declared

unconstitutional by a court, was indeed constitutional. Plaintiffs named the Attorney General, the Secretary of State, and the Board of State Canvassers as defendants. The matter was tried on stipulated facts. Briefs were filed and oral arguments were made. On July 18, 1986, the trial judge sustained the constitutionality of the statute.

The defendants appealed this ruling to the Court of Appeals. The Court of Appeals gave the matter expedited consideration and, on August 18, 1986, unanimously affirmed the trial court's ruling.

The defendants thereafter filed an application for leave to appeal with this Court on August 20, 1986.

III

Much of the debate in this matter centers on language contained in art 12, § 2 of our present constitution:

> AMENDMENT BY PETITION AND VOTE OF ELECTORS. Sec. 2. Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. *Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.* The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official

announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

SUBMISSION OF PROPOSAL; PUBLICATION. Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law. Copies of such publication shall be posted in each polling place and furnished to news media as provided by law.

BALLOT, STATEMENT OF PURPOSE. The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.

APPROVAL OF PROPOSAL, EFFECTIVE DATE; CONFLICTING AMENDMENTS. If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part of the constitution, and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved. If two or more amendments approved by the electors at the same election conflict, that amendment receiving the highest affirmative vote shall prevail. [Emphasis supplied.]

Changes in language had been adopted from that employed in Const 1908, art 17, § 2, the predecessor of Const 1963, art 12, § 2. The just mentioned provision of the 1908 Constitution read in relevant part:

Amendments may also be proposed to this con-

> stitution by petition of the qualified voters of this state. Every such petition shall include the full text of the amendment so proposed, and be signed by not less than ten percent of the legal voters of the state. Initiative petitions proposing an amendment to this constitution shall be filed with the secretary of state at least four months before the election at which such proposed amendment is to be voted upon. Upon receipt of such petition by the secretary of state he shall canvass the same to ascertain if such petition has been signed by the requisite number of qualified electors, and if the same has been so signed, the proposed amendment shall be submitted to the electors at the next regular election at which any state officer is to be elected. . . . The total number of votes cast for governor at the regular election last preceding the filing of any petition proposing an amendment to the constitution, shall be the basis upon which the number of legal voters necessary to sign such a petition shall be computed. . . . The petition shall consist of sheets in such form and having printed or written at the top thereof such heading as shall be designated or prescribed by the secretary of state. Such petition shall be signed by qualified voters in person only with the residence address of such persons and the date of signing the same.

Of extreme importance to resolution of the present controversy is focus on the absence of a call for legislative action in Const 1908, art 17, § 2 and the clear presence of one in Const 1963, art 12, § 2 as evidenced in the sentence:

> Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.

The defendants strenuously argue that the above-quoted sentence found in art 12, § 2 should not be construed to authorize the Legislature to enact a

law which provides for the staleness of signatures, subject to a rebuttable presumption. We disagree.

The language just quoted from art 12, § 2 of our constitution clearly authorizes the Legislature to prescribe by law for the manner of signing and circulating petitions to propose constitutional amendments. As the Court of Appeals observed in this case:

> The challenged statute is within the Legislature's authority to provide for the circulation of petitions and other elections procedures.

Defendants point out that in *Ferency v Secretary of State,* 409 Mich 569, 590-591; 297 NW2d 544 (1980), we stated that

> Const 1963, art 12, § 2 provides for the exercise of the right of popular amendment and describes the conditions imposed on that right. This section is self-executing—it does not depend upon statutory implementation.

However, this Court also subsequently ruled in the case of *Citizens for Capital Punishment v Secretary of State,* 414 Mich 913 (1982), in interpreting the same sentence of art 12, § 2, that

> In contending that the Board of State Canvassers did not perform its duty, the plaintiffs primarily argue that art 12, § 2 of the constitution contains all of the requirements for valid signatures and thus that the only requirement for a valid signature is that the signer be a registered voter of the State of Michigan. However, art 12, § 2, in addition to providing that petitions circulated to propose constitutional amendments must be signed by "registered electors of the state," also states that "[a]ny such petition shall be in the form, and shall be signed and circulated in such manner, as

> *prescribed by law."* (Emphasis supplied.) MCL 168.544c; MSA 6.1544(3) and MCL 168.544d; MSA 6.1544(4) set forth the other requirements which are "prescribed by law." Const 1963, art 12, § 2 is the successor of Const 1908, art 17, §§ 2 and 3. The relevant provisions of the 1908 Constitution described in detail the form and manner for the signing of petitions. The Convention Comment provided for the 1963 Constitution indicates that "[d]etails as to form of petitions, their circulation and other elections procedures are left to the determination of the legislature." In enacting MCL 168.544c; MSA 6.1544(3) and MCL 168.544d; MSA 6.1544(4), the Legislature has provided those details as contemplated by art 12, § 2 of the 1963 Constitution.
>
> * * *
>
> The plaintiffs have also argued that to the extent that there are requirements for valid signatures other than that the signers be registered electors, those other requirements are unconstitutional. However, those requirements, in essence, are authorized by the constitution itself, which specifically directs that "any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." The Legislature *has* set forth the form of the petition. In enacting these statutory requirements, therefore, the Legislature has followed the dictates of the constitution, an action which cannot, in this instance, be said to be unconstitutional. Furthermore, the requirements of these statutes serve to further the important state interest of insuring the purity of elections. [414 Mich 914-915.]

So too in the present situation, the Legislature has followed the dictates of the constitution in promulgating MCL 168.472a; MSA 6.1472(1). The statute sets forth a requirement for the signing and circulating of petitions, that is, that a signature which is affixed to a petition more than 180 days before that petition is filed with the Secretary

of State is rebuttably presumed to be stale and void. The purpose of the statute is to fulfill the constitutional directive of art 12, § 2 that only the registered electors of this state may propose a constitutional amendment.

The statute does not set a 180-day time limit for obtaining signatures. The statute itself establishes no such time limit. It states rather that if a signature is affixed to a petition more than 180 days before the petition is filed it is presumed to be stale and void. But that presumption can be rebutted.[1]

The defendants place considerable reliance on this Court's decision in *Hamilton v Secretary of State,* 221 Mich 541; 191 NW 829 (1923). In that case, the Attorney General argued that signatures to an initiatory petition had to be attached "within a reasonable period before its filing . . . ." In rejecting that contention, we stated:

> The constitutional provision contains procedural rules, regulations and limitations; it maps the course and marks the way for the accomplishment of an end; *it summons no legislative aid and will brook no elimination or restriction of its requirements;* it grants rights and conditions expressed, and if its provisions are complied with and its procedure followed its mandate must be obeyed. Its provisions are prospective in operation and self-executing. The vote for governor every two years fixes the basis for determining the number of legal voters necessary to sign an initiatory petition and start designated official action. [Emphasis supplied. 221 Mich 544.]

The flaw in the defendants' argument, however,

[1] We express no opinion in this action as to the validity of the procedures adopted by the Board of State Canvassers for rebutting the presumption of staleness and voidness. This aspect of the matter was not presented to or ruled on by the trial court or ruled on by the Court of Appeals.

is that nowhere in the 1908 Constitution, which was interpreted by this Court in *Hamilton, supra,* was the phrase "any such petition shall be in the form, and shall be signed and circulated in such manner as prescribed by law." This distinction is of considerable significance and indeed provides the authorization for the Legislature to have enacted MCL 168.472a; MSA 6.1472(1).[2] The Constitution of 1963, unlike that of 1908, does summon legislative aid in the area of the form of these petitions as well as in the areas of circulation and signing.

MCL 168.472a; MSA 6.1472(1) is presumed to be constitutional. *Hall v Calhoun Co Bd of Supervi-*

[2] We note in passing that art 2, § 8 of the 1963 Constitution provides:

> Laws shall be enacted to provide for the recall of all elective officers except judges of courts of record upon petition of electors equal in number to 25% of the number of persons voting in the last preceding election for the office of governor in the electoral district of the officer sought to be recalled. The sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question.

In response to the constitutional directive, the Legislature enacted 1969 PA 189, MCL 168.955; MSA 6.1955 which provided:

> The petitions shall be signed by registered and qualified electors equal to at least 25% of the number of votes cast for candidates for the office of governor at the last preceding general election in the electoral district of the official sought to be recalled. *Any signatures obtained more than 90 days before the filing of such petition shall not be counted.* [Emphasis supplied.]

Thus the Legislature has promulgated a ninety-day "freshness" requirement for signatures on recall petitions. Furthermore, the Legislature has decreed that if those signatures are more than ninety days old they will not be counted. In OAG 1975-1976, No 4964, pp 403-406 (April 19, 1976), the Attorney General has opined that MCL 168.955; MSA 6.1955 is constitutional. As is obvious, there is no mention in art 2, § 8 of the constitution of any temporal limitation on the validity of signatures. Nor is there one extant in art 12, § 2. While we express no opinion on the Attorney General's conclusion with regard to MCL 168.955; MSA 6.1955, the positions taken appear inconsistent.

sors, 373 Mich 642; 130 NW2d 414 (1964). A court will not declare a statute unconstitutional unless it is plain that it violates some provisions of the constitution and the constitutionality of the act will be supported by all possible presumptions not clearly inconsistent with the language and the subject matter. *Oakland Co Taxpayers' League v Oakland Co Supervisors,* 355 Mich 305, 323; 94 NW2d 875 (1959). We conclude that both the Ingham Circuit Court and the Court of Appeals have correctly determined that this statute is constitutional.[3]

We find defendants' other allegations of error to be without merit.

Accordingly, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we affirm the judgments of the Ingham Circuit Court and the Court of Appeals.

Pursuant to MCR 7.317(C)(3), the clerk is directed to issue the judgment order of this Court forthwith.

WILLIAMS, C.J., and LEVIN, BRICKLEY, CAVANAGH, BOYLE, and ARCHER, JJ., concurred.

[3] The defendants also allege that the 180-day time period specified in the statute is unconstitutional in that it is too short a time period and therefore burdens their use of the initiative process. However, as Judge CYNAR of the Court of Appeals pointed out:

> While it might have been shown that 180 days is insufficient time in which to collect a required number of valid signatures, that showing was not made in circuit court. The record contains no evidence that the 180-day limitation does or does not impose an unreasonable burden on the people's right to propose constitutional amendments. Accordingly, the trial court [judge] correctly concluded, on the record before him, that he could not say as a matter of law that the statute's presumption of validity had been overcome.

This Court expresses no opinion on this question for the reasons specified by Judge CYNAR.

DARR v FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF DETROIT

Docket No. 77616. Argued June 4, 1986 (Calendar No. 15). Decided September 16, 1986.

Richard E. Darr and Nancy Jo Darr and J. Lawrence Moisan and Kathleen A. Moisan brought an action in the Wayne Circuit Court against First Federal Savings & Loan Association of Detroit, the Darrs' mortgagee, seeking a declaration that the sale of the Darrs' mortgaged realty to the Moisans on a land contract created a lien or encumbrance subordinate to the mortgage, constituting a permissible exception to a due-on-sale clause contained in the mortgage instrument, and to enjoin foreclosure by First Federal. The court, James E. Mies, Jr., entered judgment for the plaintiffs, finding that a land contract is a lien or encumbrance which is subordinate to the mortgage and was excluded from the acceleration provisions of the due-on-sale clause. The Court of Appeals, R. M. MAHER, P.J., and D. E. HOLBROOK, JR., and LATREILLE, JJ., affirmed in an opinion per curiam (Docket No. 71078). The defendant appeals.

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

The provision in the due-on-sale clause of the mortgage instrument that liens or encumbrances subordinate to the mortgage would not amount to a sale or transfer of the security property, and thus not trigger acceleration provisions of the clause, was not intended to apply to liens created only as a result of the execution by the mortgagor of a land contract which had as its primary purpose the transfer or sale of the property.

1. A land contract vendor's interest in a land contract is personalty, and, upon the vendor's death, passes to the administrator of his estate and does not descend to his heirs as real property. By contrast, a vendee's interest is real property which

REFERENCES

Am Jur 2d, Mortgage § 1 *et seq.*

Am Jur 2d, Vendor and Purchaser, § 197 *et seq.*

See the annotations in the ALR3d/4th Quick Index under Mortgage; Vendor and Purchaser.

does descend upon the vendee's death to his heirs. The vendee of a land contract is vested with equitable title in the land, while legal title remains in the vendor as security for payment of the purchase price. The vendor retains an equitable lien upon the land for any unpaid purchase money, and the vendee, to the extent money is paid on the contract, acquires a lien as against subsequent encumbrances and purchases. The liens are not property rights in or to the land, but, rather, constitute a charge against or securities in the land. Thus, the primary purpose of a land contract is the sale and purchase of land.

2. In this case, the primary purpose of the land contract was the sale and purchase of the Darrs' land. The due-on-sale clause in the Darrs' mortgage provided that if the security property were sold or transferred by the Darrs' without prior written consent of the lender, the lender could accelerate the mortgage balance. The Darrs' and the Moisans' liens as vendors and vendees under the land contract were not liens or encumbrances subordinate to the mortgage, and thus were not excepted from the provisions of the due-on-sale clause.

Reversed.

146 Mich App 568; 381 NW2d 769 (1985) reversed.

1. MORTGAGES — LAND CONTRACTS — DUE-ON-SALE CLAUSES.

A provision in a due-on-sale clause of a mortgage instrument that liens or encumbrances subordinate to the mortgage would not amount to a sale or transfer of the security property, and thus not trigger acceleration provisions of the clause, was not intended to apply to liens created only as a result of the execution by the mortgagor of a land contract which had as its primary purpose the transfer or sale of the property.

2. PROPERTY — REALTY — LAND CONTRACTS.

The primary purpose of a land contract is the sale and purchase of land.

Frank J. Kelley, Attorney General, *Louis J. Caruso,* Solicitor General, and *Harry G. Iwasko, Jr.,* and *Philip J. Smith,* Assistant Attorneys General, for the intervening plaintiff State of Michigan.

Clark, Klein & Beaumont (by *Patrick J. Keating, David M. Hayes,* and *Thomas S. Nowinski*) for the defendant.

Amici Curiae:

William K. Black and *Paul W. Grace* (*Harry W. Quillian* and *Ralph W. Christy,* of counsel) for Federal Home Loan Bank Board.

Garrett C. Burke and *Allan G. Ratner* for Federal Home Loan Mortgage Corporation.

Dickinson, Wright, Moon, Van Dusen & Freeman (by *Gregory L. McClelland* and *Jeffery V. Stuckey*) for Michigan Association of Realtors.

Warner, Norcross & Judd (by *Jeffrey O. Birkhold* and *James H. Breay*) for Michigan Bankers Association.

Mason, Steinhardt & Jacobs, P.C. (by *John E. Jacobs* and *Jeannine F. Gleeson-Smith*), for Mortgage Bankers Association of Michigan.

Stephen A. Bromberg, Alan S. Levine, and *Robert R. Nix, II,* for the State Bar of Michigan, Real Property Law Section.

ARCHER, J.

I. FACTS

The facts and procedural history in this case are set forth in detail in *Darr v First Federal Savings & Loan Ass'n of Detroit,* 146 Mich App 568; 381 NW2d 769 (1985). Briefly, in 1977 the Darrs purchased a home located in Redford Township. The home was financed through a mortgage which the Darrs executed with First Federal for $31,000. The mortgage document was a standard form described

as the "FNMA[1]/FHLMC[2] Uniform Mortgage Instrument." The due-on-sale clause contained in paragraph 17 of the mortgage instrument is the focus of this appeal.[3]

Approximately two years after the Darrs executed the mortgage agreement, they sold their home to coplaintiffs Moisan. The Moisans paid cash for the Darrs' equity and signed a land contract. The Darrs failed to obtain consent from First Federal prior to executing the land contract as required by paragraph 17 of the mortgage instrument. The Darrs continued to submit mortgage payments to First Federal, but these payments were rejected. In 1980, First Federal notified the Darrs that the mortgage balance was due

[1] FNMA stands for Federal National Mortgage Association.

[2] FHLMC stands for Federal Home Loan Mortgage Corporation.

[3] Paragraph 17 provides:

> 17. Transfer of the Property Assumption. *If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Mortgage,* (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Mortgage to be immediately due and payable.
>
> * * *
>
> *If Lender exercises such option to accelerate, Lender shall mail Borrower notice of acceleration in accordance with paragraph 14 hereof. Such notice shall provide a period of not less than 30 days from the date the notice is mailed within which Borrower may pay the sums declared due.* If Borrower fails to pay such sums prior to the expiration of such period, Lender may, without further notice or demand on Borrower, invoke any remedies permitted by paragraph 18 hereof. [Emphasis supplied.]

We note that paragraph 17 of the FNMA/FHLMC has since been revised. Revised paragraph 17 does not contain a lien or encumbrance exception to the due-on-sale clause.

and payable within thirty days pursuant to the terms of the due-on-sale clause contained in paragraph 17 (see n 3). When the Darrs failed to pay the balance due, First Federal instituted foreclosure proceedings.[4]

One day prior to the date scheduled for the sheriff's sale on foreclosure, plaintiffs filed suit in Wayne Circuit Court, seeking declaratory and injunctive relief. Plaintiffs' complaint was based on two theories: (1) enforcement of the due-on-sale clause constituted an unreasonable restraint on alienation of the property, and (2) sale of the mortgaged realty on land contract terms creates "a lien or encumbrance" within the meaning of the lien or encumbrance exception contained in paragraph 17.

Approximately one year after plaintiffs filed their complaint, the United States Supreme Court decided *Fidelity Federal Savings & Loan Ass'n v de la Cuesta,* 458 US 141; 102 S Ct 3014; 73 L Ed 2d 664 (1982). On the basis of the holding in that case, plaintiffs abandoned their restraint on alienation claim.

On October 6, 1982, First Federal filed a motion pursuant to GCR 1963, 117.2(1) for summary judgment on plaintiffs' remaining claim. The circuit court denied First Federal's motion, finding that a land contract is a lien or encumbrance which is subordinate to the mortgage and was excluded from the due-on-sale clause. Pursuant to the terms of paragraph 17, First Federal moved for rehearing of its summary judgment motion, and the circuit court declined to reverse itself.

By agreement of the parties, judgment was entered for plaintiffs on April 12, 1983, pursuant to

[4] The foreclosure was commenced under MCL 600.3201 *et seq.;* MSA 27A.3201 *et seq.*

GCR 1963, 117.3.[5] Defendant appealed, and the Court of Appeals affirmed the judgment of the circuit court on the basis that the land contract created a lien which qualified for the "subordinate lien" exception to the due-on-sale clause.

II

ISSUE—SHOULD A LAND CONTRACT BE INTERPRETED AS A SALE OR TRANSFER OF INTEREST WITHIN THE MEANING OF PARAGRAPH 17 OF THE FNMA/FHLMC UNIFORM MORTGAGE INSTRUMENT AND NOT A "LIEN OR ENCUMBRANCE" WITHIN THE EXCLUSION OF PARAGRAPH 17?

A. HISTORICAL BACKGROUND

A review of the regulations and legislative history of the due-on-sale clause would be helpful. Briefly, in 1976 the Federal Home Loan Bank Board issued a regulation governing due-on-sale clauses contained in federal savings and loan association loan instruments.[6] Prior to the regulation being issued, there was a degree of controversy concerning a federal savings and loan association's authority to enforce a due-on-sale clause. The board decided to issue a regulation governing such clauses to ensure that a federal savings and loan association's ability to accelerate a loan upon transfer of the security property would not be restricted. The board was concerned that the elimination of the due-on-sale clause would " 'have an adverse [e]ffect on the earning power and financial stability of Federal associations, [would] impair the ability of Federal associations to sell their loans in

[5] We note that because there was no real dispute as to the facts in this case, a factual hearing was never held in the trial court.

[6] The due-on-sale regulation was initially promulgated in 12 CFR 545.6-11(f) (1977). The regulation is now set forth in 12 CFR 545.8-3(f) (1983).

the secondary markets, [would] reduce the amount of home-financing funds available to potential home buyers, and generally . . . cause a rise in home loan interest rates.' " *de la Cuesta, supra* at 168.

In *de la Cuesta,* the United States Supreme Court held that the board's due-on-sale regulation preempts conflicting state limitations on the due-on-sale practices of federal associations. *Id.* at 170. Prior to *de la Cuesta,* Michigan, as well as several other states, blocked enforcement of due-on-sale clauses. In Michigan the rule was established by the courts.

This Court was first presented with a mortgage containing a due-on-sale clause in *Campau v Chene,* 1 Mich 400 (1850). The merits of the controversy in *Campau* were not decided due to the thirty-eight year lapse between the alleged breach and the date of the commencement of the suit. The Court stated, however, that if the "covenant against alienation"[7] contained in the mortgage instrument "could be considered a condition, it would be void. For a condition annexed to a conveyance, in fee or devise, that the purchaser or devisee should not alien, is unlawful and void." *Id.* at 414. One hundred and twenty-seven years elapsed before a Michigan appellate court was asked to consider another mortgage instrument containing a due-on-sale clause.[8]

[7] The covenant against alienation read as follows:

> And for the security of the payment of the said one thousand pounds, in the manner above mentioned, and for the fulfilling of the clauses and conditions here above expressed, *Chene is prohibited from alienating, exchanging, or selling the farm or personal property without Campau's consent, and the whole is to remain and stand hypothecated till the payment in full of said one thousand pounds.* [Emphasis supplied. *Id.* at 411.]

[8] See *Nichols v Ann Arbor Federal Savings & Loan Ass'n,* 73 Mich App 163; 250 NW2d 804 (1977), lv den 400 Mich 844 (1977).

In *Nichols v Ann Arbor Federal Savings & Loan Ass'n,* 73 Mich App 163; 250 NW2d 804 (1977), lv den 400 Mich 844 (1977), the Michigan Court of Appeals determined that the due-on-sale clause was a direct restraint on alienation because it was so closely akin to a promissory restraint. The *Nichols* Court concluded that absent a showing by the lender attempting to enforce the due-on-sale clause that there was a threat to his legitimate interests in the security property sufficient to justify the restraint on alienation,[9] the due-on-sale clause was an unreasonable restraint and therefore unenforceable.[10]

[9] These legitimate interests included protecting the security property from waste or impairment and also guarding against the risks of having to resort to the security upon default.

[10] We note that the categorization of a due-on-sale clause as a restraint on alienation has been harshly criticized. The Nebraska Supreme Court stated in *Occidental Savings & Loan Ass'n v Venco,* 206 Neb 469, 472-474; 293 NW2d 843 (1980):

> It is true that the possibility of acceleration may impede the ability of an owner to sell his property as he wishes; nonetheless, not every impediment to a sale is a restraint on alienation, let alone contrary to public policy. It is a fact that zoning restrictions, building restrictions, or public improvements may impede the sale and substantially affect the ability of an owner to realize a maximum price. Yet no one suggests that such restrictions or covenants, as a class, are invalid simply because they affect the ease with which one may dispose of one's property. We are somewhat at a loss to understand how or why so many courts have been willing to describe a "due on sale" clause as a restraint on alienation and we are unwilling to do so. Therefore, we begin our analysis by holding that "due on sale" clauses are not direct restraints on alienation within the meaning of the law.
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> * * *
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> Whatever an indirect restraint on alienation . . . may be, a "due on sale" clause in a mortgage does not fall within the category. . . . [S]ome covenants may impair the marketability of property and yet not be restraints on alienation, direct or indirect, as that concept is known in the law.

Accepting the rationale in *Venco,* we believe that due-on-sale clauses should not be categorized as restraints on alienation.

As stated above, the holding in *Nichols* relative to loans originated by federal associations was negated by the United States Supreme Court decision in *de la Cuesta, supra.* We note that subsequent to the *de la Cuesta* decision federal[11] and state[12] legislation was enacted which provides that due-on-sale clauses contained in real property loan contracts written by federal associations and state lending institutions are enforceable.

B. ANALYSIS

The present case involves a mortgage instrument which excepts from the due-on-sale clause a "lien or encumbrance subordinate" to the mortgage. We are asked to determine whether a land contract sale of the security property to a third party triggered the due-on-sale clause.

Initially, we note that the fact that the land contract executed between the Darrs as vendor and the Moisans as vendee constituted a sale of the security property is not disputed.

A vendor's interest in the land contract is personal property. *Klever v Klever,* 333 Mich 179, 190; 52 NW2d 653 (1952). Upon the death of the land contract vendor, his interest goes to his administrator as personalty and does not descend to his heirs as real property. In contrast, the vendee's interest in the land contract is real property which descends to his heirs upon his death. *Bowen v Lansing,* 129 Mich 117, 120; 88 NW 384 (1901).

As we stated in *Barker v Klingler,* 302 Mich 282, 288; 4 NW2d 596 (1942):

> It is well settled in this State that the vendee in

[11] See 12 USC 1701j-3, commonly referred to as the Garn-St. Germain Depository Institutions Act of 1982, PL 97-320.

[12] See MCL 445.1621 *et seq.;* MSA 23.1125(21) *et seq.*

> a land contract is vested with the equitable title in the land, and that the legal title remains in the vendor and is held as security for the payment of the purchase price of the land, upon the payment of which the vendee is entitled to a conveyance of legal title.

Thus, a land contract vendee's rights are equitable. A vendee of a nonexecutory land contract is entitled to possession of the land.[13] To the extent that the vendee pays purchase money on the land contract, he retains an equitable lien upon the land as against subsequent encumbrances and purchases.[14] The vendor retains an equitable lien upon the land for any unpaid purchase money as against assignees in bankruptcy or insolvency or a general assignee for the benefit of creditors.[15]

In *Post v Campau,* 42 Mich 90, 94-95; 3 NW 272 (1879), we defined an encumbrance to include anything which

> constitutes a burden upon the title; a right of way, . . . a condition which may work a forfeiture of the estate, . . . a right to take off timber, . . . a right of dower, whether assigned or unassigned . . . . In short, "every right to, or interest in the land, to the diminution of the value of the land, *but consistent with the passage of the fee by the conveyance."* [Emphasis supplied.]

Hence, although an encumbrance is typically adverse to the interest of the landowner, it does not conflict with his conveyance of the land in fee. A lien is one type of encumbrance.

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[13] *Bowerman v Newaygo Circuit Judge,* 353 Mich 535, 539; 91 NW2d 879 (1958).

[14] This rule was established in the courts of chancery in England and was first pronounced in Michigan in *Payne v Atterbury,* Harr Ch 414 (Mich, 1842).

[15] *Lyon v Clark,* 132 Mich 521; 94 NW 4 (1903).

The vendor's and the vendee's liens grow out of the transaction of the sale and purchase of land. The liens originate from the same motive, from the desire of equity to compel "righteous" dealing between vendor and vendee. The liens would not come into existence absent the execution of the land contract. A land contract vendee's or vendor's lien is not a property right in or right to the land itself, it constitutes instead, a charge or security in the land.[16]

On the basis of all of the above, we conclude that the primary purpose of a land contract is the sale and purchase of land by vendor and vendee, respectively.

The due-on-sale clause presented in this case provides that if the security property is sold or transferred by the borrower without the lender's prior written consent the lender may accelerate the mortgage balance. Liens or encumbrances subordinate to the mortgage are excepted from the due-on-sale clause. We believe that the lien or encumbrance exception to the due-on-sale provision does not include liens which are created only as a result of the execution of a land contract which has as its primary purpose the transfer or sale of the security property.

CONCLUSION

The primary purpose of the land contract executed between the Darrs and the Moisans was the sale and purchase of the security property. The vendor's and vendee's liens would not have been created had the land contract not been executed. Because the primary purpose of the land contract was the sale and purchase of the security property,

[16] See *Aetna Casualty & Surety Co v Starkey*, 116 Mich App 640; 323 NW2d 325 (1982).

we hold that the lien or encumbrance exception to the due-on-sale clause is not applicable to the facts of this case.

The decision of the Court of Appeals is reversed.

WILLIAMS, C.J., and LEVIN, BRICKLEY, CAVANAGH, BOYLE, and RILEY, JJ., concurred with ARCHER, J.

PEOPLE v COLLIER

Docket No. 75603. Argued January 16, 1986 (Calendar No. 19). Decided September 16, 1986.

Eric Collier was convicted in the Recorder's Court of Detroit, John H. Gillis, Jr., J., of assault with intent to commit great bodily harm less than murder. The Court of Appeals, D. E. HOLBROOK, JR., P.J., and MACKENZIE and QUINNELL, JJ., reversed in an unpublished opinion per curiam on the ground that attempted impeachment of the defendant by the prosecutor during cross-examination and argument by reference to the defendant's failure prior to arrest to inform the police that he had been a victim of a robbery was improper (Docket No. 71813). The people appeal.

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

The impeachment of the defendant's testimony that he had been a victim of an armed robbery by reference to his failure prior to arrest to report the fact to the police was properly permitted as probative of his credibility and did not violate the Due Process or Self-incrimination Clauses of the Michigan Constitution.

1. Where an accused exercises his constitutional right to remain silent at the time of arrest, use of such silence during trial to impeach prior inconsistent statements, where no reference is made to the statements during direct examination, is improper. In this case, however, the silence alluded to by the prosecutor occurred before the defendant had any contact with the police. No mention was made of silence on the part of the defendant at or after contact with the police. Thus, reversal of the defendant's conviction on that basis was improper. In addition, it would have been entirely natural and expected that

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REFERENCES

Am Jur 2d, Criminal Law, §§ 701 *et seq.*, 825, 942.

Impeachment of defendant in criminal case by showing defendant's prearrest silence—state cases. 35 ALR4th 731.

Impeachment of defense witness in criminal case by showing witness' prior silence or failure or refusal to testify. 20 ALR4th 245.

a person robbed under the circumstances related by the defendant would have reported the crime to the police. The prosecutor did not ask the jury to infer guilt from the defendant's silence, but urged that his testimony was unbelievable in light of his subsequent conduct. Thus, the permitting of the questioning and argument regarding the defendant's prearrest silence was proper.

2. The defendant's arguments that the questioning and argument violated his right of due process and right against self-incrimination were without merit.

Justice BOYLE, concurring, wrote separately to note that the Fifth Amendment and Const 1963, art 1, § 17 guarantee a right to be free of governmentally compelled self-incrimination, and in this case no governmental action induced the defendant's silence before arrest. The constitutional right has no bearing on the probative significance of silence prior to contact with the police, and thus there was no basis to preclude use of the defendant's prearrest silence for purposes of impeachment.

Reversed and remanded.

Justice CAVANAGH, joined by Justices LEVIN and ARCHER, dissenting, stated that although the federal constitution does not prohibit use of prearrest silence in impeaching a defendant, the Supreme Court may develop evidentiary rules which prohibit such use. The Court also is free to interpret the state constitution in a manner which affords greater rights where there is a compelling reason to do so. In this case there are compelling reasons to hold as a matter of state constitutional law that a defendant's prearrest silence may not be used for purposes of impeachment.

Under the circumstances, it was not entirely natural and expected that the defendant as a victim of a robbery would have reported the crime to the police. The use of the defendant's silence, even for purposes of impeachment, impinges upon the defendant's constitutional rights while providing little probative benefit.

Justice ARCHER, joined by Justice LEVIN, dissenting, stated that evidence of a defendant's prearrest silence should not be admissible for purposes of impeachment. However, if such evidence is introduced into the record, the trial court must weigh the probative value of admitting the evidence against any prejudicial effect, case by case. Prejudicial effect outweighs the probative value of admitting such evidence whenever the trial court determines that it would not have been natural for the defendant to come forward during the time period in which the prosecutor says the silence impairs the credibility of the trial testimony.

OPINION OF THE COURT

1. CRIMINAL LAW — EVIDENCE — IMPEACHMENT — PREARREST SILENCE.

The impeachment of a defendant's testimony that he had been a victim of an armed robbery by reference to his failure to report the fact to the police was properly permitted in a prosecution for assault with intent to commit murder as probative of his credibility.

CONCURRING OPINION BY BOYLE, J.

2. CRIMINAL LAW — CONSTITUTIONAL LAW — PREARREST SILENCE — IMPEACHMENT.

A person has a right to be free of governmentally compelled self-incrimination, but the right has no bearing on the probative significance of silence prior to contact with the police, and thus there is no basis to preclude use of a defendant's prearrest silence for purposes of impeachment (US Const, Am V; Const 1963, art 1, § 17).

DISSENTING OPINION BY CAVANAGH, J.

3. CRIMINAL LAW — EVIDENCE — IMPEACHMENT — PREARREST SILENCE.

A defendant's prearrest silence should not be used for purposes of impeachment (Const 1963, art 1, § 17).

DISSENTING OPINION BY ARCHER, J.

4. CRIMINAL LAW — EVIDENCE — IMPEACHMENT — PREARREST SILENCE.

Where evidence of a defendant's prearrest silence is introduced into the record, the trial court must weigh the probative value of admitting the evidence against any prejudicial effect, case by case; prejudicial effect outweighs the probative value of admitting such evidence whenever the court determines that it would not have been natural for the defendant to come forward during the time period in which the prosecutor says the silence impairs the credibility of the trial testimony.

Frank J. Kelley, Attorney General, *Louis J. Caruso,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, and *Timothy A. Baughman,* Deputy Chief, Civil and Appeals, for the people.

Matthew Posner for the defendant.

BRICKLEY, J. The issue in this case is whether the Court of Appeals properly reversed defendant's conviction on the basis of improper prosecutorial cross-examination and argument concerning defendant's prearrest failure to inform the police of his version of the facts that he had been robbed.

FACTS AND PROCEEDINGS

Defendant was charged with assault with intent to commit murder, MCL 750.83; MSA 28.278, for stabbing Wade Dean on November 2, 1981. After a three-day jury trial, defendant was convicted of the lesser offense of assault with intent to commit great bodily harm less than murder on September 23, 1982. MCL 750.84; MSA 28.279. He was subsequently sentenced from six years eight months to ten years in prison.

There was conflicting testimony as to the events precipitating the stabbing. The only thing not in dispute is that there was an argument over some dogs. Victor Kemp testified that he had been taking care of two pit bull puppies owned by defendant for approximately one month prior to the stabbing. Kemp further testified that the day before the incident one of the puppies was stolen. When defendant discovered this, he went to Kemp's house and demanded payment for his loss. When Kemp refused to pay, he testified that defendant demanded that he be compensated by being given Kemp's own Doberman pinscher puppy. Dean, the stabbing victim, who was visiting Kemp, heard the two arguing in the driveway area of Kemp's residence and came outside to see what was happening. Both Dean and Kemp testified that after Dean came outside defendant began to make disparaging remarks about Dean. When Dean turned to walk away from the verbal altercation,

he claimed that defendant set upon him and stabbed him four times, once in the stomach and three times in the back, with a short-bladed knife which defendant had taken from his pocket. Kemp testified that defendant then turned and threatened him with the knife, but that Kemp managed to elude him by running into the street. Both Kemp and Dean denied having weapons of any sort on their persons at any time during the altercation.

Defendant's version of the events was drastically different. He claimed that he had never given either of his pit bull puppies to Kemp. Rather, he claimed that he was walking one of his puppies down the street at approximately noon when Kemp asked to speak with him in the driveway area of Kemp's home. When defendant walked up to him, he claimed that Kemp pulled a gun and Dean appeared with a knife. Kemp demanded at gunpoint that defendant turn over the dog to him, and defendant complied. When Kemp took the dog inside, Dean continued to threaten defendant with the knife. Defendant testified that he then grappled with Dean and the knife fell to the ground, after which he picked it up. When Dean then picked up a two by four and swung it at him, defendant testified that he stabbed Dean with his own knife in self-defense and left.

On cross-examination of defendant, the prosecutor asked him if he had reported the incident to the police after he left the scene:

Q. Where did you go?
A. Where did who go?
Q. You. You went to the police station right away to report it?
A. The next day.
Q. Yeah.

A. I reported it. The reason I didn't go to the police station is because I didn't have no proper ownership showing that the dog was my dog. I didn't have no papers or nothing on the dog.

Q. Weren't you a little worried because the man was laying [sic] stabbed and maybe dead? Didn't you think to report that to the police?

A. No, because he got up and run.

Q. You were more worried about kennel papers than the man laying on the sidewalk, is that right?

A. No, that's not right.

The prosecutor returned to this issue later in cross-examination of the defendant:

Q. So then why didn't you stay there and wait for the police? You ran home, you didn't call the police right away.

A. No, I didn't.

Q. Tell me again why you didn't do that now.

A. Because I had nothing showing proper ownership that that dog was mine. That's why I didn't call the police.

Q. Well, what about the assault and the robbery?

A. What about it?

Q. Didn't somebody point a gun at you?

A. Yes, they did.

Q. You didn't think that would be a crime to report?

A. No, I knew that I had stabbed him and I knew that I would be hearing from the police soon anyway.

During the prosecutor's closing argument further reference was made to defendant's failure to contact the police:

If that version makes sense, especially when his first friend is standing there with a gun and you

know there's a gun there, is that what you're gonna do? Of course if you're really a good guy and you're just being robbed of your dog and they get the dog and start turning away, the best thing for you to do is just run and high tail it out of there and go call the police.

* * *

Now, and then looking at a gun, knowing you're gonna get shot while your doing that, the logical thing to do is run and call the police. Did he do that? No, he didn't call the police. Why? Because I didn't have any kennel papers to prove that I was the owner of the dog. Now, is that a logical thing to do? Does that make sense? You don't tell the police that someone points a gun at you? That's a crime in itself? Doesn't make sense.

Defendant lodged no objection to this argument or questioning.

After being convicted, defendant appealed as of right to the Court of Appeals raising five issues, the first of which asserted that the prosecutor violated the rule of *People v Bobo,* 390 Mich 355; 212 NW2d 190 (1973), by referring in both his questioning and closing argument to defendant's failure to contact the police after the incident occurred. In an unpublished per curiam opinion released December 6, 1984, the Court of Appeals agreed with defendant on the *Bobo* issue and reversed his conviction:

> In the instant case, the prosecutor deliberately brought up defendant's pre-arrest silence, questioned him about it, and then utilized it in his closing argument. This is impermissible. . . .
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> Accordingly, the prosecutor's repeated use of defendant's pre-arrest statements requires reversal and a remand for a new trial.

The Court further noted that our decision in

Bobo had construed the result in that case under Const 1963, art 1, § 17, and that "we believe that even in light of United States Supreme Court precedent, the Michigan Supreme Court would continue to adhere to *Bobo* as a matter of state constitutional law."

We granted the prosecutor's application for leave to appeal on June 26, 1985. 422 Mich 937.

I

In *Bobo,* we were presented the following question:

> "Where an accused exercises his constitutional right to remain silent *at the time of arrest,* does the use of such silence against him at trial under the doctrine of impeachment by prior inconsistent statement constitute prejudicial error where he made no allegations on direct examination as to what was said or not said *at the time of arrest?"* [390 Mich 357. Emphasis added.]

In *Bobo,* the defendant exercised his right to remain silent "[w]hen arrested by Detroit police officers . . . ." *Id.* At trial, defendant Bobo testified that just prior to being arrested near the scene of the crime two men, presumably potential suspects, ran past him from the general area of the crime. On cross-examination, the prosecutor, over timely objection from defense counsel, was permitted to ask the defendant if he had informed the police during interrogation about the two men. The prosecutor was also allowed to remark in closing argument that the defendant had said nothing to the police about the two men running past him despite objection by defense counsel.

We held that the questioning and argument were improper because they restricted "the exer-

cise of the constitutional right to remain silent *in the face of accusation."* 390 Mich 359 (emphasis added). We went on to state that it made "little difference" whether the defendant's silence was prior to or at the time of arrest because "the defendant's Fifth Amendment right to remain silent is constant." 390 Mich 360.

We believe that the instant case is not controlled by *Bobo* because here the "silence" alluded to by the prosecutor occurred before any contact with the police. In *Bobo,* the defendant was detained by the police and may have been under arrest. Our statement that the right to remain silent is constant does not compel the conclusion that the questioning and argument on defendant's silence in this case were improper. That statement must be interpreted in light of the facts and in the context of *Bobo.* In *Bobo,* there was uncertainty as to whether defendant was in fact under arrest. 390 Mich 364-365. (Dissenting opinion of BRENNAN, J.) When the majority asserted that it did not matter whether defendant was under arrest or not, it was merely saying that given the confrontation by the police, it was irrelevant to the analysis whether the arrest had been technically effectuated. Thus, the *Bobo* holding only applied to those situations where the state seeks to impeach a defendant with his silence maintained during contact with police officers.[1] Here, the prosecutor impeached defendant regarding his failure to report a robbery to the police. There was no questioning or mention of defendant's silence at or after his contact with the police. The questioning and closing argument in this case do not violate the rule of *Bobo,* and the

[1] The parties have argued whether *Bobo* relied on the state or federal constitution. We do not decide this question due to our conclusion that the holding of *Bobo* is inapplicable to the present situation.

Court of Appeals therefore improperly reversed defendant's conviction on that basis.[2]

Defendant also asserts that under the Rules of Evidence the questioning and comment at issue were improper. *Commonwealth v Nickerson,* 386 Mass 54; 434 NE2d 992; 35 ALR4th 722 (1982); *People v Conyers,* 52 NY2d 454; 438 NYS2d 741; 420 NE2d 933 (1981).

In *Nickerson,* the Massachusetts Supreme Court held that the decision whether to admit evidence of prearrest silence is evidentiary, left to the discretion of the trial court. The defendant in *Nickerson* was charged with assault in connection with a stabbing that occurred in a gang fight. Defense witnesses testified that another member of the defendant's gang, Whipple, had done the stabbing. The defendant also testified that Whipple did the stabbing. On cross-examination, the defendant admitted that he had assisted a felon in escaping after a crime by driving Whipple home. Also, the prosecutor asked him if he had come forward in the two-day period between the crime and arrest to tell the police that it was Whipple and not he who had done the stabbing. In the closing statement to the jury, the prosecutor argued that the defendant was not to be believed because he did not come forward to report the crime. 386 Mass 55.

The trial judge instructed the jury in part as follows:

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[2] Defendant concedes that the questioning and argument here do not violate the federal constitution. *Jenkins v Anderson,* 447 US 231; 100 S Ct 2124; 65 L Ed 2d 86 (1980). See also, *Doyle v Ohio,* 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976), *Fletcher v Weir,* 455 US 603; 102 S Ct 1309; 71 L Ed 2d 490 (1982), and *Wainright v Greenfield,* 474 US —; 106 S Ct 634; 88 L Ed 2d 623 (1986).

We express no opinion on whether the Michigan Constitution should be interpreted as giving defendants greater protection than the federal one as interpreted in *Doyle* and *Fletcher.* Rather, the holding of this case is limited to only those situations where the "silence" that is questioned occurs before any contact with the police.

> So, with a super-abundance of caution, I want to make sure that we do not infringe upon the constitutional right of each of these defendants to remain silent after arrest because after arrest a person is under no obligation to speak to the police. He had a constitutional right to remain silent, and evidence of his failure to tell the police anything he knew or saw or heard is not to be considered on this issue of guilt.
>
> However, if you find beyond a reasonable doubt that the defendants on that night failed to report to the police or any authority what Whipple had said or what they had observed Whipple do, you may consider that to determine the reliability of all of the evidence offered by that defendant during the course of his evidence. You may just consider that, in light of all of the other circumstances, in determining the reliability of the testimony involved. [386 Mass 56, n 2.]

The defendant claimed that the impeachment and instruction were improper under state common-law rules. The court held that while it did not decide that impeachment with prearrest silence was always inappropriate, such impeachment was error in the circumstances of that case. 386 Mass 57.

The prosecutor wanted the jury to infer that the defendant was not telling the truth on the stand because he did not immediately come forward and identify Whipple as the person who cut the victim. The defendant, however, had no duty to report the crime or to offer exculpatory information to the authorities. Nevertheless, the judge instructed the jury that his veracity could be doubted if he did not come forward with the incriminating evidence that he was at the crime scene, that he saw the attack, and that he knew the attacker was Whipple.

The *Nickerson* court held that the jury should

not have been permitted to consider the defendant's failure to come forward. It would not have been "natural" for the defendant to produce evidence against himself. 386 Mass 60. His failure to come forward "says little about the truth of his trial testimony." 386 Mass 60-61. Allowing impeachment with prearrest silence suggests that a defendant has a duty to incriminate himself and burdens his right to testify on his own behalf. The court further noted that although most people do not know the intricacies of their constitutional rights, "it is a generally held notion that one does not have to say anything to the police and that what one does say may be used against him." 386 Mass 61.

The *Nickerson* court said that the outcome "may be different where a defendant failed to come forward prior to his arrest to report a fact or facts not tending to incriminate him." However, the court further noted that impeachment with prearrest silence "should be approached with caution, and, wherever it is undertaken, it should be prefaced by a proper demonstration that it was 'natural' to expect the defendant to speak in the circumstances." 386 Mass 61-62. The court also said that a trial judge may conduct a voir dire on this question, and if the evidence is admitted it should be for impeachment purposes only. *Id.*

While we agree with the approach of *Nickerson,* we do not believe it assists the defendant here. At the trial in this case, defendant testified that he was in fact the victim of an armed robbery rather than a perpetrator of an assault. He now contends that it would not be natural for the victim of an armed robbery to report the crime to the police. We find this position untenable. Instead, we believe it is entirely natural and expected that one who has been robbed under the circumstances

related by the defendant would report the crime to the police. Defendant knew the identity of the robber and the location of the robbery. It would have been natural for him to report the crime to the police, to have the assailant arrested, and to retrieve his property. The questioning and impeachment in this case were designed to cast doubt on the credibility of defendant's testimony. The prosecutor simply argued that if defendant's version were true he would have reported the crime. The prosecutor did not ask the jury to make an inference of guilt[3] because defendant did not con-

[3] Cf. *State v Sabbah,* 13 Ohio App 3d 124; 468 NE2d 718 (1982). In *Sabbah,* the defendant was charged with murder. The defendant, victim, and others were watching a Super Bowl game at a friend's house in Fremont, Ohio. The defendant and the victim had had an earlier altercation in which the defendant claimed the victim stole $40 from him. The prosecution's theory was that when the victim left to go to a carry-out store, the defendant waited outside the house to ambush him when he returned.

The defendant testified that he shot the victim in self-defense. He said the victim had brandished a gun earlier in the dispute over the $40 and that he also publicly made threats on the defendant's life. The defendant maintained that he was leaving the house to go home when the victim returned and accosted him with a handgun. He shot the victim in self-defense, believing that the victim was about to kill him. He further testified that after the shooting he intended to drive to Sandusky to tell his mother what happened and that he was then going to call the police.

He was arrested about an hour after the shooting while en route to Sandusky.

On cross-examination, the prosecutor questioned him extensively about not turning himself in:

> *Q.* [After the shooting] you did not go to the police station, did you?
>
> *A.* No, I was trying to get out of Fremont, period. I didn't want any more . . . .
>
> *Q.* And you didn't—You were trying to get out of Fremont, right?
>
> *A.* —trouble. I didn't want any more trouble.
>
> *Q.* And you didn't stick around and wait for the police to come so that you could explain this to them, did you?
>
> *A.* No. I could have got shot if I had stuck around.
>
> *Q.* And until this very day you have never told the police that you did this in self-defense, did you?
>
> *A.* I didn't explain it with nobody.

tact the police, but instead urged that defendant's testimony was unbelievable in light of his subsequent conduct. Accordingly, we find that no error occurred.

We also note that MRE 403 is applicable to this situation and that this type of evidence should not be admitted if its probative value is substantially outweighed by its prejudicial effect.[4]

II

The defendant, recognizing that reliance on the Fifth Amendment has been undercut by *Jenkins v*

* * *

Q. You have never, until you got on this stand here today, told anybody, with the possible exception of Jack Levin, that this shooting occurred as a result of self-defense, have you?

* * *

A. I wasn't going to explain it to nobody. [13 Ohio App 3d 126-127.]

The prosecutor also questioned the defendant regarding his failure to speak to police after his arrest and in closing argument he commented:

> What's reasonable? If you have been in the position that this man is in and you know that you are now, and the police are telling you, going to be charged with the crime, what do you do? You say, "My God, man, I was protecting myself. I was defending myself. This guy had a five, six inch gun. It's silver. Go look for it."
>
> * * *
>
> Go look for the gun Officers. This man was going to shoot me. Talk to these people. These people have told me in the last five days that he's going to kill me. Here's a list of people. Go talk to these people. They'll tell you that he's been threatening me. He didn't do any of that. He didn't do anything. He didn't do anything because none of that's true. [13 Ohio App 3d 128.]

This questioning and argument were clearly intended to convey to the jurors that they should infer guilt from defendant's prearrest silence. This inference is impermissible. See also *Jones v State,* 265 Ind 447; 355 NE2d 402 (1976).

[4] See *Conyers, supra,* 52 NY2d 458-459.

Anderson, 447 US 231; 100 S Ct 2124; 65 L Ed 2d 86 (1980), argues that, nevertheless, we should find a violation of the due process and self-incrimination provisions of the Michigan Constitution.[5] He first claims that the use of nonprobative impeachment testimony rises to a due process violation. Since we find under the facts of this case that the impeachment, by way of failure to report a claimed robbery was clearly probative, we conclude that the due process argument is without merit.

As to the violation of the "right to remain silent" the defendant urges us to adopt the minority position in *Jenkins.* In *Jenkins,* the defendant was impeached by being questioned as to why he had not volunteered his self-defense theory in the two weeks between a stabbing altercation and his arrest. The majority held that the prearrest silence impeachment did not amount to a constitutional deprivation under the Fifth Amendment and in doing so also stated in a footnote that they were not deciding the larger question whether the Fifth Amendment was implicated at all in the use of a prearrest silence. The *Jenkins* minority stated:

> The Court's holding that a criminal defendant's testimony may be impeached by his prearrest silence has three patent—and, in my view, fatal—defects. First, the mere fact of prearrest silence is so unlikely to be probative of the falsity of the defendant's trial testimony that its use for impeachment purposes is contrary to the Due Process Clause of the Fourteenth Amendment. Second, the drawing of an adverse inference from the failure to volunteer incriminating statements impermissibly infringes the privilege against self-incrimination. Third, the availability of the inference for

[5] Const 1963, art 1, § 17.

> impeachment purposes impermissibly burdens the decision to exercise the constitutional right to testify in one's own defense. [447 US 246.]

For us to find that this case invokes the Michigan Constitution would require us to differ with the *Jenkins* majority's analysis in a prearrest silence impeachment situation involving a factual setting less favorable to the defendant than that in *Jenkins*. Not only is there no federal Fifth Amendment precedent for such a finding, we are also aware of no other state that has taken such a step in the interpretation of its own self-incrimination provision. We have been offered no satisfactory arguments why we should be the first to use our own constitution to so enlarge upon existing Fifth Amendment jurisprudence.[6]

Moreover, we believe the evidentiary rule announced today will adequately protect an accused's right to not have silence be used as incrimination by allowing the jury to infer guilt from it. When a defendant at trial elects to waive his privilege not to testify and takes the stand, attempted impeachment is a time-honored method of advancing the truthfinding function. The interest in truth must occasionally yield to a competing and higher interest, *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976), but rules which inhibit the fact-finding function are, and must be, the exception and not the rule. "Once a defendant decides to testify, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self incrimina-

[6] As to the argument that this impeachment burdens the constitutional right to testify we need only speculate that such a theory would throw in doubt any impeachment of a defendant.

tion.' *Brown v United States,* 356 US 148, 156 [78 S Ct 622; 2 L Ed 2d 589] (1958)." *Jenkins v Anderson, supra,* p 238. Thus, we are not persuaded that there is a compelling reason here to construe the parallel provision of the Michigan Constitution in a manner different than that in which the federal constitution has been construed. *People v Nash,* 418 Mich 196; 341 NW2d 439 (1983).

CONCLUSION

We conclude that to the extent *Bobo* is viable it is confined to impeachment for and comment on silence at the time of arrest in the face of accusation.

We find that the essence of the impeachment and comment to the jury in this prearrest silence case, to the effect that the defendant did not report what according to his testimony would have been an armed robbery committed against him, constituted probative information to test the credibility of his trial testimony because it would have been the natural thing to do. The trial judge was within his discretion in allowing such impeachment and comment, particularly in the absence of objection.

Finally, we find that the impeachment and subsequent comment to the jury did not violate either the Due Process or Self-Incrimination Clauses of the Michigan Constitution.

Reversed and remanded to the Court of Appeals for consideration of defendant's remaining issues.

WILLIAMS, C.J., and BOYLE and RILEY, JJ., concurred with BRICKLEY, J.

BOYLE, J. (*concurring*). I concur in the result reached by the majority. I write separately first to

observe that the point overlooked by the dissent is that both the Fifth Amendment and Const 1963, art 1, § 17 guarantee a right to be free of governmentally compelled self-incrimination. In this case, there is simply no governmental action which induced defendant's silence before arrest. There is thus no basis "as a matter of state constitutional law," *post,* p 43, to preclude use of a defendant's prearrest silence for impeachment purposes.

As Justice Stevens noted, concurring in *Jenkins v Anderson,* 447 US 231, 243-244; 100 S Ct 2124; 65 L Ed 2d 86 (1980):

> The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police. We need not hold that every citizen has a duty to report every infraction of law that he witnesses in order to justify the drawing of a reasonable inference from silence in a situation in which the ordinary citizen would normally speak out. When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment. . . . Consequently, I would simply hold that the admissibility of petitioner's failure to come forward with the excuse of self-defense shortly after the stabbing raised a routine evidentiary question that turns on the probative significance of that evidence and presented no issue under the Federal Constitution.

CAVANAGH, J. (*dissenting*). I respectfully dissent

because I believe that there are compelling reasons to apply *People v Bobo,* 390 Mich 355; 212 NW2d 190 (1973), to cases involving prearrest silence, and because I am not convinced that it would have been "entirely natural" for this defendant to present himself to the police with his version of the facts.

I

The majority states that this case "is not controlled by *Bobo,*" *ante,* p 31, and that *Bobo* is "inapplicable to the present situation," *ante,* p 31, n 1. Nonetheless, the majority uses this case to limit *Bobo* to situations which impinge upon a person's right to silence "at the time of arrest in the face of accusation." *Ante,* p 39.

The majority places limited emphasis on statements made in *Bobo* which indicate that a defendant's right to remain silent is constant and attaches regardless of whether the silence occurred prior to *or* at the time of arrest. For example, the *Bobo* Court stated:

> What concerned the parties and what prompted our grant of leave was the propriety of using the fact of defendant's silence either as evidence of guilt or for the purpose of impeachment.
>
> Whether his silence was prior to or at the time of arrest makes little difference—the defendant's Fifth Amendment right to remain silent is constant. [390 Mich 360.]

I do not believe that this language would have been used if *Bobo* was only meant to apply to silence maintained after initiation of police contact.

Several Court of Appeals panels have recognized that *Bobo* applies to prearrest silence. *People v*

Ray, 119 Mich App 724; 326 NW2d 622 (1982); *People v Hoshowski,* 108 Mich App 321, 323-324; 310 NW2d 228 (1981); *People v Wade,* 93 Mich App 735; 287 NW2d 368 (1979). The panel's opinion in this case was consistent with these decisions, and I continue to agree with them as a matter of state constitutional law.

Although the federal constitution does not prohibit impeaching a defendant with his prearrest silence, this Court is free to develop evidentiary rules prohibiting its use. *Jenkins v Anderson,* 447 US 231; 100 S Ct 2124; 65 L Ed 2d 86 (1980).[1] Of course, we are also free to interpret Const 1963, art 1, § 17 in a manner which affords greater rights when there is a compelling reason to do so. See *People v Nash,* 418 Mich 196, 214-215; 341 NW2d 439 (1983); *People v Beavers,* 393 Mich 554; 227 NW2d 511 (1975).

I find compelling reasons to apply *Bobo* to prearrest silence. In effect, the majority opinion requires citizens, who may or may not have been involved in questionable conduct, to present themselves to the police with an explanation, or else

[1] The *Hoshowski* Court stated:

> We note that the United States Supreme Court in *Jenkins v Anderson,* 447 US 231; 100 S Ct 2124; 65 L Ed 2d 86 (1980), recently has held that, in general, a defendant who elects to testify in his own behalf waives any Fifth or Fourteenth Amendment objection to the use of his prearrest silence for the purposes of impeachment. However, the Court expressly recognized that each state is free to form its own evidentiary rules regarding the use of such evidence. *Id.,* 239. Michigan has already done so. The rule formulated in *Bobo, supra,* apparently was based on our Supreme Court's interpretation of both the Michigan and Federal Constitutions. *Id.,* 357, n 1. A state may adopt a standard which affords its citizens greater protection than is required under the Federal Constitution. *Oregon v Hass,* 420 US 714, 719; 95 S Ct 1215; 43 L Ed 2d 570 (1975); *People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974). [108 Mich App 325, n 3.]

face the possibility of having their failure to do so used against them in later proceedings. This is contrary to *Bobo* and repugnant to the notion that the right to silence remains constant. This is more than a "satisfactory argument," *ante,* p 38; it is a compelling reason to afford greater rights under our own constitution. I would hold that *Bobo* prevents the use of defendant's prearrest silence for impeachment purposes as a matter of state constitutional law. Const 1963, art 1, § 17; *Bobo, supra.*

II

I am thus not convinced that this case can be viewed solely as an evidentiary matter. However, even if the test of *Commonwealth v Nickerson,* 386 Mass 54; 434 NE2d 992 (1982), *were* appropriate, I still disagree with the majority's conclusion that it would have been "entirely natural and expected that one who has been robbed under the circumstances related by the defendant would report the crime to the police." *Ante,* pp 34-35. The majority acknowledges (indeed, it directs the trial judge to consider) several factors set forth in *People v Conyers,* 52 NY2d 454; 438 NYS2d 741; 420 NE2d 933 (1981). These factors include one's awareness that there is no obligation to speak or to report a crime, one's belief that any effort to do so or to exonerate one's self would be futile, and the "lamentable but undeniable fact of modern society" that the distrust that some harbor for authority leads them to shun all contact with the police, even when such avoidance is against their interests. *Conyers, supra,* p 458. In light of these factors, I cannot conclude that it would have been natural for this defendant to initiate contact with the police.

The majority states that "defendant testified that he was in fact the victim of an armed robbery rather than a perpetrator of an assault." (*Ante,* p 34.) However, the defendant admitted stabbing Dean. Defendant also testified that he did not realize that Dean was seriously hurt, since he got up and ran after the stabbing. The blade was no longer than one and one-half inches in length, and defendant heard Dean say "that little knife you got wasn't gonna hurt nobody." Defendant also explained that he did not go directly to the police since he thought that he would be hearing from them anyway. In fact, the police contacted him the next day.

Given these facts, it was not entirely natural[2] or expected for the defendant to contact the police. The lamentable but undeniable facts of modern society show that one may be afraid of retaliation for reporting a crime. This fear may outweigh one's desire to perform a "civic duty" or obtain restitution. It is also true, unfortunately, that some citizens distrust the police and take it upon themselves to resolve disputes. The use of such silence, even for impeachment purposes, impinges on a defendant's constitutional rights while adding little probative benefit. For these reasons, I would affirm the Court of Appeals opinion.

LEVIN and ARCHER, JJ., concurred with CAVANAGH, J.

ARCHER, J. (*dissenting*). I concur with Justice CAVANAGH's dissenting opinion.

The majority concludes that evidence of a defendant's prearrest silence is admissible for purposes

[2] The word "natural" has been defined as what is "[c]onsonant with particular circumstances; expected and accepted." *The American Heritage Dictionary of the English Language* (New College ed).

of impeachment. I disagree. However, if such evidence is introduced into the record, the following safeguards must be followed by the trial court to avoid misuse of defendant's prearrest silence.

The trial court must weigh the probative value of admitting evidence of defendant's prearrest silence against any prejudicial effect. The prejudicial effect outweighs the probative value of admitting the evidence whenever the trial court determines that it would not have been natural for the defendant to come forward during the time period in which the prosecutor says the silence impairs the credibility of the trial testimony. This determination is to be made on a case-by-case basis.

The evidence of defendant's prearrest silence is not admissible to show defendant's guilt. If the evidence is admitted at all, pursuant to the majority's decision, it should only be admitted for impeachment purposes. The trial court should instruct the jury accordingly when the prosecutor is allowed to present the evidence to the jury.

LEVIN, J., concurred with ARCHER, J.

McMILLAN v STATE HIGHWAY COMMISSION

Docket No. 73474. Argued December 18, 1985 (Calendar No. 8). Decided September 16, 1986.

Tamara McMillan and Patricia McMillan brought an action in the Oakland Circuit Court against the State Highway Commission, the Oakland County Road Commission, the City of Royal Oak, and the Detroit Edison Company for damages arising from injuries received by Tamara when the automobile in which she was a passenger was struck by a hit-and-run driver while traveling on a state-owned highway in the City of Royal Oak, causing the vehicle to go out of control and strike a utility pole owned by Detroit Edison which was located in the median of the highway. Following a mediation award below $10,000, the case was remanded to the 52-4 Judicial District Court. The court, James Raymond Hand, J., granted summary judgment for Detroit Edison, finding that it owed no duty to the plaintiffs as a matter of law in regard to the placement or maintenance of the utility pole. The circuit court, Hilda R. Gage, J., affirmed. The Court of Appeals, CYNAR, P.J., and JASON, J. (HOOD, J., concurring only in the result), affirmed in an opinion per curiam (Docket No. 65038). On reconsideration, the plaintiffs appeal.

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

The summary judgment granted as a matter of law by the courts below should be set aside. Upon remand, should the defendant seek summary disposition upon the basis of a lack of a genuine issue of material fact, the trial court may consider such factors as the location of the utility pole, its proximity to and the configuration of the roadway, whether the utility company had notice of previous accidents at that location, and whether alternative, less dangerous locations for the pole existed. After considering these factors and any others probative

REFERENCES

Am Jur 2d, Electricity, Gas, and Steam §§ 127, 191 *et seq.*

See the annotations in the ALR3d/4th Quick Index under Electricity and Electric Companies.

of the issue, the court, upon finding that reasonable minds could differ as to whether the defendant acted negligently in the placement of the pole, should place the issue before the jury.

1. Case law which provides that a private utility company owes no duty to the occupants of a vehicle which leaves the traveled portion of a roadway must be overruled. Plaintiffs in cases such as this case should not be precluded, as a matter of law, from presenting their cases to a jury. The questions whether a duty on the part of the utility company exists and whether the placement of the poles was so significant as to be regarded a proximate cause of the plaintiff's loss turns on resolution of the question whether the utility's conduct created an unreasonable risk of harm to the plaintiff and the result of that conduct and the intervening causes were foreseeable. When reasonable minds may differ with regard to application of the reasonableness of the risk of harm, the question is best left to the jury.

2. The overruling of the case law is to be given limited retroactive effect: It is applicable to this case, all cases pending on appeal in which the issue has been preserved for review, and all cases where the issue is pending in the trial court.

3. The permit granted Detroit Edison by the State Highway Commission to install street lights on the median of the highway was not intended to be a contract which would benefit the plaintiffs. Summary judgment on this claim was properly granted.

Affirmed in part, reversed in part, and remanded for a new trial.

Justice Riley, dissenting, stated that the undisputed facts and circumstances of this case and the evidence presented in support of plaintiffs' allegations, when viewed in the light most favorable to the plaintiffs, were insufficient to raise a question for the jury concerning whether the placement and design of the utility pole in question created an unreasonable risk to the occupants of the vehicles in the ordinary course of highway travel. The question is not whether a utility company has any legal obligation to occupants of vehicles which leave the traveled portion of a highway to use reasonable care in the placement and maintenance of utility poles, but whether, under the circumstances of a case, the utility conformed to the legal standard of reasonable conduct in the light of the apparent risk. A utility should be held to have acted reasonably in light of the risk of harm where, with public authorization and specific approval, it has erected its poles in or near a public

highway without dangerously and unreasonably obstructing highway travel in the ordinary course.

Justice ARCHER took no part in the decision of this case.

130 Mich App 630; 344 NW2d 26 (1983) affirmed in part and reversed in part.

Dawson v Postal Telegraph-Cable Co, 265 Mich 139; 251 NW 352 (1933), and *Cramer v Detroit Edison Co,* 296 Mich 662; 296 NW 831 (1941), overruled.

OPINION OF THE COURT

1. PUBLIC UTILITIES — HIGHWAYS — UTILITY POLES — DUTY OF CARE — QUESTIONS OF FACT.

The determination of the question whether a private utility company which placed a utility pole in the median of a highway owed a duty of reasonable care to the occupant of a vehicle which left the traveled portion of the highway and struck the pole depended in part on the resolution of the question of foreseeability; where reasonable minds may differ regarding the application of the reasonableness of the risk of harm, the question is best left to the jury.

DISSENTING OPINION BY RILEY, J.

2. PUBLIC UTILITIES — HIGHWAYS — UTILITY POLES — DUTY OF CARE.

A utility should be held to have acted reasonably in light of the risk of harm in erecting utility poles in or near a public highway where it is shown that with public authorization and specific approval it erected the poles without dangerously and unreasonably obstructing highway travel in the ordinary course.

William L. Fisher (*Goodman, Eden, Millender & Bedrosian,* by *Robert A. Koory,* of counsel) for the plaintiffs.

Leon S. Cohan and *Michael D. Gladstone* for defendant The Detroit Edison Company.

Amicus Curiae:

Richard M. Goodman, P.C. (by *Susan E. Lister*), *Portner & Stine, P.C.* (by *Arnold D. Portner*), and *Mark R. Granzotto* for Michigan Trial Lawyers Association.

CAVANAGH, J. The lower courts ruled, as a matter of law, that Detroit Edison owed no duty of reasonable care to an occupant of a vehicle which leaves the traveled portion of the highway and strikes a utility pole located on the median. We reverse.

On January 10, 1976, plaintiff Tamara McMillan[1] was a passenger in an automobile traveling south on Woodward Avenue in the City of Royal Oak. Woodward is a state-owned highway. At the point in question, the north- and southbound lanes are separated by a grassy median strip. The vehicle was struck by a hit-and-run driver, went out of control, and collided with a utility pole owned by the defendant Detroit Edison Company. The pole was located on the median, approximately three feet from the traveled portion[2] of Woodward Avenue.

Plaintiff alleged that the construction of a non-energy-absorbing pole, and its placement within three feet of the traveled portion of the highway, constituted a traffic hazard. Paragraph eight of plaintiff's complaint states that, "Defendants owed a duty to plaintiffs to maintain safe traffic conditions including maintaining a utility pole so as to prevent collision with an automobile and/or to minimize injuries to a passenger in the event of such collision." Paragraph nine stated that the defendant "impliedly warranted the crashworthiness of said utility pole in respect to being equipped with a breakaway feature or energy absorbing material . . . ." Plaintiff concluded that

[1] Plaintiff Patricia McMillan is Tamara's mother, and claimed derivative damages. For simplicity, this opinion will refer to the parties in the singular number.

[2] For our purposes, the "traveled portion" of a highway includes the paved surface as well as adjoining shoulders. Although the facts indicate that the pavement was separated from the median in this case by a cement curb, there is no indication in the record that a shoulder separated the pavement from the grassy median.

these duties were breached since the pole was not crashworthy and was located in such a manner as to create a traffic hazard.

The district court granted defendant's motion for summary judgment on the basis of our decisions in *Dawson v Postal Telegraph-Cable Co,* 265 Mich 139; 251 NW 352 (1933), and *Cramer v Detroit Edison Co,* 296 Mich 662; 296 NW 831 (1941).[3] The circuit court affirmed the judgment on appeal.[4] The Court of Appeals granted leave to appeal and affirmed. *McMillan v State Highway Comm,* 130 Mich App 630; 344 NW2d 26 (1983). On reconsideration, we granted leave to appeal and also granted permission to the Michigan Trial Lawyers Association to appear as amicus curiae.

[3] The district court's opinion states:

> The Court has reviewed the authority cited by Defendant, The Detroit Edison Company, in support of its Motion. Based on that authority, this Court is satisfied that the Defendant, The Detroit Edison Company, owed no duty to Plaintiffs in regards [sic] to the placement or maintenance of the utility pole in question since the utility pole was placed in such a manner as to be wholly outside the traveled portion of the highway and, as such, not a menace to the normal travel on said highway. *Dawson v Postal Telegraph-Cable Co,* 265 Mich 139 (1933); *Cramer v Detroit Edison Co,* 296 Mich 662 (1941).

[4] The circuit court concluded:

> The law in Michigan is clear that there is no duty on the part of the Defendant to make the poles more distinct or advertise their presence. Further, the record below supports the conclusion that there was no genuine issue of material fact relative to the placement of the pole in question, which was entirely outside the travel portion of the highway. *Cramer v Detroit Edison Co,* 296 Mich 662 (1941). Defendant cannot be held responsible for a collision resulting from another's act of negligence which forced the car in which Plaintiff was riding to leave the travel portion of the road causing an unforeseen collision of this nature. *Dawson v Postal Telegraph-Cable Co,* 265 Mich 139, 142 (1933).

I

We are essentially faced with the question whether the defendant owes any obligation to avoid negligent conduct to the plaintiff for personal injuries under the facts set forth in the complaint and the settled statement of facts. See *Moning v Alfono,* 400 Mich 425, 436-442; 254 NW2d 759 (1977).

The answer to this question necessarily includes considerations of duty, proximate cause, and the function of the court and jury. Proximate cause can be thought of as a policy determination which is often indistinguishable from the duty question. *Moning, supra,* p 438. Prosser and Keeton address the interrelationship between duty and proximate cause:

> *Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury.* Unlike the fact of causation, with which it is often hopelessly confused, this is primarily a problem of law. *It is sometimes said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in terms of legal policy, so that they depend essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.* Quite often this has been stated, and properly so, as an issue of whether the defendant is under any duty to the plaintiff, or whether the duty includes protection against such consequences. This is not a question of causation, or even a question of fact, but quite far removed from both; and the attempt to deal with it in such terms has led and can lead only to utter confusion.

* * *

It is quite possible to state every question which arises in connection with "proximate cause" in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur? Such a form of statement does not, of course, provide any answer to the question, or solve anything whatever; but it may be helpful since "duty"—also a legal conclusion—is perhaps less likely than "proximate cause" to be interpreted as if it were a policy-free factfinding. *Thus, "duty" may serve to direct attention to the policy issues which determine the extent of the original obligation and of its continuance, rather than to the mechanical sequence of events which goes to make up causation in fact. The question whether there is a duty has most often seemed helpful in cases where the only issue is in reality whether the defendant stands in any such relation to the plaintiff as to create any legally recognized obligation of conduct for the plaintiff's benefit.* [Prosser & Keeton, Torts (5th ed), § 42, pp 272-274. Emphasis supplied.]

The Court of Appeals, citing our earlier decisions in *Dawson* and *Cramer,* declined to impose any obligation on the defendant under the circumstances. The Court "distilled" the following rule from those decisions:

[A]ctionable negligence will not be found in a utility company for erection or maintenance of a pole unless it is on the traveled portion of the highway or in such close proximity thereto as to constitute an obstruction dangerous to anyone properly using the highway. The lighting pole in this case was located on a grassy median strip, not itself a traveled portion of the roadway, approximately three feet from the paved surface of the road. Under these facts we find that defendant breached no duty to plaintiffs in failing to design the pole in anticipation of the possibility that an

automobile, leaving the roadway out of control, would collide with it.

* * *

Other jurisdictions have similarly held that a utility company is under no obligation to guard against extraordinary exigencies created when a vehicle leaves the traveled portion of the roadway out of control. Speigel v Southern Bell Telephone & Telegraph Co, 341 So 2d 832 (Fla App, 1977); *Oram v New Jersey Bell Telephone Co,* 132 NJ Super 491; 334 A2d 343 (1975); *Wood v Carolina Telephone & Telegraph Co,* 228 NC 605; 46 SE2d 717; 3 ALR2d 1 (1948); *Monaco v Comfort Bus Line, Inc,* 134 NJL 553; 49 A2d 146 (1946). [130 Mich App 635-637. Emphasis supplied.]

In light of the development of the law since our decisions in *Dawson* and *Cramer,* we believe that it is necessary to review these decisions.

DAWSON AND *CRAMER*

Defendants argue that *Dawson* and *Cramer* state that a defendant owes no duty to an occupant of a motor vehicle which collides with a utility pole unless the pole is located on the traveled portion of the highway, or is in such proximity thereto as to constitute an obstruction dangerous to anyone properly using the highway. See *Dawson, supra,* p 142. Plaintiff, supported by amicus curiae, contends that neither *Dawson* nor *Cramer* should prohibit a jury from deciding the question of the defendants' negligence.

In *Dawson,* a car swerved to avoid a turning truck and crashed into a pile of telephone poles. The poles were lying a foot or two off the traveled portion of the highway. The trial court found the pole owners liable.

Although the *Dawson* Court stated the general

rule advanced by Detroit Edison in this case, *Dawson* was apparently decided on the basis of a finding of a lack of "proximate cause":

> The following statement from 82 ALR 395 [superseded by 3 ALR2d 6] is borne out by many decisions cited therein:
>
> "It may be stated as a general proposition that a company lawfully maintaining poles in or near a public highway is not liable for the damage to person or property resulting from a road vehicle striking such a pole, unless it is erected on the traveled portion of the highway or in such close proximity thereto as to constitute an obstruction dangerous to anyone properly using the highway, and the location of the pole is the proximate cause of the collision."
>
> *Even were we to assume, however, that defendant* lacked authority or *was otherwise negligent in piling its poles in the untraveled portion of the road, we do not believe that plaintiff could recover against defendant. Such action, even if negligent, was not the proximate cause of the accident.* Defendant could not have foreseen a collision of this kind resulting from an act of negligence by another party, forcing the car in which plaintiff was riding to leave the main portion of the road. [*Dawson, supra,* p 142. Emphasis supplied.]

The *Dawson* Court continued:

> We believe the law is correctly stated in *Wyatt v Chesapeake & Potomac Telephone Co,* [158 Va 470; 163 SE 370 (1932)]:
>
> "Of course it is true that but for the location of this pole there would have been no accident, but its unlawful location and the happening of the disaster leaves the question of causal connection still open. . . . Probable consequences are to be anticipated and not those which are merely possible. . . .
>
> "This pole was in the road and was placed there

> without the necessary statutory permit, and so was negligently placed, but its unlicensed location did not proximately contribute to plaintiff's hurt, nor is this affected by her abstract right to use the entire highway." [*Id.,* p 143.]

The *Dawson* Court concluded that the case was:

> [G]overned rather by our statement in *Bleil v Railway Co,* 98 Mich 228 [57 NW 117 (1893)], where we said:
>
> "Ample room was left in the street for the passage of vehicles in the ordinary manner while under the control of their drivers. . . . The accident was not the natural and probable result of piling the rails in the street close to the curb, but of the fright of the horse. The proximate, and not the remote, cause controls in such cases in this State." [*Id.,* p 144.]

Thus, the *Dawson* Court embraced the general rule that no duty was owed unless the pole constituted an obstruction dangerous to anyone *properly using the highway* (the duty question), *and* the location of the pole was the proximate cause of the accident (the proximate or legal cause question). *Dawson* focused on the fact that the accident was not the natural and probable result of the defendant's conduct (placing the telephone poles close to the curb). Regardless of whether the question was framed in terms of duty or proximate cause, it appears that the *Dawson* Court made a policy determination that the defendant should not be held liable for the unforeseeable consequences of its actions. *Id.*

In *Cramer,* plaintiff drove his car off the road and hit one of three posts placed on a parkway by the defendant utility company to protect a light pole. Without citing *Dawson,* the *Cramer* Court stated the law as follows:

The ornamental light pole was back about five feet from the curb, at the east end of the parkway, and the posts were set about a foot inside the curb. The guard posts were not in the highway but upon the parkway and were not a menace to travel on the highway. There was no duty on the part of defendant to make the posts more distinct or advertise their presence at that place.

Clinkenbeard v City of St Joseph, 321 Mo 71 (10 SW2d 54; 61 ALR 242 [1928]), is like the case at bar.

* * *

The [*Clinkenbeard*] court held (p 89):

"We are of opinion that neither of the defendants herein is chargeable with actionable negligence in the maintenance of the parkway, or its incidents, including the pole in question, which were entirely and wholly outside of the traveled and improved roadway of Ashland boulevard set aside and designated by the defendant city for ordinary vehicular travel and use of the public."

Applying the law to the facts, the Court concluded:

Considering the testimony of the plaintiff in the case at bar in its most favorable light it shows the cause of the accident was the want of care on the part of the plaintiff.

Under plaintiff's testimony the proximate cause of the accident was his own want of ordinary care. He was driving near the center of the street and saw a dark object right ahead of him and bushes directly in the path of his car, noticed a traveled portion of the highway on both sides of the bushes and yet he continued his course until it was too late to turn aside and avoid striking the posts.

The defendant was not guilty of actionable negligence. The ornamental light pole was back a short distance from the curb at the east end of the parkway and the posts set between that pole and the curb of the parkway. *So situated the posts*

> *were not a menace to travel on the highway, and there was no duty on the part of defendant to advertise the presence of the posts by warning signs.* [*Cramer, supra,* pp 666-667. Emphasis supplied.]

The last two quoted paragraphs indicate that *Cramer* was decided on the basis of two separate theories. First, the "proximate cause" of the accident was plaintiff's own want of care. The Court's discussion of the facts suggest that, even *if* a duty existed, the plaintiff was barred from recovery due to his contributory negligence. *Cramer* did not discuss the accident in terms of foreseeability, but rather in terms of causation-in-fact. The use of "proximate cause" in this manner is confusing and should be contrasted with the use of the phrase in *Dawson.* See Prosser & Keeton, *supra,* pp 451-453. We note that while causation-in-fact must always be shown, the importance of a finding of "contributory negligence" would be diminished today by the principles of comparative negligence. *Placek v Sterling Heights,* 405 Mich 638; 275 NW2d 511 (1979).

Second, and more important for our analysis, is the fact that *Cramer* stated that "defendant was not guilty of actionable negligence" because the placement of the pole and the posts "*were not a menace to travel on the highway,* and there was no duty on the part of the defendant to advertise the presence of the posts by warning signs." This conclusion, along with the Court's citation of *Clinkenbeard,* indicates that *Cramer* was also decided on the basis that the defendant did not owe any duty at all to a motorist leaving the traveled portion of the highway.

The lower courts were bound by *Dawson* and *Cramer* under the principles of stare decisis. How-

ever, the Court of Appeals noted that "it is for the Supreme Court to overrule or modify its case law when and if it becomes obsolete." *McMillan, supra,* p 635. We believe that the time has come. To the extent that *Dawson* and *Cramer* stand for the proposition that a private utility company owes no duty whatsoever to the occupants of a vehicle which leaves the traveled portion of the road, we overrule them for the reasons set forth below.

II

Defendant essentially advances a rule which would relieve it of any duty of reasonable care whenever an automobile is not *properly using the highway.* This translates into a rule (supported by *Cramer* and *Dawson*) that defendant owes no duty to an occupant of a vehicle leaving the traveled portion of the highway (since those leaving it are not properly using it).

A number of jurisdictions follow this rule. For example, in *Oram v New Jersey Bell Telephone Co, supra,* plaintiff's car was forced off the roadway by another car and hit a pole located approximately two feet from the road. The *Oram* court stated:

> [A] telephone company is under no obligation of guarding against extraordinary exigencies created when a vehicle leaves the travelled portion of a roadway out of control. *Monaco v Comfort Bus Line, Inc,* 134 NJL 553 [49 A2d 146] (E & A 1946). It need only anticipate ordinary travel which "contemplates an automobile being driven and kept on the roadway." *Monaco v Comfort Bus Line, Inc, supra,* at 557. To require a telephone company to anticipate extraordinary occurrences, such as the one which gave rise to this accident, would be to require it to exercise extraordinary rather than ordinary care to prevent injuries. The duty im-

> posed, however, is to provide for the usual and ordinary risks of travel. *Monaco v Comfort Bus Lines, Inc, supra.* [132 NJ Super 494-495.]

See also *Speigel v Southern Bell Telephone & Telegraph Co,* 341 So 2d 832 (Fla App, 1977); *Florida Power & Light Co v Lively,* 465 So 2d 1270, 1276 (Fla App, 1985); *Wood v Carolina Telephone & Telegraph Co, supra; Shapiro v Toyota Motor Co Ltd,* 38 NC App 658; 248 SE2d 868 (1978).

Similarly, in *Simpson v City of Montgomery,* 282 Ala 368; 211 So 2d 498 (1968), a car crashed into a utility pole located two feet, seven inches from a curb. The court cited 3 ALR2d 6 and noted that several cases made a distinction between poles located both on and off the traveled portion of the highway:

> The cases which expressly refer to poles within the median or parkway bounded by a curb as a general rule hold that as a matter of law a utility maintaining a pole in this location does not breach any duty which it owes to the traveling public.
>
> There is a difference between the location of a pole outside the traveled way on a shoulder and the location of a pole outside of the traveled way in the median behind a curb. For this difference to become a matter of law and not a matter of fact, the difference must be one of kind and not merely of degree.
>
> The standard texts state the general rule of no liability where the pole is located in the median. The case most often quoted is that of *Clinkenbeard v City of St Joseph,* 321 Mo 71; 10 SW2d 54; 61 ALR 242. [282 Ala 373.]

The majority of the court also cited our decision in *Cramer* in support of its conclusion that a utility company cannot be liable when it places a pole outside the traveled portion of the highway.

However, other courts have concluded that similar situations present questions which should be submitted to the jury. For example, in *Scheel v Tremblay,* 226 Pa Super 45; 312 A2d 45 (1973), the car swerved to avoid an oncoming car and struck a utility pole placed ten inches from the pavement by defendant Philadelphia Electric Company. The *Scheel* court reversed a summary judgment granted in defendant's favor.

> While no genuine issue as to a material fact exists, we believe the trial court erred in ruling as a matter of law that the appellee was not liable for the injuries sustained by Tremblay's passengers. It has long been the law in this and other jurisdictions that utility companies are liable for harm caused by the negligent placement and maintenance of utility poles. *Nelson v Duquesne Light Co,* 338 Pa 37; 12 A2d 299 (1940); *Scalet v Bell Telephone Co,* 291 Pa 451; 140 A 141 (1928); *Little v Central District & Printing Co,* 213 Pa 229; 62 A 848 (1906); see Annot., 3 ALR2d 6. In *Nelson v Duquesne Light Co, supra,* the Supreme Court adopted the test announced by then Judge Cardozo in *Stern v International Ry Co,* 220 NY 284, 291; 115 NE 759 (1917): "The poles, if placed and maintained with due regard for the public safety, are not unlawful obstructions . . . *they must be so located as to avoid any unreasonable danger to travelers on the highway . . . . The question is whether the place chosen is so dangerous and the danger so needless that the choice becomes unreasonable.* If danger in that degree is present [the company is] charged with liability." *Liability is not, as the trial court held, limited to those situations in which the pole is located in the roadway itself, but may be imposed where the placement of a pole close to the edge of a highway constitutes a foreseeable and unreasonable risk of harm to users of the highway.* In such cases, the conditions of the highway are critical in determining whether the location of a utility pole adjacent

> thereto constitutes an unreasonable risk of harm to users of the road. *Nelson v Duquesne Light Co, supra; Martin v Southern Bell Telephone Co,* 126 Ga App 809; 192 SE2d 176 (1972); *Bourget v Public Service Co,* 98 NH 237; 97 A2d 383 (1953); *Peninsular Telephone Co v Marks,* 144 Fla 652; 198 So 330 (1940); *Norton v Pomona,* 5 Cal 2d 54; 53 P2d 952 (1935); see 3 ALR2d 6, at pp 51-57. The narrowness and general contours of Scottsdale Road, the lack of illumination of the pole, the presence or absence of reflective markers, the proximity of the pole to the highway, the availability of less dangerous locations, and the natural tendency of westbound traffic to veer toward the middle of the road near this pole are circumstances in light of which *a jury could find that the appellee's placement and maintenance of the pole constituted an unreasonable danger to users of the highway.* [226 Pa Super 47-49. Emphasis supplied.]

Accord *Weiss v Holman,* 58 Wis 2d 608; 207 NW2d 660 (1973); *Bernier v Boston Edison Co,* 380 Mass 372; 403 NE2d 391 (1980); *Gerberich v Southern California Edison Co,* 5 Cal 2d 46; 53 P2d 948 (1935); *Bourget, supra.*[5]

As in *Scheel,* we are persuaded that the plaintiff should not be precluded, as a matter of law, from presenting her case to the jury. The question whether a duty exists, and the question whether the cause (here, the placement of the poles) was so significant and important to be regarded as a proximate cause of the plaintiff's loss, depends "in part on foreseeability—whether it is foreseeable that the actor's conduct may create a risk of harm

[5] At least one other court adhered to the general rule advanced by the defendant, but concluded that the question whether the placement of the pole constituted an obstruction dangerous to motorists was a question for the jury. *Memphis Light, Gas & Water Division v Goss,* 494 SW2d 766 (Tenn, 1973). However, we agree with the analysis in *Scheel* to the effect that the "proximity of the pole to the highway" should only be one factor in determining reasonable conduct under the circumstances.

to the victim, and whether the result of that conduct and intervening causes were foreseeable." *Moning, supra,* p 439.

The Court of Appeals said that "the probability that a vehicle will careen involuntarily off the traveled surface of the road, striking a particular pole with such force as to endager [sic] its occupants, is relatively slight." *McMillan, supra,* p 636. However, other courts have reached conflicting conclusions regarding the foreseeability of such an occurrence. Compare *Lively,*[6] *supra; Simpson, supra; Oram, supra; Hyde v Co of Rensselaer,* 73 AD2d 1021; 424 NYS2d 755 (1980), aff'd 51 NY2d 927 (1980) with *Scheel, supra; Frangis v Duquesne Light Co,* 232 Pa Super 420, 422-423; 335 A2d 796 (1975); *Gutelle v City of New York,* 80 AD2d 538; 435 NYS2d 608 (1981).[7]

After reviewing these decisions, we hold that the

[6] We believe that the analysis in *Speigel* is correct because courts must place limits on foreseeability. Clearly, it is foreseeable in the practical sense that planes and cars will crash or encounter emergencies. However, only acts which are likely to result in injury are compensable. Acts which cause injury but are foreseeable only as remote possibilities, those only slightly probable, are beyond the limit of legal liability. *National Airlines, Inc v Edwards,* 336 So 2d 545 (Fla, 1976). [465 So 2d 1276.]

[7] We also note that injuries due to car collisions are considered foreseeable in products liability actions as incident to the normal use of automobiles. However, this does not mean that the duty arises from foreseeability of risk, but only that a manufacturer must consider the environment in which its product is used. See *Rutherford v Chrysler Motors,* 60 Mich App 392; 231 NW2d 413 (1975).

In the case at bar, plaintiff's complaint briefly mentions that "defendants impliedly warranted the crashworthiness" of the pole. Plaintiff and amicus have attempted to expand this theory through the use of off-the-record information. Although plaintiff asserts that defendant is responsible for the design of their poles, defendant counters that it neither manufactures nor sells poles to the public or governmental entities for a profit. (It does, however, sell electricity at a profit.) We conclude that the record in this case does not contain sufficient information to facilitate meaningful appellate review. Plaintiff's theory may be developed on remand if the facts so warrant.

summary judgment granted as a matter of law by the lower courts should be set aside. When reasonable minds may differ regarding the application of the reasonableness of the risk of harm, the question is best left to the jury. *Moning, supra; Fiser v City of Ann Arbor,* 417 Mich 461; 339 NW2d 413 (1983); Prosser & Keeton, *supra,* p 321.[8]

> In sum, it cannot be said that there was no "obligation of reasonable conduct for the benefit of the plaintiff," or that all reasonable men would agree that defendants' conduct was not "a substantial factor in producing the result" or regarding "the foreseeability of [the] particular risk" or regarding "the reasonableness of the defendants' conduct with respect to it, or the normal character of [Alfono's conduct]" as an intervening cause.
>
> Since reasonable persons can differ regarding the balance of risk and utility (the reasonableness of the risk of harm) and since there is no overriding policy based on social utility of maintaining absolute access to slingshots by children, we reverse and remand for a new trial. [*Moning, supra,* pp 458-459.]

We overrule *Dawson* and *Cramer* because they fail to impose *any* obligation of reasonable conduct for the benefit of occupants of vehicles which leave the traveled portion of the highway. We fail to see

[8] If the facts bearing upon other aspects of "proximate cause" (that is, aspects other than causation in fact) are not in dispute and reasonable persons could not differ about the application to those facts of the legal concept of "proximate cause," the court determines that issue. *But if reasonable persons could differ,* either because relevant facts are in dispute or *because application of the legal concept of "proximate cause" to the case at hand is an evaluative determination as to which reasonable persons might differ, the issue of "proximate cause" is submitted to the jury with appropriate instructions on the law.* [Prosser & Keeton, *supra,* p 321. Emphasis supplied.]

an overriding policy which would insulate the defendant in all cases in which a pole is placed outside the traveled portion of the highway.[9] Upon remand, should the defendant seek a motion for summary disposition based upon a lack of genuine issue of material fact, the trial court may consider such factors as the location of the pole, its proximity to the roadway, the configuration of the roadway, whether the utility company had notice of previous accidents at that location, and whether alternative, less dangerous locations for the pole existed. After considering these factors and any other factor which may be probative of the issue, the trial court, upon finding that reasonable minds could differ as to whether the defendant acted negligently in the placement of the pole, should place the issue before the jury to decide. See *Scheel, supra.*

The duty imposed today is not an intolerable burden. In an analogous situation, the Court held a utility company to a reasonable standard in positioning and maintaining its power lines. *Laney v Consumers Power Co,* 418 Mich 180; 341 NW2d 106 (1983). We believe that a similar duty should

[9] As noted by the dissent in *Simpson, supra,* 282 Ala 374-375:

> The majority opinion, when stripped, says that from this day forward there can be negligence on the part of one placing a pole in Alabama, if that pole is placed on a shoulder; but there cannot be negligence on the part of one placing a pole in Alabama, if that pole is placed on a median—no matter where.
>
> Medians do not necessarily have curbs, and poles can be located around blind corners within medians. Medians are constructed in many different ways and shapes. Medians will continue to be constructed in new and different ways in the future. The mind can fashion hundreds of future happenings where a pole, carelessly placed in a median, will cause injury and death to the innocent. The majority opinion grants free license to the pole placer within a median but restricts him to the scrutiny of a jury on a shoulder. I fail to see the difference.

be imposed regarding the location of the utility poles.

Our decision today overruling *Dawson* and *Cramer* is to be given limited retroactive effect, that is, it is applicable to this case, all cases pending on appeal where the issue has been preserved for review and where the issue is currently pending in the trial courts.

III

Plaintiff also claims that she is a third-party beneficiary of a contract between Detroit Edison and the State Highway Commission. See *Clark v Dalman,* 379 Mich 251; 150 NW2d 755 (1967); *Talucci v Archambault,* 20 Mich App 153; 173 NW2d 740 (1969). We first note that this theory was not pled in plaintiff's complaint. Nonetheless, we will review this issue to prevent needless argument on remand.

The contract at issue is actually an application granting Detroit Edison permission to enter onto the right of way and install street lights and underground cables. Plaintiff focuses on the following language from the State Highway Commission's standard printed form:

> [I]f said permit is granted, the above named applicant agrees to do the following:
>
> * * *
>
> 3. Take, provide and maintain all necessary precautions to prevent injury or damage to persons and property *from operations covered by this permit* and use safety devices which are approved by the Michigan Department of State Highways.
>
> * * *
>
> A permit as requested in the foregoing application subject to the conditions to which applicant

thereby agrees is hereby granted for the period commencing 7/14/66 and ending 12/31/66.

Plaintiff concedes that the contracting parties must intend to benefit her in order for her to be entitled to recovery under this theory. See *Talucci, supra;* MCL 600.1405; MSA 27A.1405.

It is clear to us, as it was to the Court of Appeals, that the parties did not intend this plaintiff to benefit from their agreement. By its express terms, the indemnity provision only applies to "operations covered by this permit." The "desired activity" only involved installation of the street lights and cables. Furthermore, the expressed term of the agreement ended almost ten years before the accident. The plaintiff attempts to focus on general language, while ignoring the express terms and length of the agreement. We therefore affirm that portion of the Court of Appeals decision dealing with this issue.

Affirmed in part, reversed in part, and remanded for a new trial.

WILLIAMS, C.J., and LEVIN, BRICKLEY, and BOYLE, JJ., concurred with CAVANAGH, J.

RILEY, J. (*dissenting*). The issue presented is not whether a utility company owes *no general duty of reasonable care,* regarding the placement and design of utility poles, to occupants of vehicles which leave the traveled portion of a highway. The Court of Appeals, in affirming the rulings of the trial courts, did not premise its decision upon such a conclusion. The Court did not reason, by combining the questions of duty and proximate cause, that a utility company may not incur liability for the negligent placement and design of utility poles because the occupants of vehicles who may sustain

injuries as a result are "unforeseeable plaintiffs."[1] The Court did not "decline[ ] to impose any obligation on the defendant under the circumstances."[2] It expressly acknowledged that a utility company must "conform to the legal standard of reasonable conduct in the light of the apparent risk"[3] (general standard of care). The Court's decision was reached, rather, by determining that, in the light of the undisputed relevant facts presented, the placement and design of the utility pole in question did not create an unreasonable risk of harm to highway travelers (specific standard of care). In reaching that decision, the Court applied a judicially established rule concerning the specific standard to which the reasonable utility company must conform in the placement of utility poles and concluded that defendant, Detroit Edison, could not, in the present case, be found to have derogated from its duty to exercise ordinary care under the circumstances. Having so concluded, the issue of causation was not implicated and, therefore, was not addressed.

The Court of Appeals analysis relied upon this Court's recent decision in *Moning v Alfono,*[4] its earlier decisions in *Cramer v Detroit Edison*[5] and *Dawson v Postal Telegraph-Cable Co,*[6] and several decisions of the courts of other jurisdictions. Because I am persuaded that the reasoning employed by the Court of Appeals is sound, I cannot join the majority opinion for reversal.

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[1] Cf. *Palsgraf v Long Island R Co,* 248 NY 339; 162 NE 99; 59 ALR 1258 (1928). See, generally, Prosser & Keeton, Torts (5th ed), § 43, pp 284-289.

[2] *Ante,* p 52.

[3] *McMillan v State Highway Comm,* 130 Mich App 630, 635; 344 NW2d 26 (1983).

[4] 400 Mich 425; 254 NW2d 759 (1977).

[5] 296 Mich 662; 296 NW 831 (1941).

[6] 265 Mich 139; 251 NW 352 (1933).

I

I disagree that the essential question presented is whether the defendant "owes any obligation to avoid negligent conduct,"[7] under the facts of the present case. In the famous *Palsgraf* case,[8] the New York Court of Appeals held that the general duty of reasonable care only arises with respect to foreseeable plaintiffs and consequences.[9] That theory was not relied upon by the Court of Appeals in the instant case. Nevertheless, to the extent that the defendant relies upon such a theory to, in effect, assert that it is relieved of the duty to conform to the general standard of care—reasonable care under the circumstances—I am in agreement with the majority, and, thus, would reject that assertion.

I am convinced, however, that neither the Court of Appeals in the instant case, this Court in *Cramer* and *Dawson, supra,* nor the decisions of the courts of other jurisdictions involving similar cases, have relied upon the *Palsgraf*—unforeseeable plaintiff—analysis. I am persuaded that the general rule applied in those cases relates to the specific standard of care—the particular conduct required of a utility company to conform to the general standard of reasonable care. I would suggest that the majority opinion appears to have confused the general standard of care with the specific standard of care in this regard. Inaccurately framing the issue as whether a utility company has any legal obligation whatsoever to use reasonable care in the placement and maintenance of utility poles tends to obscure the nature, and difficulty, of the essential question presented.

[7] *Ante,* p 51.

[8] *Palsgraf,* n 1 *supra.*

[9] *Id.* See, generally, Prosser & Keeton, n 1 *supra.*

A

The Court of Appeals did not interpret *Dawson* and *Cramer* as standing for the proposition that a private utility company owes no duty to exercise reasonable care in the placement and design of utility poles. To the contrary, the Court expressly stated that such a legal duty is imposed, and it did not reason that the defendant was, to any extent, relieved of that general duty.[10] The Court stated, quoting from *Moning, supra,* that in negligence cases that duty is always the same, to "conform to the legal standard of reasonable conduct in the light of the apparent risk."[11] The Court discussed the nature of the risk-benefit analysis required in determining the specific standard of care—what specific conduct is required to satisfy the general duty to exercise reasonable care—quoting the following paragraphs from *Moning:*

> Even if a person recognizes that his conduct involves a risk of invading another person's interest, he may nevertheless engage in such conduct unless the risk created by his conduct is unreasonable.
>
> The reasonableness of the risk depends on whether its magnitude is outweighed by its utility. The Restatement provides: "Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." 2 Restatement, [Torts 2d], § 291.
>
> The balancing of the magnitude of the risk and

[10] The majority, relying upon the briefs of the parties and of amicus curiae, has inaccurately expressed the basis and analysis of the Court of Appeals decision which is the subject of this appeal.

[11] *McMillan,* n 3 *supra,* 635.

> the utility of the actor's conduct requires a consideration by the court and jury of the societal interests involved. The issue of negligence may be removed from jury consideration if the court concludes that overriding considerations of public policy require that a particular view be adopted and applied in all cases. [*Moning, supra,* 449-450.][12]

The Court emphasized that defining the particular standard of conduct is ordinarily a jury question, but stated that, in the present case, public policy militates in favor of uniformity. The Court reasoned:

> Once again, the drawing of this balance is a jury matter unless public policy militates in favor of uniformity. Tort liability has the effect, and to a degree the purpose, of regulating a defendant's future conduct. It is thus beneficial to develop and adhere to standards governing a utility company's duty regarding the placement and design of utility poles. The rule set forth by *Dawson* and *Cramer* accomplishes this by holding that a utility *has acted reasonably in light of the risk of harm if it locates its poles so as not to constitute an obstruction dangerous to anyone properly using the highways.* See also MCL 247.185; MSA 9.265. [Emphasis added.][13]

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[12] *Id.,* 636.

[13] *Id.,* 637. See MCL 247.186; MSA 9.266, which reflects one of a number of statutory regulations applicable to the erection and maintenance of utility poles. That provision relates specifically to the appropriate location of utility poles and provides:

> In no case shall any poles or other structures be placed above the ground or road grade between the curb or road shoulder lines, or closer than 15 feet from the center line of the roadway; and in no case shall any wires, cables or other fixtures be placed, or be permitted to remain, at less height than 15 feet above any part of the traveled portion of the road.

See also MCL 247.184; MSA 9.264, which requires the specific

Thus, the Court of Appeals viewed the rule set forth in *Dawson* and *Cramer* as relating to the specific standard of care. Applying that standard to the undisputed facts of the present case the Court concluded that the defendant could not be found to have created an unreasonable risk by virtue of the location and design of the utility pole in question.

B

I agree with the Court of Appeals interpretation of *Dawson* and *Cramer.* The general rule set forth and applied in those cases related to the specific standard of care, not the general issue of duty. I agree that in each of those cases the Court went further to address the element of proximate causation. I am persuaded, however, that the Court's decision in each of those cases rested independently upon its determination and application of the particular standard of care.[14]

The general rule applied in each of those cases, as it relates to the specific standard of care, may

approval of county and state authorities for, inter alia, the placement of utility poles in or near a public highway.

[14] The *Cramer* Court concluded:

> The defendant was not guilty of actionable negligence. The ornamental light pole was back a short distance [about five feet] from the curb at the east end of the parkway and the [guard] posts set between that pole and the curb of the parkway. So situated the posts were not a menace to travel on the highway, and there was no duty on the part of defendant [particular standard of conduct] to advertise the presence of the posts by warning signs. [*Id.,* 667.]

The *Dawson* Court discussed the statutory authority of a telegraph company to construct and maintain telegraph lines in or near public highways, and the statutory obligation of such a company not to "incommode the public in its use of the roads." *Id.,* 142.

That the *Dawson* Court's holding was based, first, upon a finding that the defendant in that case had not created an unreasonable risk, an obstruction dangerous to highway travelers, is supported by its

be paraphrased as follows. That as a general proposition, a utility company which *lawfully* positions poles in or near a public highway (in accordance with all statutory regulations), has acted reasonably in conformance with its duty to exercise ordinary care, unless the placement of such a pole constitutes an obstruction dangerous to one properly using the highway in the ordinary course of travel.

C

The decisions from other jurisdictions, referred to by the Court of Appeals and discussed in the majority opinion, have applied the general rule articulated in *Dawson* and *Cramer.* As is reflected in the quotations from those decisions set forth in the majority opinion, those cases were not decided on the basis that a utility company "[does] not owe any duty at all to a motorist leaving the traveled portion of the highway." Those decisions apply the general rule expressed in *Dawson* and *Cramer* as it relates to the specific standard of care required to conform to the general legal duty imposed.

A number of the reported decisions concerning the liability of a utility company for injuries sustained by motorists who have suffered the misfortune of colliding with a utility pole have rested upon the determination of issues other than the negligence question.[15] A consistent principle which may be deduced from the cumulative body of those decisions, however, is that, as a general rule, a

discussion of *O'Brien v Union Telephone Co,* 228 Mich 156; 199 NW 671 (1924), and its analysis that *O'Brien* was factually distinguishable. *Dawson, supra,* 144. The statement quoted by the Court from 82 ALR 395 related to the particular standard of conduct required to satisfy the general duty to use reasonable care for purposes of a common-law negligence action. See *id.,* 142.

[15] See Anno: 3 ALR2d 6, §§ 2-3, pp 9-14 and §§ 19-27, pp 56-64.

utility company is not guilty of negligence, with respect to the publicly authorized and specifically approved placement of a utility pole, unless it can be found that under the particular circumstances the placement of that pole created a dangerous obstruction to highway travel in the ordinary course.[16] A careful reading of those decisions, again, reflects that that principle relates to the particular standard of conduct required in such cases and not to the general duty question, or the issue of proximate cause. The application, in those decisions, of that general principle has resulted, consistent with the nature of common-law jurisprudence and the principle of stare decisis, in judicially defining the particular standard of conduct legally required in such cases.[17]

When, under the particular circumstances of a given case, reasonable minds could differ concerning whether the placement of a utility pole has created a dangerous and unreasonable obstruction to highway travel in the ordinary course, the question has been submitted to the jury with appropriate instructions.[18] When reasonable minds could not differ with regard to the application of that specific standard of conduct, however, the courts have properly withheld the issue from jury determination.[19]

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[16] See *id.*, §§ 3-18, pp 13-55. See also Restatement Torts, 2d, § 368, which reflects that generally accepted principle. See, generally, Prosser & Keeton, n 1 *supra,* § 57, pp 388-390.

[17] The particular standard of conduct may be established by judicial decision. See, e.g., Restatement Torts, 2d, § 285. See generally, Prosser & Keeton, n 1 *supra,* § 35, p 217.

[18] See, e.g., *Scheel v Tremblay,* 226 Pa Super 45; 312 A2d 45 (1973); *Gerberich v Southern California Edison Co,* 5 Cal 2d 46; 53 P2d 948 (1935); *Stern v Int'l Ry Co,* 220 NY 284; 115 NE 759 (1917).

[19] See, e.g., *Shapiro v Toyota Motor Co, Ltd,* 38 NC App 658; 248 SE2d 868 (1978); *Speigel v Southern Bell Telephone & Telegraph Co,* 341 So 2d 832 (Fla App, 1977); *Oram v New Jersey Bell Telephone Co,* 132 NJ Super 491; 334 A2d 343 (1975). See also, e.g., *Hyde v Rensselaer Co,* 51 NY2d 927; 434 NYS2d 984; 415 NE2d 972 (1980).

Whether submitted to the jury or decided by the court, the particular conduct required of a utility company, in the lawful placement and design of utility poles, seems to have received broad judicial acceptance. To satisfy its general duty to use ordinary care under the circumstances, a utility company which has, with public authorization and specific approval, undertaken to erect utility poles in or near a public highway, must do so without dangerously and unreasonably obstructing highway travel in the ordinary course. While highway travel in the ordinary course may include slight deviations from the traveled portions of highways, it does not include vehicles which, for whatever reason, completely and uncontrollably leave the traveled portions of those highways. Utility companies, and the governmental authorities responsible for highway design and safety generally, do not incur liability for the injuries sustained by the occupants of such vehicles, not because they have no duty to use ordinary care under the circumstances, but because they have not failed to conform to that legal duty and, therefore, have not by affirmative act or omission committed any wrongful act which may be found to have been in derogation of that duty, an essential element of the common-law negligence action.

II

The essential question presented requires determination of the following issues. The first, and broader question presented, is whether this Court should reject the judicially established specific standard of conduct applicable in determining whether a utility company, although in compliance with all statutory regulations, has failed to

exercise due care in the placement and design of a utility pole, and, instead, to require in all cases that the specific standard be submitted for jury definition case by case. Second, and only if the answer to that broader question is no, we must decide whether the evidence presented in the instant case is sufficient to raise a jury question concerning the application of that specific standard.

I am unpersuaded that we should reject the judicially established specific standard of conduct applied by the Court of Appeals in the present case, which was expressed, inter alia, by this Court in *Cramer* and *Dawson.* While it is unquestionable that in the generality of negligence cases the particular standard of conduct is appropriately, and necessarily, left to jury determination on a case-by-case basis,[20] I am persuaded, for the reasons stated in the Court of Appeals opinion, that public policy militates in favor of uniformity concerning the specific standard of conduct to which a utility company must conform for purposes of the common law of negligence, with respect to the placement of utility poles in or near public highways.

I would note that I am cognizant of the danger, generally, that attempting to define the particular standard to be applied in all similar cases may result in a failure to take account of the unusual situations which may present factors which could affect the standard.[21] I would emphasize, however, that the particular standard here in question is not an absolute and inflexible rule which precludes a finding of negligence in all cases in which a utility pole is located outside of the traveled por-

[20] See Prosser & Keeton, n 1 *supra,* § 37, pp 237-238.

[21] See *id.,* § 35, pp 217-219.

tion of the highway.[22] Perhaps most importantly, I am persuaded that the judicially established particular standard here at issue, as applied by the Court of Appeals and generally accepted by the courts of other jurisdictions, accurately reflects the obligation imposed by the law of negligence: ordinary care under the circumstances. Whether a higher standard of care than that which is imposed by the common law should be imposed upon utility companies and the governmental authorities with which they share that obligation is not at issue. Likewise, whether the statutory regulations currently applicable to the placement and design of utility poles should be amended or repealed and replaced to better serve the public interest in highway safety is also beyond the scope of this case.[23]

With regard to the second issue, I am also in agreement with the Court of Appeals conclusion concerning the application of the particular standard of conduct to the undisputed factual circumstances of the present case. Reasonable minds could not differ that the placement and design of

[22] As noted by the Court in *Scheel,* n 18 *supra,* and reflected in the quotation from that decision set forth in the majority opinion, liability would not be limited to "those situations in which the pole is located in the roadway itself, but may be imposed where the placement of a pole close to the edge of a highway constitutes . . . [an] unreasonable risk of harm to users of the highway." *Ante,* p 60, quoting *Scheel, supra,* 47-49. The particular standard of conduct requires utility poles to be "so located as to avoid any unreasonable danger to travelers on the highway." *Id.* I would also note that highway travel in the ordinary course may include minor deviations from the traveled portion proper of the highway, as opposed to vehicles uncontrollably and entirely leaving it.

[23] Through the extensive off-the-record evidence referred to in the majority opinion (*ante,* p 62, n 7), plaintiff and amicus curiae seem to assert that currently applicable statutory regulations regarding the appropriate placement and design of utility poles, fail to adequately further highway safety. To the extent that that is a legislative matter, it is, of course, beyond the scope of our decision in this case. See n 13.

the utility pole in question did not create an obstruction dangerous to highway travelers in the ordinary course, and, therefore, that defendant did not breach its legally imposed duty to exercise ordinary care under the circumstances. The undisputed facts and circumstances, and the evidence presented in support of plaintiffs' allegations viewed in the light most favorable to plaintiffs, are insufficient to raise a jury question concerning whether the placement and design of the utility pole in question created an unreasonable risk to the occupants of vehicles in the ordinary course of highway travel.

Liability could not be imposed upon defendant in the present case on the basis of plaintiffs' asserted negligence theory.[24] The general societal interest underlying that theory—shifting an innocent tort victim's loss to the tortfeasor whose *wrongful* conduct is responsible therefor—is inapplicable.

Therefore, I would affirm the decision of the Court of Appeals.

ARCHER, J., took no part in the decision of this case.

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[24] To the extent that plaintiffs' implied warranty of crashworthiness theory is asserted independently of their negligence claim as a theory of products liability, I would expressly reject it. The Detroit Edison Company is no more a proper party for such a claim than is the State Highway Commission. Neither is a manufacturer, wholesaler, or retailer of utility poles. That defendant sells electricity is, of course, irrelevant in a products liability action concerning utility poles.

KLANSECK v ANDERSON SALES & SERVICE, INC

Docket No. 74713. Argued January 15, 1986 (Calendar No. 12). Decided September 17, 1986.

Stephen Klanseck and Karen Klanseck brought an action in the Oakland Circuit Court against Anderson Sales & Service, Inc., and American Honda Motor Co., Inc., seeking damages for injuries suffered by Stephen Klanseck in an accident involving a motorcycle driven by Stephen purchased from the defendant. The court, Francis X. O'Brien, J., entered judgment on a jury verdict for the plaintiffs against both defendants, but reduced the damages by the jury's finding of sixty percent comparative negligence on the part of Stephen. The plaintiffs appealed, alleging it was error for the court to instruct the jury that it could infer negligence from the plaintiff's failure to obtain a motorcycle endorsement on his driver's license as required by statute and to instruct the jury regarding the plaintiff's duty to mitigate damages. The Court of Appeals, D. F. WALSH and SIMON, JJ. (T. M. BURNS, P.J., dissenting), affirmed (Docket No. 64816). The plaintiffs appeal.

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

Where evidence is presented which raises an issue regarding a driver's incompetence or inexperience as a causal factor in an accident, the jury may be instructed that it may draw an inference of negligence from the violation of a licensing statute and to decide whether such negligence was in fact a proximate cause of the accident. Scant evidence of a plaintiff's alleged failure to mitigate damages which raises an issue for the jury's decision may support instruction of the jury regarding the plaintiff's duty to mitigate damages.

1. Evidence of violation of a penal statute creates a presump-

REFERENCES

Am Jur 2d, Damages § 200 *et seq.*

Am Jur 2d, Negligence §§ 234 *et seq.;* 288 *et seq.;* 378 *et seq.*

Am Jur 2d, Trial § 758 *et seq.*

See the annotations in the ALR3d/4th Quick Index under Automobiles and Highway Traffic.

tion of negligence which may be rebutted by evidence of a legally sufficient excuse for the violation. Absent such excuse, a jury may infer negligence on the basis of the violation and then determine whether the violation was a proximate cause of an accident.

2. The use of a statutory violation to establish negligence is a matter of judicial discretion; however, the relevance of the violation must be specifically established. Factors which the court may apply in determining relevance are whether the statute is intended to protect against the result of the violation, the plaintiff is within the class intended to be protected by the statute, and the evidence will support a finding that the violation was a proximate contributing cause of the occurrence.

3. In this case, the plaintiff's violation of the motorcycle endorsement requirement was relevant. The licensing statute is intended to protect against accidents involving motorcycles driven by persons not legally recognized as competent, the plaintiff is within the class of persons intended to be protected, and the plaintiff's failure to obtain the endorsement could properly have been found by the jury to have been a causal factor. The instruction by the trial court properly informed the jury of its duty to find whether the violation was a proximate cause of the plaintiff's injuries.

4. An injured party has a duty to exercise reasonable care to minimize damages, including obtaining proper medical or surgical treatment. Although the evidence of the plaintiff's failure to mitigate damages was weak, there was evidence that he had not followed the advice of his physician regarding obtaining further tests. Even scant evidence may support instruction where it raises an issue for the jury's decision.

Affirmed.

Justice LEVIN, joined by Justice ARCHER, dissenting, stated that the instruction was erroneous in permitting the jury to infer that the cyclist was negligent solely on the basis that because he did not have a license he may not have had the skills to obtain a license.

136 Mich App 75; 356 NW2d 275 (1984) affirmed.

OPINION OF THE COURT

1. NEGLIGENCE — JURY INSTRUCTIONS — VIOLATION OF PENAL STATUTE — MOTORCYCLES.

Where evidence is presented which raises an issue regarding a driver's incompetence or inexperience as a causal factor in an accident, the jury may be instructed that it may draw an inference of negligence from the violation of a licensing statute

and to decide whether such negligence was in fact a proximate cause of the accident.

2. NEGLIGENCE — VIOLATION OF PENAL STATUTE — PRESUMPTION OF NEGLIGENCE.

Evidence of violation of a penal statute creates a presumption of negligence which may be rebutted by evidence of a legally sufficient excuse for the violation; absent such excuse, a jury may infer negligence on the basis of the violation and then determine whether the violation was a proximate cause of an accident.

3. NEGLIGENCE — JURY INSTRUCTIONS — RELEVANCE — JUDICIAL DISCRETION — VIOLATION OF PENAL STATUTE.

The use of a statutory violation to establish negligence is a matter of judicial discretion; however, the relevance of the violation must be specifically established; factors which the court may apply in determining relevance are whether the statute is intended to protect against the result of the violation, the plaintiff is within the class intended to be protected by the statute, and the evidence will support a finding that the violation was a proximate contributing cause of the occurrence.

4. DAMAGES — JURY INSTRUCTIONS — DUTY TO MITIGATE.

Where even scant evidence is presented of a plaintiff's alleged failure to mitigate damages, an instruction of the jury regarding a plaintiff's duty to mitigate damages may be supported where it raises an issue for the jury's decision.

Vandeveer, Garzia, Tonkin, Kerr, Heaphy, Moore, Sills & Poling, P.C. (by *Robert D. Brignall* and *James M. Prahler*), for the plaintiffs.

Dice, Sweeney, Sullivan, Feikens, Hurbis & Foster, P.C. (by *Jon Feikens* and *Dennis J. Mendis*), for defendant American Honda Motor Co., Inc.

Kohl, Secrest, Wardle, Lynch, Clark & Hampton (by *Michael L. Updike*) for defendant Anderson Sales & Service, Inc.

WILLIAMS, C.J. This motorcycle accident case presents two issues involving jury instructions. The first question is whether it was error for the

trial judge to instruct the jury that it could infer negligence from plaintiff's failure to obtain a motorcycle endorsement as required by MCL 257.312a, 257.312b; MSA 9.2012(1), 9.2012(2). We hold that where evidence is presented which raises an issue regarding a driver's incompetence or inexperience as a causal factor in an accident, the jury may be instructed that it may draw an inference of negligence from the violation of a licensing statute. It is then for the jury to decide whether such negligence was in fact a proximate cause of the accident. The court's instruction in this case was therefore proper.

The second question is whether it was error for the court to instruct the jury regarding the plaintiff's duty to mitigate damages. Since evidence was presented that the plaintiff did not follow the course of action recommended by his physician, we find the court's instruction was warranted.

We therefore affirm the decision of the Court of Appeals.

I. FACTS

Plaintiff, Stephen Klanseck, brought this action, seeking damages for injuries suffered in a motorcycle accident which occurred May 27, 1976. Mr. Klanseck had that day purchased a Honda GL 1000 motorcycle from defendant Anderson Sales & Service, Inc., and was heading for home with his new cycle when the machine began to "fishtail." Plaintiff applied the brakes and the motorcycle slid sideways and went down, resulting in plaintiff's injuries.

Following the accident, plaintiff received sutures in his left arm, was x-rayed and released. Twelve days later, a fracture of plaintiff's right wrist was diagnosed and treated. Plaintiff, who was em-

ployed as an auto mechanic, claimed that his injuries resulted in chronic pain and numbness in his left arm and hand, which interfered with his work and eventually resulted in a serious mental disorder.

After the accident, it was found that the front tire had deflated. A small hole was later discovered on the portion of the tube that contacted the wheel rim. Plaintiff's expert witness testified that the puncture resulted from the improper placement of a rubber strip, allowing contact between the tube and the metal heads, or nipples, of the spokes on the front rim.

Plaintiff had not previously owned a motorcycle. He had had approximately ten hours of experience riding a small "dirt bike," and three hours of experience riding a friend's Honda GL 1000. He admitted on cross-examination that, although he was aware that he was required by law to obtain a motorcycle endorsement on his driver's license, he had not done so. He also stated that he knew at the time of the accident that the proper response to a blowout was to allow the motorcycle to coast to a stop without applying the brakes. He explained that he did not follow that procedure because he did not realize that the tire was losing air pressure. "A brand new bike, I didn't know whether something was left loose or what the problem was."

The defendants presented as witnesses experienced motorcycle riders who testified that a front tire blowout would not cause a fall if the machine were handled properly. The trial court instructed the jury that it might infer negligence if it found that plaintiff violated a statute, and must then decide if such negligence was a proximate cause of the accident. The court also gave an instruction on plaintiff's duty to mitigate damages. Plaintiff ob-

jected to instructions on comparative negligence and to the mitigation instruction.

The jury found that both defendants were negligent and had breached implied warranties to the plaintiff. Damages were assessed in the amount of $40,000, reduced to $16,000 by the jury's finding of sixty percent comparative negligence on the part of the plaintiff. The Court of Appeals affirmed, 136 Mich App 75; 356 NW2d 275 (1984). This Court granted leave to appeal June 26, 1985, 422 Mich 936 (1985).

II. VIOLATION OF A LICENSING STATUTE AS EVIDENCE OF NEGLIGENCE

The trial court instructed the jury as follows:

> Now, there are some statutes that will apply in this case. In this situation we have one statute I will read as follows, and it states: A person, before operating a motorcycle upon a public street or highway in this State, shall procure a motorcycle endorsement on the operator or chauffeur's license.
>
> A second part of that same statute reads on as follows: Before a person is issued a motorcycle endorsement on an operator's or chauffeur's license, the person shall pass an examination as provided in section 309, and the rules of the Department of State.
>
> Each written examination given an applicant for a motorcycle endorsement on an operator's or chauffeur's license, as provided in section 309, shall also include subjects designed to cover a motorcycle.
>
> The person shall pass an examination which shall include a driving test designed to test the competency of the applicant for the first motorcycle endorsement on the operator or chauffeur's license, to operate a motorcycle upon the highways

> of this state with safety to himself and other persons and property.
>
> * * *
>
> Now, ladies and gentlemen, if you find that the Plaintiff violated [this statute] before or at the time of the occurrence, you may infer that the Plaintiff was negligent.
>
> You must then decide whether such negligence was a proximate cause of this occurrence.

Plaintiff argues that the instruction regarding the licensing statute was erroneous because his failure to obtain a motorcycle endorsement could not be found to have caused the accident. He contends that his negligence, if any, must be judged according to what he did or did not do when confronted by the sudden emergency caused by the rapid deflation of the front tire and that the licensing statute is therefore irrelevant on the issue of negligence.

A

In upholding the instruction, the Court of Appeals relied on *Turri v Bozek,* 79 Mich App 212; 261 NW2d 264 (1977), rev'd on other grounds 406 Mich 900 (1979), and *Parks v Pere Marquette R Co,* 315 Mich 38; 23 NW2d 196 (1946). *Turri* involved a collision between a motorcycle and a camper in which there was evidence of negligence on the part of both drivers. The trial court instructed the jury that the plaintiff's failure to obtain a motorcycle endorsement constituted negligence per se, and the jury returned a verdict of no cause of action. The Court of Appeals affirmed the trial court, finding that the fact of plaintiff's violation of the licensing statute met the criteria of relevance established by the Michigan Standard

Jury Instructions.[1] Because this Court had recently adopted comparative negligence in *Placek v City of Sterling Heights,* 405 Mich 638; 275 NW2d 511 (1979), the *Turri* case was reversed and remanded for a new trial pursuant to that opinion.

In *Parks,* plaintiff's decedent was killed while a passenger in his own automobile which was being driven by a friend. The question in that case was whether the trial court erred in instructing that the negligence of the driver, if found by the jury, should be imputed to plaintiff's decedent, and in refusing to instruct the jury that the driver's lack of an operator's license had no bearing on the question of negligence. This Court upheld the trial court's actions, noting with regard to the licensing issue:

> As bearing upon the question of contributory negligence it was competent to disclose to the jury that the driver of decedent's automobile did not have a license, since an unlicensed driver operating an automobile upon the highways of this State does so in direct violation of the statute. [Citation omitted. *Id.,* 48.]

Perhaps because it would have made no difference in the result, the *Parks* Court did not indicate whether the violation of the licensing statute was evidence bearing on the negligence of the driver, which could be imputed to plaintiff's decedent, or whether the lack of an operator's license was evidence bearing directly on the negligence of the decedent in entrusting his automobile to an unlicensed driver. Therefore, although *Parks* is in-

[1] The Court noted that *Zeni v Anderson,* 397 Mich 117; 243 NW2d 270 (1976), abandoned the per se rule and adopted a standard providing that a statutory violation establishes a prima facie case of negligence. Since *Zeni* was decided after the trial in *Turri,* the Court found that "the lower court's instruction on negligence per se was proper under former law and harmless under present law." *Turri, supra,* 216.

structive, we do not view it as dispositive in the present case.

B

The fact that a person has violated a safety statute may be admitted as evidence bearing on the question of negligence. In some instances, it may be said that the Legislature, in enacting a statute prescribing a certain course of conduct, has fixed a standard of reasonableness which may be viewed as a settled rule, removing from the jury the task of making its own determination of reasonable behavior in a negligence case.[2] Thus, for example, in a case involving a child who suffocated in an abandoned refrigerator, the existence of a state statute prohibiting the abandonment of a refrigerator without removing its door would relieve the jury of a decision whether the person who abandoned the appliance was negligent to have done so. In many jurisdictions, such a statutory violation is said to be negligence per se, conclusively removing the determination of negligence from the jury.[3]

In Michigan, however, the rule is that evidence of violation of a penal statute creates a rebuttable presumption of negligence. *Zeni v Anderson,* 397 Mich 117, 128-129; 243 NW2d 270 (1976). This presumption may be rebutted by evidence of a legally sufficient excuse for the statutory violation. Absent such excuse, the jury may infer negligence on the basis of the violation. It is then for the jury to determine whether violation of the statute was a proximate cause of the accident.

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[2] See Prosser & Keeton, Torts (5th ed), § 36, pp 229-230.

[3] *Olson v Ratzel,* 89 Wis 2d 227; 278 NW2d 238 (1979); *Seim v Garavalia,* 306 NW2d 806 (Minn, 1981); *Nazareno v Urie,* 638 P2d 671 (Alas, 1981); *Hartenbach v Johnson,* 628 SW2d 684 (Mo App, 1982); *Murray v O & A Express,* 630 SW2d 633 (Tex, 1982).

The use of a statutory violation to establish negligence is a matter of judicial discretion. *Zeni, supra,* p 137. The Note on Use for Michigan Standard Jury Instruction 12.01, Violation of Statute, provides that the instruction should be given only if

> 1. the statute is intended to protect against the result of the violation;
> 2. the plaintiff is within the class intended to be protected by the statute; and
> 3. the evidence will support a finding that the violation was a proximate contributing cause of the occurrence.

These factors are necessary to a determination of relevance. When a party is alleged to have violated a safety statute, the court may apply the factors above in assessing whether the claimed violation is relevant to the facts presented at trial. Thus, for example, if the plaintiff were shown to have been driving a motorcycle unequipped with a headlight in violation of a statute, such violation would be irrelevant in litigation involving a single vehicle accident in daylight in which plaintiff's ability to see or be seen was not at issue. In such a case, a court might hold, under the third factor listed above, that a driver's violation of the headlight statute could not have been a proximate cause of the accident. In short, the statutory violation would be irrelevant to the facts of the case.

While we hold today that, in certain cases, the fact that a person has violated the motorcycle licensing statute may be used as evidence of negligence, we caution that relevance must be specifically established. As the Supreme Court of Florida stated in *Brackin v Boles,* 452 So 2d 540, 545 (Fla, 1984):

> Relevancy is usually inherently established when the traffic regulation which was violated concerns the manner in which an automobile was operated. Relevancy is not so easily established when the traffic regulation which was violated concerns a licensing requirement.

We thus do not find it necessarily inconsistent with our holding here to note that a number of opinions of appellate courts in our sister states have found a party's violation of a licensing statute irrelevant to the issues presented.[4] We find the analysis of the *Brackin* court instructive:

> Thus the real issue in this case is whether the trial judge erred in deciding as a matter of law that Brackin's violating the restriction on his license was not relevant to the manner in which he was operating the automobile. In some situations the violation of such a restriction may be relevant to show the driver's inexperience and incompetence in handling an automobile. . . . In this case, however, Brackin's experience and competence were not placed in issue. Moreover, the accident took place only a few days before Brackin's seventeenth birthday and he had been driving for almost two years. Boles' case did not rest upon Brackin's inexperience, but rather upon the allegation that Brackin was exceeding the speed limit. We therefore find that the trial court was correct in ruling that Brackin's violation of [the licensing statute] was not relevant and therefore was inadmissible. [*Id.*]

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[4] See, e.g., *Mattero v Silverman,* 71 NJ Super 1, 8; 176 A2d 270 (1961), stating the rule that "mere lack of an operator's license is not in itself evidence of negligence in the operation of a motor vehicle, in the absence of some causal connection between the injury and the failure to have the license," citing Anno: 29 ALR2d 963, 970; *Mutz v Lucero,* 90 Ariz 38, 41; 365 P2d 49 (1961), lack of license inadmissible as evidence of negligence; *Lunski v Lindemann,* 270 Or 316, 320-321; 527 P2d 254 (1974), and *Fielding v Driggers,* 126 Ga App 365; 190 SE2d 601 (1972), evidence of lack of motorcycle endorsement was properly excluded where there was no causal connection in producing the accident.

In some cases, however, courts in other jurisdictions have found that violation of a licensing statute is relevant in a negligence case. In *Dorsett v Dion,* 347 So 2d 826 (Fla App, 1977), the plaintiff brought an action for damages for injuries suffered in an accident allegedly involving the defendant's car, although there was no contact between the two vehicles. The court held that where plaintiff's injury may have resulted from her inexperience and inability to handle her car, evidence that she was driving in violation of a learner's permit was relevant, since it could be found to have a causal connection. See also *Duncan v Hixon,* 223 Va 373; 288 SE2d 494 (1982).

The question facing the court, then, is whether, considering the evidence in the present case, plaintiff's lack of a motorcycle endorsement could be found to have a causal connection and was therefore relevant to the matters at issue.

Considering the first two factors of the relevancy test, we agree with the Court of Appeals that the motorcycle licensing statute is intended to protect against accidents involving motorcycles driven by persons not legally recognized as competent, and that plaintiff is within the class of persons intended to be protected by the statute. With regard to the third factor, we find that plaintiff's failure to obtain an endorsement could properly have been found by the jury to have been a causal factor in the accident because plaintiff's experience and competence were placed in issue by defendant's presentation of evidence. Defendant's theory of the case was that the accident could have been avoided if plaintiff had handled the motorcycle competently when he first felt the effect of the loss of air in the front tire. Defendant presented witnesses who testified regarding the safest procedure to follow in the event of a blowout. Under the

unique facts of this case, we find that plaintiff's statutory violation was relevant.

The foregoing discussion of the relevancy determination involves a decision to be made by the court as a matter of law that, according to the evidence presented, the jury *could* find a causal connection between the statutory violation and the accident. This determination should not be confused with the jury's duty to decide, as a matter of fact, whether the violation *was* a proximate cause of the accident. The quoted instruction properly informed the jury of its duty to find whether the statutory violation was a proximate cause of plaintiff's injuries.

III. FAILURE TO MITIGATE DAMAGES

With regard to plaintiff's alleged failure to mitigate damages, the court gave the following instruction:

> Now, a person has a duty to use ordinary care to minimize his own damages after he has been injured, and it is for you to decide whether the Plaintiff failed to use such ordinary care and, if so, whether any damages resulted from such failure.
>
> You may not compensate the Plaintiff for any portion of his damages which resulted from his failure to use ordinary care.

Plaintiff contends that this instruction was erroneous because no evidence was presented that would create an issue as to plaintiff's failure to mitigate his damages. Defendant points to the testimony of Dr. Gary W. Roat, and claims that it creates an issue on the question of mitigation. Dr. Roat, a neurologist, testified that the plaintiff had come to him on referral from another physician about a year after the accident and that he had

treated the plaintiff a number of times for numbness and tingling in his hand as well as back and leg pain. After trying several medications, Dr. Roat recommended that plaintiff undergo additional diagnostic tests, including nerve conduction studies, an electromyelographic examination, and a myelogram to determine whether he had a herniated disk. According to Dr. Roat's testimony, plaintiff decided against taking these tests unless his symptoms worsened.

It is well-settled that an injured party has a duty to exercise reasonable care to minimize damages, including obtaining proper medical or surgical treatment. *Poikanen v Thomas Furnace Co,* 226 Mich 614, 618-619; 198 NW 252 (1924); *Smith v Jones,* 382 Mich 176, 186; 169 NW2d 308 (1969). It is also settled that the charge of the court must be based upon the evidence and should be confined to the issues presented by the evidence. *Susich v Michigan Consolidated Gas Co,* 292 Mich 612, 616; 291 NW 26 (1940); *Litvin v Joyce,* 329 Mich 56, 60; 44 NW2d 867 (1950).

Although the evidence of plaintiff's alleged failure to mitigate damages was weak, there was evidence that plaintiff had not followed the recommendation of Dr. Roat. Even scant evidence may support an instruction where it raises an issue for the jury's decision. *McKinch v Dixon,* 391 Mich 282, 286; 215 NW2d 689 (1974). The trial court's instruction on failure to mitigate damages was proper.

Affirmed.

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

LEVIN, J. (*dissenting*). The instruction was, in my opinion, erroneous in permitting the jury—

even if it was satisfied that the cyclist was not negligent at the time of the accident—to infer that he was negligent solely on the basis that, because he did not have a license, he may not have had the skills to obtain a license. Whether the cyclist had the requisite skills or not, if he in fact operated the motorcycle with due care the jury could not properly find that he was negligent, and the instruction should not have permitted the jury to find that he was negligent.

ARCHER, J., concurred with LEVIN, J.

LEWIS v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE

DIONNE v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE

Docket Nos. 74127, 72940. Argued February 6, 1986 (Calendar Nos. 1, 2). Decided September 17, 1986.

Jessie Lewis brought an action in the Wayne Circuit Court against the Detroit Automobile Inter-Insurance Exchange, seeking no-fault benefits for injuries suffered when, while a pedestrian, he was struck by an automobile driven by the defendant's insured. The court, Harold M. Ryan, J., entered judgment on a jury verdict for the plaintiff and denied the defendant's motion for accelerated judgment on the basis of the one-year-back rule. The Court of Appeals, WAHLS, P.J., and BRONSON and N. J. KAUFMAN, JJ., affirmed in an unpublished opinion per curiam and certified that its decision was in conflict with that of another panel (Docket No. 67686). The defendant appeals.

Lester R. Dionne brought an action in the Wayne Circuit Court against the Detroit Automobile Inter-Insurance Exchange for no-fault benefits for injuries suffered when his motorcycle, insured by the defendant, collided with an automobile. The court, John M. Wise, J., granted the defendant's motion for accelerated judgment on the ground that the plaintiff failed to file suit within one year of the date of the accident. The Court of Appeals, J. H. GILLIS, P.J., and GRIBBS and GAGE, JJ., affirmed in an unpublished memorandum opinion (Docket No. 64006). The plaintiff appeals.

In an opinion by Chief Justice WILLIAMS, joined by Justices

REFERENCES

Am Jur 2d, Insurance § 1876 *et seq.*

When statute of limitations commences to run on automobile no-fault insurance personal injury claim. 36 ALR4th 357.

Limitation of action against insurer for breach of contract to defend. 96 ALR3d 1193.

Insurer's failure to pay amount of admitted liability as precluding reliance on statute of limitations. 41 ALR3d 1111.

LEVIN, CAVANAGH, BOYLE, and ARCHER, the Supreme Court *held:*

The one-year limit on bringing an action for recovery of personal protection insurance benefits is tolled from the date a claimant makes a specific claim for benefits to the date the insurer formally denies liability, provided the claimant pursues the claim with reasonable diligence.

1. Under the no-fault act, an action for recovery of personal protection insurance benefits may not be commenced later than one year after the date of the accident. However, tolling the one-year limitation from the date a specific claim for benefits is made to the date liability is formally denied, where the claimant has sought reimbursement with reasonable diligence, preserves the legislative purpose of preventing stale claims and encouraging prompt denials of claims. Failure to permit tolling would require a claimant to file suit as the one-year deadline approached, regardless of the status of the claim, resulting in needless litigation.

2. In *Lewis,* the record shows that the plaintiff pursued his claim with reasonable diligence. In addition, the trial court did not err in permitting the plaintiff to present witnesses even though he had failed to file a witness list as required by local court rule because the witnesses called by the plaintiff were listed on the defendant's witness list, and the defendant does not claim surprise or prejudice. Finally, the jury's award was supported by the testimony presented.

3. In *Dionne,* the case must be remanded to the trial court for reconsideration of the defendant's motion for accelerated judgment.

Lewis, affirmed.

Dionne, reversed and remanded.

Justice BRICKLEY, joined by Justice RILEY, dissenting, stated that § 3145 of the no-fault act plainly and unambiguously provides that a person may not recover personal protection benefits for any portion of a loss incurred more than one year prior to the commencement of a suit. Absent ambiguous language or constitutional infirmity, the judiciary should not substitute policy for explicit directives of the Legislature, especially when, as in this case, a provision is clear and not necessarily inconsistent with other purposes and sections of the act.

OPINION OF THE COURT

1. INSURANCE — NO-FAULT — LIMITATION OF ACTIONS — TOLLING.

The one-year limit on bringing an action for recovery of personal

protection insurance benefits is tolled from the date a claimant makes a specific claim for benefits to the date the insurer formally denies liability, provided the claimant pursues the claim with reasonable diligence (MCL 500.3145; MSA 24.13145).

DISSENTING OPINION BY BRICKLEY, J.

2. INSURANCE — NO-FAULT — LIMITATION OF ACTIONS.

A person who brings an action to recover personal protection benefits may not recover benefits for any portion of the loss incurred more than one year prior to the commencement of the suit (MCL 500.3145[1]; MSA 24.13145[1]).

David J. Franks and *Rader, Eisenberg & Feldman, P.C.* (by *Merrill Gordon*), for plaintiff Lewis.

Robert A. Canner & Associates, P.C. (by *Robert A. Canner*), and *Daniel P. Feinberg* for plaintiff Dionne.

Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen (by *Mary Catherine Rentz* and *Kenneth M. Mattson*) for the defendant in *Lewis.*

Dickinson, Brandt, Hanlon, Becker & Lanctot (by *James H. Schoolmaster*); (*MacArthur, Cheatham, Acker & Smith, P.C.,* by *James G. Gross,* of counsel) for the defendant in *Dionne.*

WILLIAMS, C.J. In this opinion we consider the question whether the "one year back" limit on recovery of no-fault insurance benefits contained in MCL 500.3145(1); MSA 24.13145(1) should be tolled from the date a claimant makes a specific claim for benefits to the date the insurer formally denies liability, provided the claimant pursues the claim with reasonable diligence. We hold that such tolling best reflects the purposes of the no-fault statute.

I. FACTS *LEWIS*

On November 13, 1978, Jessie Lewis, a pedes-

trian, was struck by an automobile driven by Larry Perkins and insured by defendant Detroit Automobile Inter-Insurance Exchange. The plaintiff's guardian, Hattie Shaw, contacted the defendant regarding plaintiff's medical expenses. Because the accident report listed Ms. Shaw's residence at 16151 Whitcomb as the plaintiff's address, the defendant told her to contact her own insurer for payment.[1] On March 10, 1979, Mr. Lewis' attorney notified the defendant that his client would be making a claim for benefits under the no-fault act, MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.* On March 15, 1979, the defendant, noting the plaintiff's statement of residence on Whitcomb, replied by letter, stating, "At this point it does not appear we will be in a position to afford PIP benefits to Mr. Lewis."[2] On May 5, 1979, plaintiff's attorney submitted to defendant an affidavit regarding his residence at the time of the accident.[3] On May 8, 1979, defendant mailed plaintiff's attorney an application for benefits and requested an additional affidavit stating plaintiff's residence at the time of the accident. Defendant also inquired as to the names of other household members and

[1] Mr. Lewis had apparently given conflicting information regarding his address, listing his sister's home on Whitcomb as his mailing address, but claiming to have been living with a friend at the time of the accident. If the plaintiff had been living with his sister, her no-fault policy would have covered his injuries. MCL 500.3114; MSA 24.13114. Mr. Lewis was not personally insured.

[2] In its brief, defendant claims to have formally denied plaintiff's claim by this letter. Plaintiff points out that the statement in the letter is equivocal and conflicts with the trial testimony of defendant's employee, Colleen Campbell, who stated that defendant had never denied plaintiff's claim. Plaintiff also notes that negotiations regarding plaintiff's claim continued after the letter was mailed. We need not decide whether the statement in the letter could be regarded as a formal denial, because defendant did not claim before the trial court or the Court of Appeals that it had formally denied plaintiff's claim. This issue may thus be regarded as waived.

[3] This affidavit was mentioned in testimony, but is not a part of the record.

as to Mr. Lewis' employment. On June 11, 1979, Lewis' attorney returned the application for benefits which listed "medical bills to date" of $3,186.[4]

On June 19, 1979, defendant's agent telephoned plaintiff's attorney, requesting further medical reports and the name of the insurer of automobiles at the Whitcomb address. In September and October, defendant responded to inquiries from the hospital by stating that it was awaiting necessary information from plaintiff's attorney. On November 14, 1979, plaintiff's attorney wrote defendant, asking if the claim was going to be paid. The letter stated that plaintiff had complied with all defendant's requests and asked, if defendant was going to deny benefits, that the denial and the reasons therefor be in writing. On November 19, 1979, defendant responded by letter, stating, "The file has been reviewed by my supervisor, concerning possible payment. He has requested the name of the insurers of the autos housed at the Whitcomb street address." On January 23, 1980, plaintiff submitted to defendant an affidavit stating that his residence at the time of the accident was 15887 Robson.

On February 22, 1980, plaintiff filed suit. The Department of Social Services intervened as plaintiff to recoup amounts paid pursuant to Medicaid. MCL 400.106; MSA 16.490(16). The defendant's motion for accelerated judgment based on the one-year-back rule was denied. The jury returned a verdict for plaintiff of $27,120.70.

The Court of Appeals affirmed and certified, pursuant to Administrative Order No. 1984-2, that its decision in this case conflicted with the holding

[4] Corrine Lenard, supervisor of receivables for Mount Carmel Mercy Hospital, testified at the trial that Mr. Lewis' total hospital bill was $26,753.20. She stated that the Department of Social Services paid $23,460.70, the patient paid $106.50, and the remaining $3,186 was outstanding.

of another panel in *Kransz v Meredith,* 123 Mich App 454; 322 NW2d 571 (1983). By order of June 24, 1985, this Court granted leave to appeal. 422 Mich 930.

II. FACTS *DIONNE*

Plaintiff Lester Dionne was injured on July 9, 1975, when his motorcycle, insured by defendant DAIIE, collided with an automobile. The accident occurred on the premises of plaintiff's employer. Mr. Dionne's attorney notified defendant of the accident on July 2, 1976. On July 8, 1976, plaintiff's attorney submitted a number of medical bills in connection with the claim. On October 16, 1976, defendant mailed plaintiff's attorney a number of forms which were completed and returned on January 6, 1977. On March 31, 1977, defendant wrote to plaintiff's attorney requesting further information regarding the claim. Plaintiff's attorney did not respond. Over a year later, on July 7, 1978, plaintiff filed suit in Wayne Circuit Court. The court granted accelerated judgment to the defendant on the basis of the one-year-back rule. The Court of Appeals affirmed. We first held this case in abeyance pending decision in *Welton v Carriers Ins Co,* 421 Mich 571; 365 NW2d 170 (1984). By order of June 24, 1985, we granted leave to appeal. 422 Mich 929.

III. DISCUSSION

In *Tom Thomas Organization, Inc v Reliance Ins Co,* 396 Mich 588; 242 NW2d 396 (1976), this Court considered a provision in an insurance contract which limited the time for bringing suit on the policy to twelve months after loss or discovery of loss. We held there that the period of limitation

was tolled from the time the insured gave notice of loss until formal denial of the claim. In *In re Certified Question: Ford Motor Co v Lumbermens Mutual Casualty Co,* 413 Mich 22; 319 NW2d 320 (1982), we applied a similar tolling concept to the limitation provision of a statutory fire insurance policy.

The Court of Appeals, in *Richards v American Fellowship Mutual Ins Co,* 84 Mich App 629; 270 NW2d 670 (1978), lv den 406 Mich 862 (1979), applied the *Tom Thomas* rationale to the one-year-back rule contained in § 3145 of the no-fault act. The *Richards* panel held that the one-year limitation was tolled from the time the insured provided notice of loss until a formal denial of liability. Other panels of the Court of Appeals have declined to follow *Richards,* resulting in conflicting lines of authority in that Court. Compare *Lansing General Hospital v Gomez,* 114 Mich App 814; 319 NW2d 683 (1982), and *Joiner v Michigan Mutual Ins Co,* 137 Mich App 464; 357 NW2d 875 (1984) (following *Richards*) with *Aldrich v Auto-Owners Ins Co,* 106 Mich App 83; 307 NW2d 736 (1981), *Allstate Ins Co v Frankenmuth Mutual Ins Co,* 111 Mich App 617; 314 NW2d 711 (1981), *English v Home Ins Co,* 112 Mich App 468; 316 NW2d 463 (1982), and *Kransz v Meredith, supra.*

In *Welton v Carriers Ins Co, supra,* this Court considered a case in which the plaintiff was injured in a work-related motor vehicle accident in which the defendant insurance company was both the no-fault and the workers' compensation carrier. The plaintiff urged this Court to adopt the *Richards* analysis tolling the § 3145 one-year-back rule. We declined to reach the *Richards* question, however, because of our holding that the plaintiff's notice to the defendant insurance company of his workers' compensation claim was not sufficient to

trigger tolling of his no-fault claim, even assuming the validity of the *Richards* tolling principle. The *Welton* opinion stated that, if such tolling were adopted, it would begin only when a claim for specific benefits was submitted to the insurer. In a footnote, the Court recognized that *Tom Thomas* and *Ford* permitted tolling as of the date of notice. The Court reasoned that "the peculiar nature of the statutory no-fault limitation provision" justified a more strictly tailored rule.

> First, the fire insurance limitation provision operates as an absolute bar to suits not brought within one year of discovery (or inception) of the loss. Absent a tolling rule, the fact that either an insured has promptly notified the insurer of the loss or the insurer has already partially paid the claim would have no effect on that bar. With no-fault, the statute has a built-in "tolling" permitting later suit once notice is given or partial payment been made. Thus, the consequences of the one-year cutoff, and the corresponding need for relief by tolling as of the date notice is given, is more drastic in the case of fire insurance actions than with no-fault.
>
> Second, the specified procedure for claim and recovery of fire insurance benefits includes greater built-in delays, shortening the insured's already limited time to sue, than does the no-fault law. Following a covered fire loss, the insured generally has 60 to 90 days to file proof of loss, after which the insurer has 60 days to pay or settle the claim. Additional delays may arise when the insurer does not promptly submit proof of loss forms or promptly "accept" the proof of loss once submitted. See *Tom Thomas,* 396 Mich 592-593. The no-fault law simply provides that payment of a claim is overdue if not paid within 30 days after proof of loss is received by the insurer. MCL 500.3142(2); MSA 24.13142(2). Accordingly, the one-year period in which a fire insurance plaintiff may sue is more substantially curtailed by the recovery mechanism

than is the no-fault limitation period, further warranting an earlier tolling date.

Finally, the fact that the Legislature has already provided a tolling provision for commencing a no-fault action, triggered by "notice of injury," suggests both that notice of injury was intended to have no greater effect and that there is less justification for this Court to interfere with the statutory scheme. [*Welton, supra,* 580, n 4.]

We now reach the question that the *Welton* Court reserved and conclude that the one-year-back rule of § 3145 is tolled from the date of a specific claim for benefits to the date of a formal denial of liability. We believe this result effectively preserves the Legislature's purpose. As Justice BOYLE stated in *Welton:*

> Tolling the statute when the insured submits a claim for specific benefits would not appear to detract from the policies underlying the one-year limitation on recovery. By submitting a timely and specific claim, the insured serves the interest in preventing stale claims by allowing the insurer to assess its liability while the information supporting the claim is relatively fresh. A prompt denial of the claim would barely affect the running of the limitation period, while a lengthy investigation would simply "freeze" the situation until the claim is eventually denied. In effect, the insured would be charged with the time spent reducing his losses to a claim for specific benefits plus the time spent deciding whether to sue after the claim is denied. [*Id.,* 578-579.]

Most persons are confident that, in the event of a loss, their insurer will pay their claim without the necessity for litigation. It is only when an insurer denies liability that it is unequivocally impressed upon the insured that the extraordinary step of pursuing relief in court must be taken. A

contrary result today would require the prudent claimant to file suit as a precautionary measure when the one-year deadline approached, regardless of the status of the claim. In addition to requiring a level of sophistication many claimants may not possess, such an approach would encourage needless litigation. One of the important reasons behind the enactment of the no-fault system was the reduction of automobile accident litigation. *Cassidy v McGovern,* 415 Mich 483, 501; 330 NW2d 22 (1982).

In addition to the above-cited Michigan insurance cases, there is precedent in the case law for the principle of judicial tolling. In *American Pipe & Construction Co v Utah,* 414 US 538, 559; 94 S Ct 756; 38 L Ed 2d 713 (1974), the United States Supreme Court stated:

> These cases fully support the conclusion that the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.

See also *Steele v Bliss,* 166 Mich 593; 132 NW 345 (1911). Although the facts in these cases are dissimilar to those of the instant case, they do stand for the proposition that limitation statutes are not entirely inflexible, allowing judicial tolling under certain compelling circumstances.

To the rule enunciated in *Richards,* we add the caveat that the insured must seek reimbursement with reasonable diligence or lose the right to claim the benefit of a tolling of the limitations period. Such a condition should alleviate the defendant's

fear that adoption of the tolling principle will result in "open-ended" liability in cases in which the claimant, having made a specific claim for benefits, thereafter refuses to respond to the carrier's legitimate requests for more information needed to process the claim.

IV. OTHER ISSUES *LEWIS*

Defendant in *Lewis* raises two other issues for our consideration. DAIIE argues that the jury's verdict must be overturned because of plaintiff's failure to file a witness list as required by Wayne Circuit Court Rule 301.3(d). On the first day of trial, the court denied defendant's motion to bar the plaintiff from presenting testimony because of the failure to comply with this rule. The witnesses called by plaintiff were all listed on defendant's witness list. Defendant does not claim to have been surprised or prejudiced by plaintiff's admitted neglect, and we can perceive no error in the trial court's decision to allow the plaintiff to proceed.

Finally, the defendant argues that the jury should have reduced its award because $23,460.70 of plaintiff's debt was discharged by a Medicaid payment of $18,940. We first note that the figure of $18,940 was not presented to the jury. Walter Stacey, director of reimbursement for the Mount Carmel Mercy Hospital, testified that although $23,460.70 of Mr. Lewis' bill was discharged through the Medicaid program, Medicaid did not pay individual accounts, but reimbursed the hospital for a certain percentage of allowable expenses. Mr. Stacey estimated that where $23,000 was recognized as a Medicaid-covered expense, the hospital would actually receive "roughly $18,900" from

the Department of Social Services.[5] He also stated that if the hospital were presented with payment of plaintiff's entire obligation of $26,753.20, it would reimburse Medicaid and keep the rest. If, as defendant claims, the jury's award of the entire amount of plaintiff's bill[6] resulted in a windfall for the plaintiff, it was not clearly established at trial. We therefore find that the jury's award was supported by the testimony presented.

CONCLUSION

In *Lewis,* the record shows that the plaintiff pursued his claim with reasonable diligence. We therefore affirm the decision of the Court of Appeals. In *Dionne,* we reverse the decision of the Court of Appeals and remand the case to the Wayne Circuit Court for reconsideration of defendant's motion for accelerated judgment under the standard announced in this case.

LEVIN, CAVANAGH, BOYLE, and ARCHER, JJ., concurred with WILLIAMS, C.J.

BRICKLEY, J. (*dissenting*). Because the plain and unambiguous language of MCL 500.3145(1); MSA 24.13145(1) is contrary to the conclusion of the majority, I respectfully dissent. Although the majority may further one of the broad purposes of the no-fault act—avoiding litigation—this judicial amendment of a clear legislative directive will have a pernicious long-term effect. Unless statu-

[5] Defendant's brief in this Court states, "The exact amount paid by Medicaid is $18,940, as shown by the attached letter of Bernard Rosner, dated September 1, 1982." Defendant does not further identify Mr. Rosner, and no such letter is attached. In any event, a party may not enlarge the record on appeal. *Dora v Lesinski,* 351 Mich 579; 88 NW2d 592 (1958).

[6] The jury actually awarded plaintiff $27,120.70, some $367.50 over the amount of the hospital bill. Defendant does not contest this discrepancy.

tory language is ambiguous or a constitutional mandate compels revision, the well-settled principle of this Court is that "the explicit declaration of the legislature is the law, and the courts must not depart from it." *Becker v Detroit Savings Bank*, 269 Mich 432, 436; 257 NW 853 (1934).

MCL 500.3145; MSA 24.13145 provides:

> (1) An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. *However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.* The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.
>
> (2) An action for recovery of property protection insurance benefits shall not commence later than 1 year after the accident.

Section 3145 is clear in its directive that a claimant cannot recover benefits for losses incurred more than one year prior to the commencement of the suit; not one year plus the period of time between making the claim and the denial of the claim as the majority holds.

The majority amends this statutory directive by use of a three-part response. First, by employing precedent which favors a "practical" reading of the tolling principles; second, basing its decision on perceived paramount purposes of the act rather than the one section in question; and, third, by providing a reasonable-diligence requirement for pursuing reimbursement. However, neither precedent nor the internal provisions of the act can fully support such reasoning.

The majority has explicitly acknowledged that not all panels of the Court of Appeals have accepted the approach advanced in *Richards v American Fellowship Mutual Ins Co,* 84 Mich App 629; 270 NW2d 670 (1978), lv den 406 Mich 862 (1979). Indeed, other panels have recognized the proper judicial role:

> Under *Richards,* therefore, the permissible period of recovery runs, apparently, from one year prior to the commencement of the action only if there is no hiatus between the giving of notice of loss by the insured and the denial of liability by the insurance company. This seems to us contrary to the plain language of the statute and results in impermissible judicial legislation. We believe the statutory language is unambiguous and see no need for departing from the literal interpretation. [*Aldrich v Auto-Owners Ins Co,* 106 Mich App 83, 86; 307 NW2d 736 (1981).]
>
> The Court-imposed tolling period in *Richards* finds no support in the statute. Section 3145(1) is clear and unambiguous and is not subject to interpretation by the Court. We are in agreement with the more recent decisions from panels of this Court which have rejected the *Richards* analysis in favor of a literal reading of § 3145(1). [*Kransz v Meredith,* 123 Mich App 454, 458-459; 332 NW2d 571 (1983).]

See also *English v Home Ins Co,* 112 Mich App

468; 316 NW2d 463 (1982); *Allstate Ins Co v Frankenmuth Mutual Ins Co,* 111 Mich App 617; 314 NW2d 711 (1981). And, even if this Court's recent decision in *Welton v Carriers Ins Co,* 421 Mich 571; 365 NW2d 170 (1984), does in fact imply favoring the *Richards* approach, as the majority suggests, its foundation upon purposes of the act may not supplant explicit legislation, no matter how "progressive" the result may appear.

I think *Welton* casts doubt on the *Richards* approach of reading a tolling provision into the one-year-back rule. As the majority points out, in *Welton* we distinguished our decisions in *The Tom Thomas Organization, Inc v Reliance Ins Co,* 396 Mich 588; 242 NW2d 396 (1976), and *In re Certified Question: Ford Motor Co v Lumbermens Mutual Casualty Co,* 413 Mich 22; 319 NW2d 320 (1982), where we construed a statutory fire insurance policy to include a tolling provision for the period between the filing and rejection of a claim. *Ante,* pp 98-99.

The second attack on the statute is based on policy and consumer expectations. The majority observes that most people expect that insurance companies will pay their claims without having to begin litigation, and that it is only when a claim is formally denied that litigation will be necessary. The majority thus concludes that to follow the statute as written would require a claimant to file a suit as a "precautionary measure" when the one-year deadline approached. Although the majority approach may further the general policy of reducing litigation, the statute is not necessarily inconsistent with other purposes and provisions of the act. For example, §§ 3142 and 3148 impose sanctions upon an insurer for late payments. Thus, § 3145 may be viewed as a complementary provision which "sanctions" an insured who is not

diligent in pursuing a claim. See also *Pendergast v American Fidelity Fire Ins Co,* 118 Mich App 838; 325 NW2d 602 (1982); *Davis v Farmers Ins Group,* 86 Mich App 45; 272 NW2d 334 (1978). This Court was not privy to all of the arguments and purposes presented to the Legislature when it drafted these specific tolling requirements. When statutory language is as clear as it is here, it is outside our province to second-guess the Legislature as to which policy is paramount in regard to § 3145.

The third response by the majority to § 3145 is to add a requirement that a claimant must pursue reimbursement with "reasonable diligence." That is, a claimant cannot simply keep the claim open by not responding to requests for information necessary to resolve the claim. The necessity for this addition demonstrates the fact that this Court has engaged in judicial legislation.

The majority does not suggest that § 3145 contains any ambiguity or that the Legislature was not in full command of what it intended to do. To the contrary, the Legislature was cognizant of a need for some tolling. Again, as we said in *Welton, supra,* and as pointed out by the majority:

> [T]he fact that the Legislature has already provided a tolling provision for commencing a no-fault action, triggered by "notice of injury," suggests both that notice of injury was intended to have no greater effect and that there is less justification for this Court to interfere with the statutory scheme. [*Welton, supra,* 580, n 4.]

Absent ambiguous language or constitutional infirmity, the judiciary should not substitute policy for explicit directives of the Legislature, especially when, as here, the language is clear and not necessarily inconsistent with other purposes and sections of the act.

RILEY, J., concurred with BRICKLEY, J.

COMMERCIAL UNION INSURANCE COMPANY v MEDICAL PROTECTIVE COMPANY

Docket No. 74912. Argued January 15, 1986 (Calendar No. 16). Decided September 17, 1986.

Commercial Union Insurance Company, an excess insurer, brought an action in the Wayne Circuit Court against Medical Protective Company, a primary insurer, alleging negligence and bad faith in failing to defend or settle a medical malpractice claim against a common insured, and seeking to recover monies paid on behalf of the insured. The court, Theodore R. Bohn, J., granted summary judgment for the defendant, holding that the plaintiff had no direct cause of action against the defendant because the defendant's duty to act in good faith ran to the insured and not to the plaintiff, and that the plaintiff was estopped from maintaining its claim as the subrogee of its insured because of its participation in the settlement of the claim. The Court of Appeals, BRONSON, P.J., and SHEPHERD and SWALLOW, JJ., reversed, holding that the defendant had a duty to act in good faith toward the plaintiff and the plaintiff could claim breach of the duty directly or as equitable subrogee of the insured, and that summary judgment was improper because factual questions had been raised (Docket No. 66538). The defendant appeals.

In opinions by Chief Justice WILLIAMS, joined by Justices CAVANAGH and ARCHER, and by Justice BOYLE, joined by Justices LEVIN, BRICKLEY, and RILEY, the Supreme Court *held:*

In this case, the primary carrier did not owe a direct duty to the excess carrier to act in good faith to defend or settle the claim against the common insured. The excess insurer's cause

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REFERENCES

Am Jur 2d, Insurance §§ 1789, 1791-1793, 1794 *et seq.*

Liability insurance: excess carrier's right of action against primary carrier for improper or inadequate defense of claim. 49 ALR4th 304.

Reinsurer's liability for primary liability insurer's failure to compromise or settle. 42 ALR4th 1130.

Excess carrier's right to maintain action against primary liability insurer for wrongful failure to settle claim against insured. 10 ALR4th 879.

of action against the primary insurer is as equitable subrogee of the insured.

Chief Justice WILLIAMS, joined by Justices CAVANAGH and ARCHER, would hold that an excess insurer may sue a primary insurer as the equitable subrogee of an insured for the primary insurer's bad-faith failure to defend or settle a claim within policy limits.

1. An insurer is liable to its insured for a judgment exceeding policy limits when the insurer, who has exclusive control of defending and settling a claim, refuses in bad faith to defend the claim or to settle it within policy limits. The cause of action originates in the implied covenant of good faith and fair dealing which arises from the contract between the insurer and the insured. While no such contract exists between a primary and excess insurer, a majority of courts have recognized a cause of action by an excess insurer against a primary insurer for bad-faith failure to settle or defend a claim against a common insured on the basis of equitable subrogation.

2. Where an insured does not carry excess insurance, the insured can become liable for any judgment exceeding primary coverage limits and, thus, has every incentive to enforce a primary insurer's contractual duty to defend or attempt to settle a claim in good faith within policy limits. Where an insured carries excess liability insurance, however, the incentive dissolves because the excess carrier and not the insured would bear the injury resulting from a primary insurer's breach. Therefore, an excess insurer, as equitable subrogee of the insured, may maintain a cause of action against a primary insurer for the primary insurer's bad-faith failure to defend or settle a claim within policy limits.

3. In this case, the primary carrier did not owe a direct duty to the excess carrier to act in good faith to defend and settle a claim within the policy limits of the primary carrier. If the excess carrier is to proceed against the primary carrier, it must do so as the subrogee of the insured.

4. The trial court improperly granted the defendant's motion for summary judgment because the plaintiff's complaint sufficiently alleged a claim upon which relief could be granted. As the equitable subrogee of the insured, the plaintiff can claim damages for injuries resulting from the defendant's alleged failure to defend and settle in good faith or with due care; material issues of fact exist as to whether the defendant acted in good faith, whether the defendant reasonably relied on the plaintiff's participation in the final settlement, and whether the insured failed to coöperate.

Justice BOYLE, joined by Justices LEVIN, BRICKLEY, and RILEY,

agreed that in this case the excess insurer's cause of action against the primary insurer is as equitable subrogee of the insured, that there is no direct duty between the primary and excess insurers, and that summary disposition was improper, but wrote separately to note that no convincing legal precedent or reasoning and no policy considerations were here presented which would lead to a determination that traditional tort doctrine should be expanded to recognize such a direct duty.

Affirmed in part, reversed in part, and remanded.

136 Mich App 412; 346 NW2d 648 (1984) affirmed in part and reversed in part.

1. INSURANCE — SUBROGATION — EXCESS INSURERS — PRIMARY INSURERS.

A primary insurer did not owe a direct duty to an excess insurer to act in good faith to defend or settle a claim against a common insured; the excess insurer's cause of action against the primary insurer for loss as a result of the primary insurer's failure to so act was as equitable subrogee of the insured.

2. INSURANCE — SUBROGATION — EXCESS INSURERS — PRIMARY INSURERS.

An excess insurer may sue a primary insurer as the equitable subrogee of an insured for the primary insurer's bad-faith failure to defend or settle a claim within policy limits.

3. INSURANCE — FAILURE TO SETTLE — BAD FAITH.

An insurer is liable to its insured for a judgment which exceeds policy limits where the insurer, in bad faith, refuses to settle a claim within policy limits.

MacArthur, Cheatham, Acker & Smith, P.C. (by *Brian J. Doren* and *James G. Gross*), for the plaintiff.

Moll, Desenberg, Bayer & Behrendt (by *Jon P. Desenberg* and *David J. Franks*) for the defendant.

WILLIAMS, C.J. The issue in this case is whether an excess insurer has a cause of action against a primary insurer for the latter's failure to defend or settle a liability claim in good faith. Courts have recognized such a cause of action under at least two theories: 1) the primary insurer owes a

duty to act in good faith toward its insured, and the excess insurer is equitably subrogated to the position of the insured, and 2) the primary insurer owes a duty to act with due care and in good faith directly toward the excess insurer. We join many other jurisdictions by adopting the first theory and holding that an excess insurer may sue a primary insurer as the equitable subrogee of the insured. We would decline to hold at this time that a primary insurer owes a tort duty to act in good faith and with due care directly to the excess insurer.

I. FACTS

In 1974, Elaine Smith and her husband sued Merle Berman, M.D., and Cottage Hospital for damages which allegedly resulted from Dr. Berman's negligent administration of spinal anesthetic. Mrs. Smith alleged that Dr. Berman's negligence caused a right foot drop, constant right leg pain, psychiatric problems, and a neurogenic bladder requiring regular self-catheterization.

The Medical Protective Company (MP) insured Dr. Berman with primary professional liability insurance up to $200,000, and the Commercial Union Insurance Company (CU) insured him with excess professional liability insurance up to $1,000,000. Under the terms of the primary policy, MP controlled Dr. Berman's defense in the malpractice action. MP hired attorney Lee Wulfmeier to represent Dr. Berman.

In September, 1975, the Smiths sent interrogatories to Wulfmeier, who forwarded them to Berman. Berman apparently refused to answer after Wulfmeier urged him twice by letter to respond. Berman's failure to comply with a court order compelling answers to the interrogatories resulted

in a default judgment being entered against him on May 25, 1978.

Soon thereafter, Wulfmeier informed MP that the default judgment had entered and that Berman had retained private counsel, who had supplied Wulfmeier with answers to the interrogatories. The remainder of the letter states:

> I have spoken with [the Smiths' attorney] who has indicated he would not set aside the default, voluntarily, but would not necessarily oppose it if indeed we tried to set it aside. We are in that *tender position* of *having the matter defaulted although our defense to same is lack of cooperation* and therefore *I believe we would not have to forward monies to the stp* [sic] *if indeed they went forward with collection.* This is again a complicated situation and one that nessitates [sic] your thinking and attention, almost immediately. I would be more than happy to discuss this matter with you and also have a conference call with Dr. Berman's personal attorney if you deem that necessary. [Emphasis added.]

Another letter from Wulfmeier to MP, dated July 12, 1978, enclosed a draft "reservation of rights" letter to be forwarded to Berman. This letter indicated MP's intent to refuse to pay damages on any award entered in the case because of Berman's failure to coöperate in the defense. The draft letter also notified Berman that he must have his own counsel seek to set aside the default judgment. In a third letter to MP, sent one week before the parties were to go to trial on the question of damages, Wulfmeier assessed the case as follows:

> I believe *this is a very bad case, and presents us with very little defense* in light of Dr. Gibbs' testimony. He is absolutely convinced that this

injection was given into the conus and that is the reason for all of the problems that this lady has, which obviously are well-documented in the records. The hospital has indicated that they would pay $25,000.00 of a total $200,000.00 settlement, and *unfortunately we did not jump on this some time ago when we could probably have paid only $100,000.00.* I would appreciate your thoughts as to *whether or not you wish to spend $175,000.00 to resolve this potentially horrendous case.* [Emphasis added.]

Two other important events occurred in the late months of 1978, just prior to the trial date in January, 1979. In October, 1978, Berman died. On December 21, 1978, CU wrote to MP protesting MP's failure to attempt to have the default judgment set aside. CU apparently suspected MP of deliberately allowing the default judgment to stand in order to avoid paying any judgment on the grounds of noncoöperation. In its letter to MP, CU stated:

With Dr. Berman in default, in my opinion the trial of the case will be limited to the issue of damages. In my further opinion it is very likely that damages will greatly exceed the sum of $200,000, your policy limit.

It is the position of [CU] that if this case proceeds to trial on the issue of damages and if those damages are in a sum in excess of $200,000 and if [CU] is called upon to pay any sum in excess of $200,000, that it will look to the Medical Protective Company and its agents for the recovery of such sums. It is [CU's] opinion that your actions in this case have clearly prejudiced it.

On the first day of trial, Wulfmeier unsuccessfully attempted to have the default judgment set aside. Settlement negotiations ensued between MP, CU, and Wulfmeier. The attorney representing CU stated that

> it is the position of the . . . excess carrier that Medical Protective, by not offering its primary limits, is engaging in negotiations in bad faith, at least as far as we are concerned, and the circumstances of this litigation should be tendering its limits of Two Hundred Thousand Dollars toward any potential settlement. . . . It is the position of the excess carrier this case has a value of at least Two Hundred Thousand Dollars, no less than Two Hundred Thousand Dollars and under those circumstances, the limits of Medical Protective ought to be tendered to the excess carrier.

The attorney representing the Smiths stated that "[t]he plaintiffs never have been offered a nickel in this case."

The parties eventually entered into a settlement for $350,000. MP contributed $190,000, and Dr. Berman's estate contributed $10,000, toward MP's policy limit of $200,000. Cottage Hospital contributed $25,000, and CU contributed the remaining $125,000. The malpractice action was dismissed with prejudice on May 24, 1979.

CU filed the present action in March, 1980, alleging that "notwithstanding its duties and obligations . . . [MP] was guilty of negligence and bad faith . . . ."[1] The trial court granted MP's motion for summary judgment on two grounds: 1)

[1] Paragraph 8 of CU's complaint stated in full:

> 8. That notwithstanding its duties and obligations as aforesaid, the defendant, by its agents, employees, attorneys and representatives, was guilty of negligence and bad faith in the following particulars:
>
> A. In permitting its insured Berman to go into default;
>
> B. In failing to take any steps to set aside its insured's default until shortly before trial, at which time such attempt was unsuccessful;
>
> C. In selecting counsel for its insured Berman and in instructing and allowing counsel to act contrary to the best interests of its insured;
>
> D. In misrepresenting the extent of its coverage to Smiths' counsel;

CU had no direct cause of action against MP, and 2) CU was estopped from maintaining its claim as the subrogee of its insured because of its participation in the settlement of the claim.

The Court of Appeals reversed, holding that 1) MP had a duty to act in good faith toward CU, and CU could claim breach of this duty directly or as the equitable subrogee of the insured; and 2) summary judgment was improperly granted, because factual questions were raised regarding whether MP had acted in good faith, whether Berman's action amounted to noncoöperation, and whether MP reasonably relied on CU's participation in the settlement. *Commercial Union Ins Co v Medical Protective Co,* 136 Mich App 412; 356 NW2d 648 (1984). In an order entered June 26, 1985, we granted leave to appeal. 422 Mich 939.

II. EQUITABLE SUBROGATION

This Court held long ago that an insurer is liable to its insured for a judgment exceeding policy limits when the insurer, who has exclusive control of defending and settling the suit, refuses to settle within policy limits in "bad faith." *City of Wakefield v Globe Indemnity Co,* 246 Mich 645, 648; 225 NW 643 (1929). This cause of action originates in the implied covenant of good faith and fair dealing which arises from the contract between the insurer and the insured. *Id.,* 650. Because no contract exists between a primary

E. In failing to reveal the extent of its coverage to Smiths' counsel;

F. In failing to settle or attempt to settle the *Smith v Berman* case within its policy limits;

G. In failing to timely attempt settlement within its policy limits;

H. In failing to tender its policy limits.

insurer and an excess insurer, courts have struggled to determine whether any sound theoretical basis exists for recognizing an excess insurer's cause of action against a primary insurer for failing to defend or settling in bad faith. A majority of courts recognize such a cause of action on the basis of equitable subrogation.

Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other. It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a "mere volunteer." *Smith v Sprague,* 244 Mich 577, 579-580; 222 NW 207 (1928); *Foremost Life Ins Co v Waters,* 88 Mich App 599, 603; 278 NW2d 688 (1979), rev'd on other grounds 415 Mich 303; 329 NW2d 688 (1982).

Where an insured does not carry excess insurance, the insured can become liable for any judgment exceeding primary coverage limits. Sutterfield, *Relationships between excess and primary insurors* [sic]: *The excess judgment problem,* 52 Ins Counsel J 638, 639 (1985). In such a situation, the insured has every incentive to enforce the primary insurer's contractual duty to defend or to attempt to settle within policy limits in good faith. Where, however, an insured carries excess coverage, that incentive dissolves. The excess carrier, and not the insured, bears the injury resulting from the primary insurer's breach, and is therefore the party with the greatest incentive to enforce the primary insurer's duties.

Numerous courts allow an excess insurer to maintain an action against a primary insurer for bad-faith failure to defend or settle within the latter's policy limits on the basis of the theory of

equitable subrogation. Sutterfield, *supra.* The theoretical basis for this action was succinctly stated by the Supreme Court of California:

> Since the insured would have been able to recover from the primary carrier for a judgment in excess of policy limits caused by the carrier's wrongful refusal to settle, the excess carrier, who discharged the insured's liability as a result of this tort, stands in the shoes of the insured and should be permitted to assert all claims against the primary carrier which the insured himself could have asserted. [*Commercial Union Assurance Cos v Safeway Stores,* 26 Cal 3d 912, 917-918; 164 Cal Rptr 709; 610 P2d 1038 (1980).]

Accord *Continental Casualty Co v Reserve Ins Co,* 307 Minn 5, 7-9; 238 NW2d 862 (1976); *North River Ins Co v St Paul Fire & Marine Ins Co,* 600 F2d 721, 723, n 3 (CA 8, 1979) (applying South Dakota law); *Ranger Ins Co v Travelers Indemnity Co,* 389 So 2d 272, 274-276 (Fla App, 1980); *Centennial Ins Co v Liberty Mutual Ins Co,* 62 Ohio St 2d 221, 223-224; 404 NE2d 759 (1980); *Portland General Electric Co v Pacific Indemnity Co,* 579 F2d 514, 515-516, n 2 (CA 9, 1978) (applying Oregon law); *Vencill v Continental Casualty Co,* 433 F Supp 1371, 1376 (SD W Va, 1977) (applying West Virginia law).[2]

Proponents of the equitable subrogation theory point out that allowing an excess insurer a cause of action does not increase the scope of the primary insurer's duty; nor does it increase the amount of liability, beyond that which the primary

[2] See also cases discussed in Smith, *The implied covenant of good faith and fair dealing as affecting equitable subrogation,* 1980 Ins Law J 378, Wall, *Bad faith, excess liability actions by or against excess insurers,* 48 Ins Counsel J 311 (1981), Sutterfield, *supra,* and Anno: *Excess carrier's right to maintain action against primary liability insurer for wrongful failure to settle claim against insured,* 10 ALR4th 879.

insurer owes its insured.[3] In addition, allowing the excess insurer to enforce the primary insurer's duty to settle in good faith serves the public and judicial interests in fair and reasonable settlement of lawsuits by discouraging primary carriers from "gambling" with the excess carrier's money when potential judgments approach the primary insurer's policy limits. Sutterfield, *supra,* 638, 642. Finally, the public interest in avoiding unnecessarily high insurance premiums is served by recognizing such a cause of action because, where the excess insurer is required to cover both primary and excess liability as a result of the primary insurer's breach of the duty to settle in good faith, policy rating structures are distorted, rendered uncertain, and made more expensive. *Valentine v Aetna Ins Co,* 564 F2d 292, 298 (CA 9, 1977) (applying California law, and approving suit by excess insurers against primary insurers under the doctrine of equitable subrogation). Sutterfield, *supra,* 640.

For all these reasons, we would hold that an excess insurer may maintain a cause of action against a primary insurer for the latter's bad-faith failure to defend or settle within policy limits. The excess insurer is equitably subrogated to the position of the insured and acquires no lesser or greater rights than those held by the insured.

III. DIRECT DUTY OWED BY PRIMARY INSURER TO EXCESS INSURER

Courts have held that a primary insurer owes a good-faith duty to defend and attempt to settle a claim within policy limits directly to an excess insurer, in spite of the fact that no contractual relationship between the two carriers exists. The

[3] See, e.g., *Peter v Travelers Ins Co,* 375 F Supp 1347, 1350 (CD Cal, 1974), and Sutterfield, *supra,* 640.

California courts' analyses of this problem is instructive, as they have considered the existence of duties outside those imposed by a contractual relationship. See Smith, *supra.*

When the insured and the primary insurer conspired to fraudulently assign dates of loss to policy years other than those in which the losses actually occurred, the Second District of the California Court of Appeals held that the excess insurer had a direct cause of action against *both* the insured and the primary insurer for breach of the duty of good faith and fair dealing. *Kaiser Foundation Hospitals v North Star Reinsurance Corp,* 90 Cal App 3d 786, 792; 153 Cal Rptr 678 (1979). The court held that the covenant of good faith and fair dealing was not a "one-way street but requires that 'neither party'—not the insured, nor the insurer—'will do anything to injure the right of the other to receive the benefits of the agreement . . . .' " *Id.* (citations omitted).

In the same year, the Third District of the Court of Appeals held that a primary insurer owes a duty directly to an excess insurer to defend and settle a liability claim in good faith. *Transit Casualty Co v Spink Corp,* 94 Cal App 3d 124; 156 Cal Rptr 360 (1979). In *Spink,* the insured had refused to settle under any circumstances, and the excess insurer was required to pay $175,000 to satisfy a jury verdict. The excess insurer also contributed $285,000 to settle other death and injury claims resulting from the insured's negligence, and it claimed that the failure to settle in the first case had ultimately increased the settlement outlay on the later claims.

Because the insured had contributed to the primary insurer's failure to settle, the excess insurer gained nothing from stepping into the shoes of the insured under the doctrine of equitable subroga-

tion. The court found that equitable subrogation failed to "achieve evenhanded justice," and that "[t]riangular reciprocity" of obligations was the more rational rule of liability. *Id.,* 132-133. The court reasoned that a theory of liability resting on reciprocal duties of reasonable care owed by each of the three parties to each other would promote the sharing of the loss according to the measure of each party's comparative fault. *Id.,* 135-136. The court contrasted this result with that achieved through equitable subrogation, which it characterized as "all-or-nothing" "litigation success or defeat according to the measure of conduct [by the primary insurer or the insured] over which the [excess insurer had no] control." *Id.,* 134. Thus, a significant reason for *Spink*'s adoption of "triangular reciprocity" was the perception that an excess carrier might otherwise be unjustly denied recovery against a primary carrier when the insured had contributed to the bad-faith failure to settle.

The First District of the California Court of Appeals disagreed with *Spink*'s theory of triangular reciprocity. *Commercial Union Assurance Cos v Safeway Stores, Inc,* 158 Cal Rptr 97 (Cal App, 1979), aff'd 26 Cal 3d 912; 164 Cal Rptr 709; 610 P2d 1038 (1980). In *Safeway,* the appellate court held that an insured contemplating settlement had no duty to give the excess insurer's financial interests equal consideration with its own. The court reasoned that the bargained-for expectations of the parties, and the disparity in bargaining power between the insured and its excess insurer, made it unnecessary to impose additional duties on the insured to protect the insurer from injustice. *Id.,* 158 Cal Rptr 101-102. However, *Safeway* is distinguishable from the situation in *Spink* and the case at bar. In *Safeway,* there was no primary carrier because the insured was self-insured up to a cer-

tain limit. Therefore the conflict arose between the insured and its excess insurer (parties in privity), rather than between the primary insurer and the excess insurer. In addition, when the California Supreme Court affirmed the decision in *Safeway,* it adopted the opinion of the Court of Appeals, but deleted that portion of the Court of Appeals opinion which criticized *Spink*'s recognition of triangular reciprocity. *Commercial Union Assurance Cos v Safeway Stores, supra,* 26 Cal 3d 915, 920-921. From this we conclude that the California Supreme Court has not ruled upon the *Spink* doctrine of "triangular reciprocity."

CU's primary argument in favor of recognizing a direct duty of good faith running from the primary to the excess insurer is very similar to the *Spink* theory: CU believes that, absent such a duty, the excess insurer will be at the mercy of the conduct of its insured. It is true that the insured's breach of obligations owed to the primary insurer can defeat the subrogation claim of its excess insurer. However, the insured and the excess insurer share an ongoing contractual relationship as parties to their own contract. The excess insurer can bargain for any obligation it seeks to impose upon its insured. If the insured breaches a duty owed to the excess insurer, the excess insurer can refuse coverage or pursue an action against its own insured. In this way, legitimate expectations of all three parties, the insured, the primary insurer, and the excess insurer, can be traced to bargained-for agreements. Such an arrangement promotes certainty in the setting of rate structures, which in turn keeps insurance costs down and encourages policyholders to carry excess insurance, to the

benefit of the insured and third-party judgment creditors alike.[4]

Two other jurisdictions have addressed the direct duty theory, but without the depth or clarity of the California courts. In *Estate of Penn v Amalgamated General Agencies,* 148 NJ Super 419, 422-423; 372 A2d 1124 (1977), the New Jersey Superior Court apparently adopted the direct duty theory, although in doing so it relied on case authority recognizing the equitable subrogation theory. The New York Court of Appeals did not explicitly discuss the direct duty theory in *Hartford Accident & Indemnity Co v Michigan Mutual Ins Co,* 61 NY2d 569, 574; 463 NE2d 608 (1984), but held somewhat ambiguously that the primary insurer owed the excess insurer "the same duty to act in good faith which [the primary insurer] owed to its own insureds . . . ." While supportive of the increased interest in a direct duty rule, these cases nonetheless add little to our analysis.

After an examination of the facts in the instant case, we conclude that it is not the most appropriate case on which to decide the application of the direct duty rule. CU is alleged to have participated in the settlement process because of its December 21, 1978, letter of protest to MP, its discussions with MP and Wulfmeier on the first day of trial, and its eventual payment of $125,000 of the $350,000 settlement. CU may argue for recognition of the direct duty theory, but it may be estopped from gaining the benefit. Thus, however appealing the theory of direct duty, this case does not present itself as the best vehicle for recognition of a

[4] See also Note, *Involuntary assignment of a cause of action for bad faith failure to settle within the policy limits,* 1984 S Ill U L J 365, 378.

direct duty cause of action in tort between a primary insurer and excess insurer.[5]

There is also the argument that the excess insurer had the ability to protect itself from the insured's bad-faith conduct through a noncoöperation clause.

For these reasons, we would hold that in this case the primary carrier does not owe a direct duty to the excess carrier to act in good faith to

[5] We decline to state that, under certain conditions, a direct duty of good faith and due care from a primary insurer toward an excess insurer is inappropriate. Whether a primary insurer owes a duty to act in good faith or with due care toward an excess insurer as well as the insured is analogous to the question whether a manufacturer owes a duty to act with due care toward an ultimate purchaser as well as a retailer of his product, or whether a professional who undertakes a service in a contract owes a duty to act with due care toward third parties who foreseeably will be affected as well as toward the person with whom the professional makes the contract. This Court has held that in the case of the manufacturer and the professional there is liability.

In these cases, a contract between two parties gives rise to contractual duties. Breach of a contractual duty causes injury to a third party, who is then allowed to bring a tort action. In *Spence v Three Rivers Builders & Masonry Supply, Inc,* 353 Mich 120; 90 NW2d 873 (1958), a manufacturer's breach of an implied warranty of merchantability in a contract of sale gave rise to a tort action in favor of an injured ultimate consumer of the product. In *Clark v Dalman,* 379 Mich 251; 150 NW2d 755 (1967), a repair contractor's breach of the contractual duty to notify an inspector of work completed, and his breach of the common-law duty to act reasonably so as not to endanger licensees or invitees, gave rise to a tort action in favor of an injured inspector. In *Crews v General Motors Corp,* 400 Mich 208; 253 NW2d 617 (1977), a manufacturer's breach of the duty to make reasonable repairs imposed in a sales contract gave rise to a tort action in favor of the purchaser's injured employee. In *Williams v Polgar,* 391 Mich 6; 215 NW2d 149 (1974), a title abstracter's breach of the duty to perform in a diligent and reasonably skillful manner implied in a contract for its services gave rise to a tort action for negligent misrepresentation in favor of the foreseeable users of the abstract of title, the land seller's grantees. While in all cases the existence of a contractual relationship created "the relation out of which [arose] the common-law duty to exercise ordinary care," *Clark, supra,* 261, in none of them was the lack of privity between plaintiff and defendant a bar to recovery. However, recovery was permitted only by those whose relationship to the action taken under the contract was reasonably foreseeable. In addition, the scope of the duty owed to the party not in privity was no greater than that already owed to the party in privity.

defend and settle a claim within the former's policy limits. If the excess carrier is to proceed against the primary carrier, it must do so as the subrogee of the insured. Accord *Bohemia, Inc v Home Ins Co,* 725 F2d 506, 512, n 6 (CA 9, 1984).

IV. PROPRIETY OF SUMMARY JUDGMENT

The trial court granted MP's motion for summary judgment pursuant to GCR 1963, 117.2(1), for failure to state a claim upon which relief can be granted. The trial court found that MP's good-faith duty to defend and settle ran only to Dr. Berman, its insured. The court also found that CU was estopped from claiming injury as a result of MP's action, because CU participated in the settlement negotiations and approved the settlement amount, thereby inducing MP to forego any further legal action such as appealing the trial court's refusal to set aside the default judgment, or proceeding to trial on the damages question.

The trial court improperly granted summary judgment. First, CU has stated a claim upon which relief can be granted: As the equitable subrogee of the insured, CU can claim damages for injuries resulting from MP's alleged failure to defend and settle in good faith or with due care. Second, for the reasons ably set forth in the Court of Appeals opinion, material issues of fact exist as to whether MP acted in good faith, whether MP reasonably relied on CU's participation in the final settlement, and whether the insured failed to coöperate. *Commercial Union Ins Co, supra,* 421-424. For these reasons, summary disposition was improper.

On the basis of our analysis, the judgment of the Court of Appeals should be affirmed except for its premature recognition, on the facts of this case, of a duty to act in good faith running directly from

the primary insurer to the excess insurer, and this case should be remanded to the circuit court for proceedings consistent with this opinion.

CAVANAGH and ARCHER, JJ., concurred with WILLIAMS, C.J.

BOYLE, J. I concur with the result and the reasoning behind Chief Justice WILLIAMS' findings that in this case the excess insurer's cause of action against the primary insurer is as equitable subrogee of the insured and that there is no direct duty between the primary and excess insurers. I write separately to state further that, contrary to the assertion in footnote 5 of Chief Justice WILLIAMS' opinion, I find no convincing legal precedent or reasoning and no policy considerations which would lead me to determine that such an expansion of traditional tort doctrine is appropriate in these circumstances. As the opinion astutely states:

> [T]he insured and the excess insurer share an ongoing contractual relationship as parties to their own contract. The excess insurer can bargain for any obligation it seeks to impose upon its insured.

I further agree that summary disposition was improper because "material issues of fact exist as to whether MP acted in good faith, whether MP reasonably relied on CU's participation in the final settlement, and whether the insured failed to coöperate."

LEVIN, BRICKLEY, and RILEY, JJ., concurred with BOYLE, J.

COMMERCIAL UNION INSURANCE COMPANY v LIBERTY MUTUAL INSURANCE COMPANY

Docket Nos. 75089, 75090. Argued January 15, 1986 (Calendar No. 15). Decided September 17, 1986.

Commercial Union Insurance Company, an excess insurance carrier, brought an equitable subrogation action in the Oakland Circuit Court against Liberty Mutual Insurance Company, a primary insurance liability carrier, alleging that Liberty's failure to settle a case against a mutual insured for an amount much less than Commercial was eventually required to pay constituted bad faith and caused Commercial to be exposed to risk. The court, Robert L. Templin, J., entered judgment on a jury verdict for the defendant and denied the plaintiff's motion for judgment notwithstanding the verdict or for a new trial. The Court of Appeals, M. J. KELLY, P.J., and HOOD and SHEPHERD, JJ., reversed and remanded for a new trial, holding that the trial court's instructions on bad faith were, in part, prejudicial and erroneous (Docket Nos. 67250, 68242). The defendant appeals and the plaintiff cross-appeals.

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

A trial court, in an action by an insured alleging bad faith by an insurer, should instruct the jury that bad faith is the arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty.

1. Good-faith denials, offers of compromise, or other honest

REFERENCES

Am Jur 2d, Insurance §§ 1399, 1400, 1403, 1674 *et seq.*, 2028 *et seq.*

What constitutes bad faith on part of insurer rendering it liable for statutory penalty imposed for bad faith in failure to pay, or delay in paying, insured's claim. 33 ALR4th 579.

Reliance on, or rejection of, advice of counsel as factor affecting liability in action against liability insurer for wrongful refusal to settle claim. 63 ALR3d 725.

Liability insurer's negligence or bad faith in conducting defense as ground of liability to insured. 34 ALR3d 533.

See also the annotations in the ALR3d/4th Quick Index under Insurance.

errors of judgment are not sufficient to establish bad faith. Nor can claims of bad faith be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment. However, bad faith can exist without actual dishonesty or fraud.

2. Supplemental factors which may be considered in determining whether liability for bad faith exists are as follows. Because the facts in each case will vary, the trial court has the option of determining which factors, if any, are to be included in jury instructions. The factors are not exclusive, and no single factor is decisive.

— Failure to keep the insured fully informed of all developments in a claim or suit that could reasonably affect the interests of the excess insurer.

— Failure to inform the insured of all settlement offers that do not fall within policy limits.

— Failure to solicit a settlement offer or initiate settlement negotiations when warranted by the circumstances.

— Failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury.

— Rejection of a reasonable offer of settlement within policy limits.

— Undue delay in accepting a reasonable offer to settle a potentially dangerous case within policy limits where the verdict potential is high.

— An attempt by the insurer to coerce or obtain an involuntary contribution from the insured in order to settle within policy limits.

— Failure to make a proper investigation of the claim prior to refusing an offer of settlement within policy limits.

— Disregarding advice or recommendations of an adjuster or attorney.

— Serious and recurrent negligence by the insurer.

— Refusal to settle a case within policy limits following an excessive verdict when the chances of reversal on appeal are slight or doubtful.

— Failure to take an appeal following a verdict in excess of policy limits where there are reasonable grounds for such an appeal, especially where recommended by trial counsel.

In applying the factors, the conduct under scrutiny must be considered in light of the circumstances existing at the time of the conduct. Bad faith arises upon the occurrence of certain

acts, not at a later date as a result of an unsuccessful day in court.

3. In this case, the trial court's instruction that bad faith is to be equated with duplicity or deceitful conduct or concealment was error which increased the plaintiff's burden of proof, requiring reversal and a new trial.

Justice LEVIN, concurring, stated that the terms arbitrary, reckless, and indifferent have varying meanings depending on context. To instruct a jury in the abstract that arbitrary or indifferent conduct would tend to show bad faith, without reference or regard to particular circumstances, could readily cause jury misunderstanding and lead to erroneous results. Intentional disregard of the interests of a person owed a duty does not always equate with bad faith. An insurer may properly put its interests ahead of the interests of the insured, and thus intentionally disregard the interests of the insured, so long as it does not act in bad faith.

A list of supplemental factors to be considered in determining whether there is liability for bad faith, which were developed in cases in which the Supreme Court has not examined or ruled upon the record and for which there has not been adversary briefing should not be offered for inclusion in jury instructions. If the jury is to be instructed upon specific factors, the trial court should add that merely because there is evidence tending to show the presence of a factor does not necessarily mean that there was bad faith. Further, if a jury is instructed on factors that tend to show bad faith, it should also be instructed on factors that tend to countervail such a finding, and the trial court should be required to incorporate into the instruction the concept expressed in the opinion of the Court that it is inappropriate in reviewing the conduct of the insurer to utilize twenty-twenty hindsight, that the conduct under scrutiny must be considered in light of the circumstances existing at the time, that if bad faith exists in a given situation it arose upon the occurrence of the acts in question, and that bad faith may not arise at some later date as a result of an unsuccessful day in court.

Affirmed.

137 Mich App 381; 357 NW2d 861 (1984) affirmed.

OPINION OF THE COURT

1. INSURANCE — JURY INSTRUCTIONS — BAD FAITH.

A trial court, in an action by an insured alleging bad faith by an insurer, should instruct the jury that bad faith is the arbitrary,

reckless, indifferent, or intentional disregard of the interests of the person owed a duty.

2. INSURANCE — SETTLEMENT OF CLAIMS — BAD FAITH — FRAUD.

Good-faith denials, offers of compromise, or other honest errors of judgment by an insurer made in attempts to settle a claim are not sufficient to establish bad faith with respect to an insured; nor can claims of bad faith by the insurer be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment; however, bad faith can exist without actual dishonesty or fraud.

3. INSURANCE — SETTLEMENT OF CLAIMS — BAD FAITH.

In determining whether liability exists for bad faith in an attempt by an insurer to settle a claim, a trial court may supplementally instruct the jury, where applicable in a given case, to consider whether the insurer failed to keep the insured fully informed of all developments in the claim or suit that could reasonably have affected the interests of the insured, failed to inform the insured of all settlement offers that did not fall within policy limits, failed to solicit a settlement offer or initiate settlement negotiations when warranted by the circumstances, failed to accept a reasonable compromise offer of settlement where the facts of the case or claim indicated obvious liability and serious injury, rejected a reasonable offer of settlement within policy limits, unduly delayed in accepting a reasonable offer to settle a potentially dangerous case within policy limits where the verdict potential was high, attempted to coerce or obtain an involuntary contribution from the insured in order to settle within the policy limits, failed to make a proper investigation of the claim prior to refusing an offer of settlement within policy limits, disregarded advice or recommendations of an adjuster or attorney, was seriously and recurrently negligent, refused to settle a case within policy limits following an excessive verdict when the chances of reversal on appeal were slight or doubtful, and failed to take an appeal following a verdict in excess of the policy limits where there were reasonable grounds for such an appeal, especially where recommended by trial counsel.

Law Offices of Franklin, Petrulis, Bigler, Berry & Johnston, P.C. (by *Bruce W. Franklin, J. Steven Johnston,* and *Richard R. Danforth*), for the plaintiff.

Kohl, Secrest, Wardle, Lynch, Clark & Hampton

(by *Konrad D. Kohl* and *Michael L. Updike*) for the defendant.

ARCHER, J. Plaintiff, an excess insurance carrier, filed an equitable subrogation action in the Oakland Circuit Court against defendant, a primary insurance carrier. Plaintiff alleged that defendant's failure to negotiate a settlement in a case against their mutual insured constituted bad faith pursuant to *City of Wakefield v Globe Indemnity Co,* 246 Mich 645; 225 NW2d 643 (1929), thereby causing plaintiff to be exposed to risk. A jury found no cause of action against Liberty Mutual. The circuit court denied plaintiff's motion for judgment notwithstanding the verdict or for a new trial. The Court of Appeals reversed, ordering a new trial, and finding that the trial court's "bad faith" instructions were, in part, prejudicial and erroneous. *Commercial Union Ins Co v Liberty Mutual Ins Co,* 137 Mich App 381; 357 NW2d 861 (1984).

We affirm the decision of the Court of Appeals.

I

Liberty Mutual, a primary insurance carrier, provided primary liability insurance coverage for WXYZ with a single injury coverage limit of $100,000. Edith Webster suffered a slip and fall while working at WXYZ-TV. Ms. Webster and her husband, Forrest, brought suit for damages, and Liberty Mutual assumed the defense on behalf of WXYZ. Following trial, the Websters were awarded $100,000. Liberty Mutual appealed. The Court of Appeals reversed and remanded the case for a new trial. *Webster v WXYZ,* 59 Mich App 375; 229 NW2d 460 (1975), lv den 395 Mich 751 (1975). Settlement negotiations continued, yet the parties

were unable to come to an agreement. The case went to trial a second time, where the jury returned a verdict of $700,000 in favor of the Websters. Liberty Mutual tendered its $100,000 policy limits, and Commercial Union took over the defense of the case. Its appeal efforts were unsuccessful. Commercial Union was eventually required to pay $854,131.61 to the Websters.

Commercial Union subsequently sued Liberty Mutual for failure to settle the Webster action for an amount much less than Commercial Union has since been required to pay. Commercial Union's rights in this suit are premised upon its status as an equitable subrogee of WXYZ. In alleging that Liberty Mutual acted in "bad faith," Commercial Union complained that Liberty Mutual (1) failed to make settlement offers and ignored numerous settlement demands between May, 1971, and the commencement of the first Webster trial in October, 1973, (2) failed to communicate each and every settlement demand made throughout the pendency of the Websters' claim, (3) failed to respond properly to settlement offers at figures below the first jury award while the first Webster case was pending on appeal, (4) chose to ignore the advice of its attorney to make efforts to settle the case following the Court of Appeals reversal of the first Webster case, but before the second trial, and (5) failed to communicate all material developments as they occurred throughout the pendency of the Websters' claim.

Liberty Mutual responded to Commercial Union's allegations by contending that Commercial Union (1) never suggested Liberty Mutual pay its policy limits to settle the Websters' claim, (2) never retained its own counsel, (3) never participated in settlement negotiations, (4) never independently evaluated the value of the Websters'

claim, and (5) never objected to Liberty Mutual's proceeding with a second trial of the case.

After evidence was presented at the Commercial Union/Liberty Mutual trial, the trial court gave the following "bad faith" instruction, which reads in pertinent part:

> The term bad faith as used in these instructions may be defined as involving insincerity, *dishonesty,* disloyalty, *duplicity, or deceitful conduct; it implies dishonesty or concealment.* An honest mistake of judgment is not in and of itself bad faith and no single fact is necessarily decisive of the issue. [Emphasis supplied.][1]

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[1] Provided in its entirety, the "bad faith" instruction reads:

> Now, as to bad faith, a lot has been said about bad faith, and of course, that is the claim here of the Plaintiff, that the Defendant acted in bad faith.
>
> Now, good or bad faith is a state of mind.
>
> The term bad faith as used in these instructions may be defined as involving insincerity, dishonesty, disloyalty, duplicity, or deceitful conduct; it implies dishonesty or concealment. An honest mistake of judgment is not in and of itself bad faith and no single fact is necessarily decisive of the issue.
>
> Now, the insurer does not act in bad faith if it refuses settlement in the honest belief that it has a fair chance of victory, or of keeping the verdict within the policy limit or, upon reasonable grounds that the compromise amount is excessive.
>
> Now, indicators of bad faith include but are not limited to the following:
>
> First, that the primary insurer treated the case as if it were not responsible for the entire amount.
>
> Also an indicator is failure to inform the insured or the excess carrier of all offers and demands and their legal significance.
>
> Also another indicator is failure to adequately notify the assured [sic] or the excess carrier of the claim and its nature.
>
> The arbitrary refusal to settle for a reasonable amount, where it is apparent that the suit would result in a judgment in excess of the policy limit, or indifference to the effect of the refusal on the excess carrier, or failure to fairly consider a compromise and facts presented and pass honest judgment thereon, or refusal to settle upon grounds which depart from the contract and the purpose of the grant of power, would tend to show bad faith.

In finding this part of the instruction to be erroneous, the Court of Appeals relied on *City of Wakefield v Globe Indemnity Co,*[2] *supra.* In *Wakefield,* the insured, the City of Wakefield, operated an automobile bus line. Frank Borski was injured by one of the city vehicles and sued for damages. Globe Indemnity Co., which provided the city with a $10,000 policy of liability insurance, assumed the defense of the case along with the city attorney, who was attorney of record. Near the end of trial, the carrier's attorney, having heard the testimony of medical witnesses and having talked with witnesses for the defense, concluded that the case was hopeless and recommended settlement. Mr. Campbell, a representative of the insurance carrier, refused settlement and, although given full opportunity at trial to disclose his reasons for refusal, failed to do so. The jury returned a verdict against Globe Indemnity for over $15,000, in excess of the amount of the policy limit. The insured was required to pay the excess amount of the judgment. The insured sued its liability insurance carriers on the theory that the carriers were guilty of negligence and bad faith in refusing to accept a compromise offer of settlement for less than their liability as recommended by the carriers' attorney. The *Wakefield* Court held that the insurers were

Now, the primary carrier owes the same duty to the excess carrier as the primary carrier would owe to its insured.

[2] In *Wakefield,* the lead opinion did not acquire the majority signatures. The concurring opinion written by Justice SHARP acquired five signatures. The majority quoted with approval the minority's statement that "[i]t is not bad faith if counsel for the insurer refuse settlement under the *bona fide* belief that they might defeat the action, or, in any event, can probably keep the verdict within the policy limit." The majority similarly approved a minority statement that "[a] mistake of judgment is not bad faith." *Wakefield* at 656. The majority did not indicate whether it approved of some additional language in *Wakefield* at 652-653, which was used in the trial court instruction quoted in footnote 1.

not liable to the insured for refusal to compromise his claim unless the refusal was in bad faith, stating that

> the insurer does not act in bad faith if it refuses settlement in the honest belief that it has a fair chance of victory, or of keeping the verdict within the policy limit, or . . . that the compromise amount is excessive, or if it has legal defenses . . . . On the other hand, arbitrary refusal to settle for a reasonable amount, where it is apparent that suit would result in a judgment in excess of the policy limit, indifference to the effect of refusal on the insured, failure to fairly consider a compromise and facts presented and pass honest judgment thereon, or refusal upon grounds which depart from the contract and the purpose of the grant of power, would tend to show bad faith. [246 Mich 652-653.]

In relying on *Wakefield,* the Court of Appeals in the instant case held that

> "[b]ad faith" by an insurance company for a breach of a duty to settle is something more than negligence. *Wakefield, supra; Commercial Union v Medical Protective Co,* [136 Mich App 412; 356 NW2d 648 (1984), lv gtd 422 Mich 939 (1985)]. However, unlike the implication of the *Medley* [*v Canady,* 126 Mich App 739; 337 NW2d 909 (1983)] definition, "bad faith" pursuant to *Wakefield* is something less than fraud . . . .
>
> By instructing the jury that bad faith may be defined as or equated with "duplicity or deceitful conduct," or "concealment," the trial court erroneously increased Commercial Union's burden of proof. The language defining "bad faith" in *Wakefield* is sufficient. We find the errors in the substantive instructions to the jury prejudicial and reversible. [137 Mich App 391-392.]

We agree with the Court of Appeals. By instruct-

ing the jury that bad faith is equated with "duplicity or deceitful conduct," or "concealment," the trial court erroneously increased plaintiff's burden of proof. However, unlike the Court of Appeals, we find the language defining "bad faith" in *Wakefield* lacking because it defines "bad faith" by limited example only.

Contrary to holdings in some other jurisdictions, bad faith should not be used interchangeably with either "negligence" or "fraud."[3] Michigan has reached this conclusion in the past.[4] Accordingly, we define "bad faith" for instructional use in trial courts as arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty.[5]

Good-faith denials, offers of compromise, or

[3] Jurisdictions which favor simple negligence and standards just short of fraud are collected at 40 ALR2d 168 and 34 ALR3d 533.

[4] See *City of Wakefield, supra, Bentley v Farmers' Ins Exchange,* 289 F2d 59 (CA 6, 1961), *Rutter v King,* 57 Mich App 152; 226 NW2d 79 (1974), *Commercial Union v Medical Protective Co, supra, Jones v Nat'l Emblem Ins Co,* 436 F Supp 1119 (ED Mich, 1977), *McCoy v Zurich Ins Co,* 509 F Supp 1106, 1108 (ED Mich, 1981), aff'd 703 F2d 564 (CA 6, 1982), and *Jackson v St Paul-Mercury Indemnity Co,* 339 F2d 40 (CA 6, 1964).

[5] Although the right to recover on a bad-faith claim is generally conditioned upon proving "bad faith" as it is defined in this opinion, we agree with the Court of Appeals that the "bad faith" definition, "conscious doing of a wrong because of dishonest purpose or moral obliquity," as used in *Medley v Canady,* 126 Mich App 739, 748; 337 NW2d 909 (1983), is correct when limited to bad-faith cases involving § 6 of the Uniform Trade Practices Act, MCL 500.2006(4); MSA 24.12006(4). The differentiation in definitions arises because § 6 of the Uniform Trade Practices Act is a statutory penalty, intended to penalize recalcitrant insurers who, in bad faith, are dilatory in paying claims. *Fletcher v Aetna Casualty & Surety Co,* 80 Mich App 439, 445; 264 NW2d 19 (1978), aff'd 409 Mich 1 (1980); *Sharpe v DAIIE,* 126 Mich App 144, 150; 337 NW2d 12 (1983); *Sederholm v Michigan Mutual Ins Co,* 142 Mich App 372, 394; 370 NW2d 357 (1985). Since § 6 is a statutory provision having a punitive purpose, a higher standard of liability is warranted. Virtually all authority sanctioning penalties and other punitive-type damages require the higher standard of malice or fraud. See *Hoskins v Aetna Life Ins Co,* 6 Ohio St 3d 272; 452 NE2d 1315 (1983); *Kirk v Safeco Ins Co,* 28 Ohio Misc 44, 46; 273 NE2d 919 (1970).

other honest errors of judgment are not sufficient to establish bad faith. Further, claims of bad faith cannot be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment. However, because bad faith is a state of mind,[6] there can be bad faith without actual dishonesty or fraud. If the insurer is motivated by selfish purpose or by a desire to protect its own interests at the expense of its insured's interest, bad faith exists, even though the insurer's actions were not actually dishonest or fraudulent.[7]

Although the Court has articulated here a precise definition of "bad faith" for instructional purposes, there are supplemental factors which may be considered in determining whether liability exists for bad faith. These factors clarify the "indicators" pronounced in the trial court's bad-faith instruction in the instant case.[8] They also embrace the *Wakefield* language.[9] Because the facts of each individual case will vary in any given situation, the trial court, in its discretion, will have the option of determining which factors, if any, are to be included in instructions to the jury. The recommended factors are not exclusive. No single factor shall be decisive. Among the factors which the factfinder may take into account, together with all other evidence in deciding whether or not the defendant acted in bad faith are:[10]

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[6] As stated in *Wakefield:* "Good or bad faith is a state of mind." 246 Mich 653.

[7] See *Valentine v Liberty Mutual Ins Co,* 620 F2d 583 (CA 6, 1980); *Shearer v Reed,* 286 Pa Super 188; 428 A2d 635 (1981).

[8] See n 1.

[9] See n 2.

[10] These twelve recommended factors represent a composite of the dispositive issues discussed in numerous "bad faith" cases in other jurisdictions. The authorities are collected in 40 ALR2d 168, 10 ALR4th 879, 63 ALR3d 725, 85 ALR3d 1211, and Sutterfield, *Relationships between excess and primary insurors: The excess judgment problem,* 52 Ins Counsel J 638, 640-641 (1985).

1) failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured,[11]

2) failure to inform the insured of all settlement offers that do not fall within the policy limits,[12]

3) failure to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances,[13]

4) failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury,[14]

5) rejection of a reasonable offer of settlement within the policy limits,[15]

6) undue delay in accepting a reasonable offer to settle a potentially dangerous case within the policy limits where the verdict potential is high,[16]

7) an attempt by the insurer to coerce or obtain an involuntary contribution from the insured in order to settle within the policy limits,[17]

8) failure to make a proper investigation of the claim prior to refusing an offer of settlement within the policy limits,[18]

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[11] See *Ranger Ins Co v Travelers Indemnity Co,* 389 So 2d 272 (Fla App, 1980); *Springer v Citizens Casualty Co,* 246 F2d 123 (CA 5, 1957); *Jones v Nat'l Emblem Ins Co,* n 4 *supra; Meirthew v Last,* 376 Mich 33; 135 NW2d 353 (1965).

[12] See *Short v Dairyland Ins Co,* 334 NW2d 384 (Minn, 1983).

[13] See *Rutter v King,* n 4 *supra; Glendale v Farmers Ins Exchange,* 126 Ariz 118; 613 P2d 278 (1980); *Ranger Ins Co v Travelers Indemnity Co,* n 11 *supra; Shearer v Reed,* n 7 *supra; Rova Farms Resort, Inc v Investors Ins Co,* 65 NJ 474; 323 A2d 495 (1974).

[14] See *Jackson v St Paul-Mercury Indemnity Co,* n 4 *supra; Short v Dairyland,* n 12 *supra.*

[15] See *Samson v Transamerica Ins Co,* 30 Cal 3d 220; 178 Cal Rptr 343; 636 P2d 32 (1981); *Rova Farms Resort, Inc v Investors Ins Co,* n 13 *supra; Peter v Travelers Ins Co,* 375 F Supp 1347 (CD Cal, 1974).

[16] See *Phelan v State Farm Mutual Automobile Ins Co,* 114 Ill App 3d 96; 69 Ill Dec 861; 448 NE2d 579 (1983); *Hayes Bros, Inc v Economy Fire & Casualty Co,* 634 F2d 1119 (CA 8, 1980); *Maine Bonding & Casualty Co v Centennial Ins Co,* 64 Or App 97; 667 P2d 548 (1983), aff'd en banc 298 Or 514; 693 P2d 1296 (1985); *Rova Farms Resort, Inc v Investors Ins Co,* n 13 *supra.*

[17] See *Rova Farms Resort, Inc v Investors Ins Co,* n 13 *supra.*

[18] See *Fertitta v Allstate Ins Co,* 439 So 2d 531 (La App, 1983), clarified, motion den 441 So 2d 1250 (La App, 1983), aff'd 462 So 2d

9) disregarding the advice or recommendations of an adjuster or attorney,[19]

10) serious and recurrent negligence by the insurer,

11) refusal to settle a case within the policy limits following an excessive verdict when the chances of reversal on appeal are slight or doubtful,[20] and

12) failure to take an appeal following a verdict in excess of the policy limits where there are reasonable grounds for such an appeal, especially where trial counsel so recommended.[21]

In applying any factors, it is inappropriate in reviewing the conduct of the insurer to utilize "20-20 hindsight vision." The conduct under scrutiny must be considered in light of the circumstances existing at the time. A microscopic examination, years after the fact, made with the luxury of actually knowing the outcome of the original proceeding is not appropriate. It must be remembered that if bad faith exists in a given situation, it arose upon the occurrence of the acts in question; bad faith does not arise at some later date as a result of an unsuccessful day in court.

II

The holding in this case makes it unnecessary for us to address the remaining issue raised on cross-appeal because our affirmance of the decision of the Court of Appeals renders the issue moot.

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159 (La, 1985); *Van Dyke v St Paul Fire & Marine Ins Co,* 388 Mass 671; 448 NE2d 357 (1983).

[19] See *Allen v Allstate Ins Co,* 656 F2d 478 (CA 9, 1981); *Rova Farms Resort, Inc v Investors Ins Co,* n 13 *supra; Ranger Ins Co v Travelers Indemnity Co,* n 11 *supra; Ferris v Employers Mutual Casualty Co,* 255 Iowa 511; 122 NW2d 263 (1963).

[20] See *Samson v Transamerica Ins Co,* n 15 *supra; Phelan v State Farm Mutual Automobile Ins Co,* n 16 *supra.*

[21] See *Reichart v Continental Ins Co,* 290 So 2d 730 (La App, 1974), cert den 294 So 2d 545 (La, 1974).

We therefore affirm the decision of the Court of Appeals.

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

LEVIN, J. (*concurring*). I agree with the majority that the trial court erred in instructing the jury over objection "that bad faith is equated with 'duplicity or deceitful conduct,' or 'concealment . . . .' "[1]

I write separately because I am unable to agree with the definition of bad faith set forth in the opinion of the Court and other observations in the opinion.

The opinion states: "we define 'bad faith' for instructional use in trial court as arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty."[2]

The terms "arbitrary, reckless, indifferent" have varying meanings depending on the context.

It has been said that some authorities hold that the term "reckless" means "no more than 'negligent,' while others hold that [the term means] 'wantonness or bordering on willful,' and there is also a meaning between these two extremes." 76 CJS, p 63. The same encyclopedia states that the term has been held in particular cases to "imply mere inattention to duty; thoughtlessness; indifference; heedlessness; carelessness; and nothing more than mere negligence." *Id.*

In *City of Wakefield v Globe Indemnity Co,* 246 Mich 645, 653; 225 NW 643 (1929), this Court said that an "*arbitrary* refusal to settle for a reasonable amount, where it is apparent that suit would result in a judgment in excess of the policy limit,

[1] *Ante,* pp 135-136.

[2] *Id.,* p 136.

indifference to the effect of refusal on the insured . . . would tend to show bad faith." (Emphasis supplied.) The Court thereby indicated what kind of "arbitrary" or "indifferent" conduct would tend to show bad faith. To instruct a jury in the abstract that arbitrary or indifferent conduct would tend to show bad faith, without reference or regard to particular circumstances, could readily cause jury misunderstanding and lead to erroneous results.

Nor can I agree that "intentional disregard of the interests of the person owed a duty" may always be equated with bad faith. An insurer may properly put its interests ahead of the interests of the insured, and thus intentionally disregard the interests of the insured; it may act out of a "selfish purpose or by a desire to protect its own interests at the expense of its insured's interest,"[3] as long as it does not act in bad faith. If an insurer could not in any circumstance place its interests ahead of those of its insured, if it is obliged in all circumstances to subordinate its interests to the interests of its insured, then an insurer would be obliged in all cases to pay policy limits lest it expose the insured to any risk whatsoever of a judgment in excess of policy limits.

I also question cataloging a list of factors developed in cases the record in which this Court has not examined or ruled upon; the factors are necessarily taken out of context and may not adequately explain limitations implicit in the particular circumstances in which the factor was held to be relevant. Also, there has not been adversary briefing in this Court on the question whether all the factors enumerated in the opinion of the Court evidence bad faith.

[3] *Id.*, p 137.

If the Court is of the opinion that it is appropriate to instruct a jury concerning specific factors, it should, I believe, require the judge to add that merely because there is evidence tending to show the presence of a factor does not necessarily mean that there was bad faith. Further, if the jury is instructed on factors that tend to show bad faith it should also be instructed on factors that tend to countervail such a finding—the specific factors that tend to show an absence of bad faith.

Finally, if the jury is instructed on factors, the judge should be required or encouraged to incorporate into the instruction the gist of the last paragraph of part I of the opinion of the Court, viz.:

> In applying any factors, it is inappropriate in reviewing the conduct of the insurer to utilize "20-20 hindsight vision." The conduct under scrutiny must be considered in light of the circumstances existing at the time. A microscopic examination, years after the fact, made with the luxury of actually knowing the outcome of the original proceeding is not appropriate. It must be remembered that if bad faith exists in a given situation, it arose upon the occurrence of the acts in question; bad faith does not arise at some later date as a result of an unsuccessful day in court.

Absent a statement in the opinion of the Court requiring or encouraging the judge to so balance the instruction to the jury, the judge may not understand that he should incorporate in the instruction the gist of the foregoing language quoted from the opinion of the Court.

PORT HURON AREA SCHOOL DISTRICT v PORT HURON EDUCATION ASSOCIATION

Docket No. 72647. Argued March 6, 1986 (Calendar No. 1). Decided October 3, 1986.

The Port Huron Area School District brought an action in the St. Clair Circuit Court against the Port Huron Education Association, seeking to have set aside as exceeding arbitral jurisdiction and authority an arbitrator's decision that a male teacher's seniority rights under a collective bargaining agreement between the district and the association had been violated when the district recalled a female teacher with less seniority to fill a high school girls' physical education position. The court, Ernest F. Oppliger, J., granted summary judgment for the district. The Court of Appeals, T. M. BURNS, P.J., and D. F. WALSH and SIMON, JJ., reversed in an unpublished opinion per curiam (Docket No. 63636). The plaintiff appeals.

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

The award of the arbitrator is unenforceable. In granting the award, the arbitrator clearly exceeded the scope of his authority which was expressly and unambiguously circumscribed in the arbitration contract.

1. Labor arbitration is a product of contract, and its legal basis depends entirely upon the particular contracts of particular parties. An arbitrator possesses no general jurisdiction to resolve matters independent of the arbitration contract; rather, jurisdiction and authority to resolve a particular dispute concerning the appropriate interpretation of a collective bargain-

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REFERENCES

Am Jur 2d, Arbitration and Award §§ 90 *et seq.*, 167 *et seq.*

Am Jur 2d, Labor and Labor Relations §§ 1851 *et seq.*, 1984-1988.

Validity and construction of statutes or ordinances providing for arbitration of labor disputes involving public employees. 68 ALR3d 885.

See also the annotations in the ALR3d/4th Quick Index under Arbitration and Award; Labor and Labor Unions.

ing agreement derives exclusively from the contractual agreement of the parties.

2. Judicial review of an arbitrator's decision is limited; a court may not review an arbitrator's factual findings or decisions on the merits. Whether an arbitrator exceeded his contractual authority is an issue for judicial determination. An arbitrator's jurisdiction and general remedial authority are entirely subject to the agreement of the parties. An arbitrator's award is properly vacated where the award is dependent upon the arbitrator's interpretation of provisions expressly withheld from arbitral jurisdiction or upon the arbitrator's disregard and contravention of provisions expressly limiting arbitral authority.

3. In this case, the jurisdiction and authority of the arbitrator was expressly and specifically limited, and his award was dependent upon his disregard of those specific terms and conditions which were reflected in the provisions of the arbitration agreement. The arbitrator clearly exceeded his contractual authority, and the award is unenforceable.

4. The school district, by not initially challenging the arbitrability of the grievance, did not waive its right to have the arbitration agreement enforced in accordance with its terms. Whether the grievance was arbitrable on its face is entirely distinguishable from whether the award was properly vacated on the ground that the arbitrator exceeded his jurisdiction and authority.

Reversed.

Justice LEVIN stated that the question presented is whether the arbitrator exceeded his authority in deciding that the seniority clause of the collective bargaining agreement required that the position of physical education teacher be assigned without regard to the sex of the teacher, although this in effect rendered unenforceable, in the case of a male teacher, the school district's decision to include locker and shower room supervision as a duty and qualification of the job.

The arbitrator, in construing the agreement as a whole to find that the district's right under the management rights clause to establish gender as a job qualification was specifically limited by express provision of the preamble that the agreement was to be applied without regard to sex, did not exceed his authority. The grievance asserted violations of the seniority provisions of the agreement. The district defended on the basis of its right, under the management rights clause, to establish sex as a job qualification. Whether it had such a right was a question of construction and not arbitral authority. The pream-

ble, being a specific limitation in the agreement, was properly considered in its construction. In deciding the issue, the arbitrator necessarily considered the relative importance of the competing rights and prerogatives and made a judgment based on reason.

OPINION OF THE COURT

1. ARBITRATION — SCHOOLS — ARBITRATORS — COLLECTIVE BARGAINING — AUTHORITY.

An arbitrator's jurisdiction and authority to resolve a particular dispute concerning the appropriate interpretation of a collective bargaining agreement derives exclusively from the agreement; an arbitrator possesses no general jurisdiction to resolve matters independent of that provided by the agreement.

2. ARBITRATION — SCHOOLS — ARBITRATORS — COLLECTIVE BARGAINING — AUTHORITY — JUDICIAL REVIEW.

Whether an arbitrator exceeded his contractual authority is an issue for judicial determination; an arbitrator's award is properly vacated when the award is dependent upon an arbitrator's interpretation of provisions expressly withheld from arbitral jurisdiction under a collective bargaining agreement, or upon an arbitrator's disregard and contravention of provisions expressly limiting arbitral authority.

OPINION BY LEVIN, J.

3. ARBITRATION — SCHOOLS — ARBITRATORS — COLLECTIVE BARGAINING — AUTHORITY.

Whether a school district had a right under the management rights clause of a collective bargaining agreement to establish gender as a job qualification was a question of construction of the agreement as a whole, rendering proper consideration by an arbitrator of specific limitations in the preamble of the agreement precluding use of sex in the application of the agreement's provisions.

Touma, Watson, Nicholson, Whaling, Fletcher & DeGrow, P.C. (by *Gary A. Fletcher* and *Michael L. West*), for the plaintiff.

Levin, Levin, Garvett & Dill (by *Erwin B. Ellmann* and *Eli Grier*) for the defendant.

RILEY, J. The question presented concerns the

limited scope of judicial review of labor arbitration awards in situations in which it is claimed that the arbitrator exceeded his contractual authority in granting an award. We hold that, in the present case, in light of the express contractual limitations upon arbitral jurisdiction and authority reflected in the arbitration agreement, the award is unenforceable. In granting the award, the arbitrator clearly exceeded the scope of his authority as expressly circumscribed in the arbitration contract.

I

In accordance with the labor agreement between the Port Huron Area School District and the Port Huron Education Association, the school district instituted layoffs in the spring of 1980, because of financial difficulties the school district was experiencing. Prior to 1980, it had always been possible to have at least one male and one female physical education teacher on duty for all of the classes. Additionally, teachers' aides (of the same sex as their assigned students) had been employed to assist in locker room supervision when it had not been possible to match teachers of the same sex as the students with the position in one previous year. The teacher's aide positions, however, were eliminated during the 1979-80 school year in an overall austerity program to address the financial problems experienced by the school district.[1]

The school district established a procedure by

[1] The school district found that the teachers' aides could not satisfactorily assist in the locker room supervision responsibilities of physical education teachers because they were not trained to advise and assist the students regarding personal hygiene, lacked disciplinary skills, and reported to the principal and not the teacher. Thus, as a means of addressing their force crisis, the school district elected not to assume the extra expense of employing teachers' aides to perform that function.

which it would have both a male and a female physical education instructor at each of its two high schools and that these instructors would be of the same sex as their students and be responsible, without the assistance of aides, for locker room supervision which consumes approximately twenty-five percent of the teachers' time. During the restaffing process, it appears that one male physical education teacher resigned and was replaced by a laid-off male teacher. There also appears to have been a rescheduling error and the recalled male teacher was assigned a teaching schedule which included some time periods when he would be the only teacher on duty and, thus, the only supervisor on duty for the girls' locker room. The school district resolved this error by adjusting the teaching schedules, thereby creating a vacancy for the position of girls' physical education teacher. Consistent with the same sex qualifications previously established by the school district, and the policy decision to eliminate the employment of teachers' aides, the most senior available male teacher was passed over, and the position was offered to the most senior available female physical education teacher. The male teacher was given another assignment in the school district.

The male teacher who was passed over filed a grievance on September 19, 1980, alleging that he was the most senior qualified teacher to hold the position and that he was not offered the position in violation of the recall and seniority provisions incorporated in Article II of the collective bargaining agreement. Section 3, ¶¶ C(3)(e) and 4(c) of that article read as follows:

> If a vacancy arises for which a teacher on layoff is qualified, the District shall notify such teacher

> of the vacancy in writing by certified mail notice . . . .
>
> * * *
>
> In the event that anyone on the Placement List resigns, the Division for Personnel Administration shall take action to issue a contract to the next available teacher on the Seniority List who qualifies for the vacancy.

The grievant asked that the position in question be given him.

The employer, responding on October 22, 1980, denied the grievance, asserting that the grievant was not offered the position because he was not a teacher who qualified for the vacancy:

> One of the qualifications used by the District during the placement and staffing process was that a teacher who teaches girls physical education classes must be a female instructor in order to provide locker room supervision. As there would have been no afternoon female physical education teacher at Port Huron High School if Mr. Grinder had been recalled from layoff to that position, it was necessary that we recall the next female physical education teacher, which we did. Mr. Grinder did not meet the qualifications required to fill the position, therefore, there is no violation of the Agreement and the grievance is denied.

The grievance proceeded to arbitration,[2] and the hearing was conducted on May 26, 1981. The arbitrator upheld the grievance, finding that the use of gender as a criterion in offering the girls' physical education teaching position violated the professional agreement. The arbitrator, in his written opinion, expressly found that the use of sex as a qualification was prohibited by the preamble of

[2] The grievance proceeded through each of the five steps provided for in the collective bargaining agreement to precede arbitration and was denied at each step.

the contract, and that his authority, consistent with arbitral jurisdiction generally,[3] extended to determining whether the school district's management decision was "reasonable and necessary." The arbitrator concluded that the school district had not established the "reasonableness and necessity" of its management decision, that the use of sex as a qualification was prohibited by the preamble of the contract, and, therefore, that pursuant to the seniority provisions of the contract, the grievant was entitled to the girls' physical education position, notwithstanding the required locker room supervision responsibilities. The arbitrator emphasized that his decision did not authorize other sex supervision and, apparently, implied that the school district must increase its staff to execute that function.

The school district commenced the present action in circuit court on September 16, 1981, seeking to have the award set aside as being in excess of the arbitrator's jurisdiction and authority which was expressly limited and circumscribed by provisions of the arbitration contract. The education association answered, asking the court to confirm the award, and the matter was submitted on cross-motions for summary judgment.[4] The circuit court granted the school district's motion and set aside the arbitration award on the ground that the arbitrator clearly exceeded his contractual authority in granting the award.

The education association appealed, and the

[3] The arbitrator said that "many arbitrators" employ such an approach. He declined, however, to mention the specific management rights and arbitration provisions reflected in the contract which he was specifically commissioned to interpret, and from which his specific jurisdiction and authority was exclusively derived, which expressly restricted such an approach.

[4] The association did not argue that the school district had waived its right to challenge the award on the ground asserted, but contended only that the award should be confirmed because it did not exceed the arbitrator's jurisdiction or authority.

Court of Appeals reversed in an unpublished opinion. We granted the school district's application for leave to appeal. 422 Mich 856 (1985).

II

The parties are generally in agreement with regard to the law to be applied in this case. It is well-settled that arbitration is a favored means of resolving labor disputes and that courts refrain from reviewing the merits of an arbitration award when considering its enforcement. To that extent, judicial review of an arbitrator's decision is very limited; a court may not review an arbitrator's factual findings or decision on the merits.

The United States Supreme Court expressed the federal policy of judicial deference in the context of labor arbitration in the celebrated *Steelworkers' Trilogy*.[5] This Court expressed its general acceptance of such a policy, similarly, in *Frazier v Ford Motor Co,* 364 Mich 648; 112 NW2d 80 (1961). See *Carr v Kalamazoo Vegetable Parchment Co,* 354 Mich 327; 92 NW2d 295 (1958). See also *Kaleva-Norman-Dickson School Dist v KND Teachers' Ass'n,* 393 Mich 583; 227 NW2d 500 (1975).

The legal basis underlying this policy of judicial deference is grounded in contract: the contractual agreement to arbitrate and to accept the arbitral decision as "final and binding." Labor arbitration is a product of contract, and, therefore, its legal basis depends entirely upon the particular contracts of particular parties. Arbitration contracts may vary, according to their specific terms, in the scope of the matters entrusted to final and binding

[5] *United Steelworkers v American Mfg Co,* 363 US 564; 80 S Ct 1343; 4 L Ed 2d 1403 (1960); *United Steelworkers v Warrior & Gulf Navigation Co,* 363 US 574; 80 S Ct 1347; 4 L Ed 2d 1409 (1960); *United Steelworkers v Enterprise Wheel & Car Corp,* 363 US 593; 80 S Ct 1358; 4 L Ed 2d 1424 (1960).

arbitration, and in the arbitral authority conferred to resolve disputes concerning such matters.[6] An arbitrator's jurisdiction and authority to resolve a particular dispute concerning the appropriate interpretation of a collective bargaining agreement derives exclusively from the contractual agreement of the parties; an arbitrator possesses no general jurisdiction to resolve such matters independent of the arbitration contract.[7]

There is no contention, in the present case, that the merits of the award here in question are subject to review. The only issue is whether the arbitrator, in granting the award, disregarded the terms of his employment and the scope of his authority as expressly circumscribed in the arbitration contract. Parties consenting to arbitration pursuant to written agreements consent to arbitrate within the framework of the terms and conditions of such agreements. An arbitrator who refuses to recognize the terms and conditions expressly circumscribing his jurisdiction and authority in resolving a submitted dispute, thereby exceeding the limits upon which the contractual submission is based, exceeds the consensual au-

[6] Concurring in *American Mfg Co,* n 5 *supra,* 570, Justice BRENNAN emphasized:

> [T]he arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish, for there is no compulsion in law requiring them to include any such promises in their agreement.

[7] The Court in *Warrior & Gulf,* n 5 *supra,* 581, explained:

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties." [Quoting Sulman, *Reason, contract, and law in labor relations,* 68 Harv L R 999, 1016 (1955).]

thority bestowed upon him by the contract, and the award resulting therefrom is without legal sanction. Whether an arbitrator exceeded his contractual authority is an issue for judicial determination. This well-established principle is within the limited scope of judicial review of labor arbitration awards and was articulated by the United States Supreme Court in *United Steelworkers v Enterprise Wheel & Car Corp,* 363 US 593, 597; 80 S Ct 1358; 4 L Ed 2d 1424 (1960):

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Although the judicial policy favoring labor arbitration warrants a strong presumption in favor of enforcing arbitral awards, an award is properly vacated when that award is dependent upon an arbitrator's interpretation of provisions expressly withheld from arbitral jurisdiction, or upon an arbitrator's disregard and contravention of provisions expressly limiting arbitral authority.[8]

Thus, while an arbitrator has considerable lati-

[8] There are many ways in which an arbitrator may exceed his authority. See *United States Postal Service v Nat'l Rural Letter Carriers Ass'n,* 535 F Supp 1034 (ND Ohio, 1982). The issue in the present case requires us to consider whether the arbitrator disregarded express provisions of the arbitration contract specifically withholding arbitral jurisdiction and authority. An arbitrator can bind the parties only on issues that they have agreed to submit to him. See *Piggly Wiggly Operators' Warehouse, Inc v Piggly Wiggly Truck Drivers Union,* 611 F2d 580 (CA 5, 1980). Similarly, the parties are free to contractually limit an arbitrator's authority in resolving otherwise arbitrable disputes.

tude, his powers are not unlimited in the resolution of labor disputes; the arbitrator remains a creature of the contract, and his "subject matter" jurisdiction and general remedial authority remain entirely subject to the agreement of the parties. See, generally, St. Antoine, *Judicial review of labor arbitration awards: A second look at* Enterprise Wheel *and its progeny,* 75 Mich L R 1137 (1977).

III

The circuit court vacated the award, in the instant case, on the ground that the award was dependent upon the arbitrator's interpretation of a provision of the preamble to the collective bargaining agreement which was expressly withheld from arbitral jurisdiction. Additionally, the court found that the award was dependent upon the arbitrator's disregard of a provision of the arbitration contract expressly limiting arbitral authority in the resolution of otherwise arbitrable disputes with respect to the specific reservation of management rights.

The Court of Appeals, reversing the decision of the circuit court, agreed that the arbitrator relied upon the interpretation of provisions expressly withheld from arbitral jurisdiction, but held that the award was not dependent upon it: that an independent basis, within the arbitral authority conferred by the contract, may have existed to support the award. The Court further held that the school district had waived its right to challenge the award on the ground that it was in excess of the arbitrator's authority because the school district failed to challenge the "arbitrability" of the grievance in the first instance.

We consider first whether the arbitrator ex-

ceeded his contractual authority and whether the award was dependent on it, and, second, whether the school district waived its right to challenge the award by voluntarily submitting to arbitration without challenging the arbitrability of the grievance in the first instance.

A

The parties in the instant case addressed, in specific terms, the arbitrator's authority in their agreement. Some of the relevant provisions circumscribing arbitral jurisdiction and authority expressly set forth in the arbitration agreement are as follows:

> 2. Powers of Arbitrator
>
> a. The arbitrator shall be empowered, *except as limited herein,* . . . to make a decision in cases of alleged violations, misinterpretations, or misapplications of a specific Article and Section of this Agreement.
>
> (1) *He shall have no power to* add to, subtract from, *disregard,* alter, *or modify any of the terms of this Agreement.*
>
> (2) *He shall have no power to* establish salary scales, change any salary figures in the Agreement, or *increase or change any staffing requirements* set forth in this Agreement.
>
> * * *
>
> (4) His powers shall be limited to deciding whether the District has violated specific Articles or Sections of this Agreement. *It is agreed . . . he shall have no power to change any practice, policy or rule of the District through substituting his judgement for that of the District as to the reasonableness of any practice, policy, rule or any action taken by the District.*
>
> * * *
>
> (6) In rendering decisions, *he shall give full*

recognition to the responsibilities of the Board as indicated in Article IX, Paragraph E, which establishes the District's rights, powers and authority as that exercised or had by it prior to the date of this Agreement.

His decision shall be consistent with the rights reserved to the District by this provision.

(7) . . . .

b. Although the Arbitrator may cite case law in making his award *he shall have no power to interpret State and/or Federal Law,* to hear any matters involving constitutional rights or to render any provisions of this Agreement inapplicable by reason thereof.

c. The Arbitrator's decision shall be submitted in writing and shall set forth his findings and conclusions with respect to the issue submitted to arbitration.

d. There shall be no appeal from an Arbitrator's decision *if within the scope of his authority* as set forth herein, and it shall be final and binding . . . .

* * *

N. Grievances concerning the following *shall not proceed* past Step 5 of the grievance procedure [the last step before arbitration]:

Preamble . . . .

* * *

ARTICLE IX—MISCELLANEOUS

A. *This Agreement* constitutes the sole and entire existing Agreement between the parties and *supersedes all prior practices,* whether oral or written, and expresses all obligations of, and restrictions imposed upon, the District and the Association. This *Agreement is subject to amendment, alteration or additions, only by a subsequent written agreement* between, and executed by, the District and the Association. The waiver of any breach, term or condition of the Agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions. [Emphasis added.]

The arbitrator, in the present case, issued a written decision in which his findings and conclusions were outlined in detail in accordance with the contractual provision reflected in the arbitration agreement requiring him to do so.[9] That written decision reflects the conclusions and authority upon which the award was based as follows.

First, although neither the grievance nor the answer which was submitted implicated the preamble to the collective bargaining agreement which was, indeed, expressly withheld from arbitral jurisdiction,[10] the arbitrator, on his own initiative, proceeded to interpret § F as prohibiting the use of sex as a qualification for the position of girls' physical education teacher. That section of the preamble reads as follows:

> The District and the Association mutually pledge themselves to continue to recognize the full constitutional and civil rights of all teachers. . . . The provisions of this Agreement shall be applied without regard to race, creed, religion, color, sex, age or national origin.

The arbitrator interpreted that section of the preamble as prohibiting the use of sex as a bona fide occupational qualification, notwithstanding the arbitration contract's specific and unambiguous provision that the appropriate interpretation of that section of the preamble was expressly withheld from arbitral jurisdiction.[11]

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[9] The arbitrator was required to issue a written decision reflecting the findings and conclusions supporting his award by express provision of the arbitration agreement.

[10] By express contractual agreement specifically reflected in the arbitration agreement, grievances concerning the preamble were not subject to arbitration.

[11] Arbitral authority to interpret "State and/or Federal Law" was also affirmatively withheld by express agreement of the parties in another provision of the arbitration contract. The parties' intent to

Next, the arbitrator, considering "what contractual authority the District use[d] to support its action," said:

> It is customary for arbitrators to review broadly the powers conferred upon the Employer by the management rights clause. However, many arbitrators seek to determine *whether the disputed power is related in a reasonable manner to the orderly and efficient operation of the enterprise.* This is the view taken here where the contractual limitations on such rights are so unambiguous. [Emphasis added.]

The arbitrator concluded that "the District has some affirmative burden to persuade the arbitrator of the operational reasonableness and necessity for its action," and, that in the "absence of compelling reasons to the contrary" the use of a same-sex qualification for the position of girls' physical education teacher violated § F of the preamble, and, therefore, could not be used in applying the seniority and recall provisions of the agreement.

The arbitrator questioned the reasonableness of the school district's decision to eliminate the use of aides, which were used in one previous school year to fulfill the teachers' locker room supervision

withhold disputes concerning civil rights from their arbitration agreement is clearly expressed. The underlying reasons for withholding such disputes from arbitration is supported by the United States Supreme Court's reasoning in its recent decision in *McDonald v West Branch,* 466 US 284; 104 S Ct 799; 80 L Ed 2d 302 (1984).

Such disputes are exceptions from the finality doctrine of the federal policy favoring the enforcement of labor arbitration awards. Arbitration agreements, and the submission of disputes pursuant thereto, for example, do not preclude subsequent actions brought by employees under Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.,* 42 USC 1983, or the Fair Labor Standards Act, 29 USC 201 *et seq.* See *McDonald, supra,* discussing *Alexander v Gardner-Denver Co,* 415 US 36; 94 S Ct 1011; 39 L Ed 2d 147 (1974); *Barrentine v Arkansas-Best Freight System, Inc,* 450 US 728; 101 S Ct 1437; 67 L Ed 2d 641 (1981).

functions, and, in effect, his award required the school district to recreate those positions.[12]

Arbitral authority to determine the "reasonableness and necessity" of management policy decisions was limited by express contractual provision.[13] The arbitrator's reasoning that the school district was required to establish the "reasonableness and necessity" of its management decision making gender a bona fide occupational qualification for the position of girls' physical education teacher, a position which requires locker room

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[12] The arbitrator said:

> It should be obvious but warrants specific mention that this reasoning above does not authorize other-sex supervision of locker rooms in the District. It merely states that . . . sex cannot be used as an occupational requirement here.

It should be noted again that by express contractual provision the arbitrator lacked the authority to "increase or change any staffing requirements." As the circuit court noted in vacating the award, the enforcement of the award would, in fact, authorize other-sex supervision inasmuch as a significant portion of a physical education teacher's responsibilities include locker room supervision. The arbitrator's decision, thus, seems to have impliedly ordered the school district to recreate and restaff the position of teacher's aide to accommodate the grievant and other physical education teachers who could not be denied positions requiring locker room supervision of students of the opposite gender.

[13] See § 2a(4), *ante,* p 154, for the text of that contractual provision. Additionally, inasmuch as that approach was an attempt to apply the bona fide occupational qualification provision of the Michigan Civil Rights Act, MCL 37.2208; MSA 3.548(208), it was contrary to the express agreement of the parties to withhold disputes concerning the preamble from arbitration and to their express agreement to limit arbitral authority to interpret "State and/or Federal Law." That provision of the Michigan Civil Rights Act states in part:

> An employer may have a bona fide occupational qualification on the basis of religion, national origin, sex, age, or marital status, height and weight without obtaining prior exemption from the commission, provided that an employer who does not obtain an exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of the business. [*Id.*]

supervision as a significant responsibility,[14] was contrary to that express contractual provision which specifically limited arbitral authority to employ such an approach.[15]

The arbitrator, in his written decision, did not determine that the school district's past action of employing teachers' aides to assist in discharging the locker room supervision responsibilities of physical education teachers had, by accretion, modified the original collective bargaining agreement and become a part of the agreement binding the school district from discontinuing the use of such aides. We note, moreover, that, again, by express contractual agreement, the arbitrator was prohibited from making such a determination.[16]

The Court of Appeals reasoned that the award in the instant case was, at least in part, based upon the arbitrator's independent interpretation of the seniority and recall provisions of the agreement and, accordingly, that the arbitrator's opinion "drew its essence from the contract and was

[14] The arbitrator acknowledged that locker room supervision consumes approximately twenty-five percent of a physical education teacher's time and that it has always been a significant responsibility of the position.

[15] Whether that provision is viewed as a specific limitation upon arbitral authority or a specific reservation of management rights, the arbitrator exceeded his authority in disregarding the contractual agreement reflected in it. The arbitrator's assertion that "many arbitrators" employ such an approach does not support disregarding the specific and unambiguous provision of the contract prohibiting him from employing such an approach. Inasmuch as that approach was an attempt to apply Michigan statutory law, it was contrary to at least two other express provisions of the arbitration contract. See § 2a(7)(b), and § N, *ante,* p 155, and n 13.

[16] The parties expressly provided that their agreement could not be modified except by written agreement. See Article IX, A, *ante,* p 155, for the text of that provision. In the absence of such agreement, and pursuant to generally applicable principles of contract law, modifications can occur by virtue of prior or subsequent conduct. Cf. *Torrington Co v Metal Products Workers Union Local 1645,* 362 F2d 677 (CA 2, 1966). See Jones, *The name of the game is decision—Some reflections on "arbitrability" and "authority" in labor arbitration,* 46 Tex L R 865, 873 (1968).

not based on the arbitrator's own brand of personal justice." We are persuaded, however, that the award was dependent upon the arbitrator's interpretation of § F of the preamble and his disregard for the parties' specific agreement limiting arbitral authority in the management rights reservation provisions. We agree that, ordinarily, unless otherwise expressly agreed, an arbitrator has great latitude in the sources he may rely upon in resolving disputes concerning the appropriate interpretation of specific contractual provisions, including aspirations expressed in a preamble, the past practices of the parties, and, in some circumstances, the reasonableness of policy decisions within the management rights reserved to an employer. That the parties to an arbitration agreement are free to circumscribe and limit arbitral jurisdiction and authority, however, is beyond question, and such contractual terms and conditions are valid and entitled to judicial enforcement.[17]

In vacating the arbitral award in the present case, the circuit court did not substitute its opinion on the merits of the grievance for that of the arbitrator. The court was careful to appropriately limit its review to whether the arbitrator had exceeded his contractual jurisdiction and authority. In the present case, that jurisdiction and authority was expressly and specifically limited, and the award was dependent upon the arbitrator's disregard of those specific terms and conditions which were reflected in the provisions of the arbitration agreement itself, and by reference to them.

[17] See n 6. The parties' agreement to remove disputes concerning civil rights from their arbitration agreement is enforceable and understandable. While arbitrators may possess superior insight in such subjects as "the law of the shop," they may lack the training and expertise to apply "the law of the land." See n 11, and cases cited therein.

In this case, the arbitrator clearly exceeded his contractual authority; the award is unenforceable and was properly vacated by the circuit court.

B

The issue whether the school district waived its right to challenge the award in the present case, as having been granted in excess of the arbitrator's jurisdiction and authority, was not before the circuit court; the association failed to assert that defense during the proceedings instituted by the school district to set aside the award. Accordingly, that issue was not properly before the Court of Appeals.[18] Because the Court of Appeals decision addressed that issue, even though it had not been raised in the trial court, we discuss it briefly.

A party who voluntarily agrees to submit a specific grievance to arbitration may be precluded from later challenging the "arbitrability" of that grievance. See, e.g., *American Motorists Ins Co v Llanes,* 396 Mich 113; 240 NW2d 203 (1976).[19] It does not follow, however, that by voluntarily submitting to arbitrate a specific grievance a party waives his rights completely to later challenge the arbitral award on the ground that the arbitrator exceeded his authority. The most obvious example is when an arbitral award reaches beyond the

[18] The association's failure to assert that defense in the circuit court, either by way of affirmative defense or otherwise, precluded judicial review of the issue. See *Pryber v Marriott Corp,* 98 Mich App 50; 296 NW2d 597 (1980), aff'd 411 Mich 887 (1981); *Hudson v Maher,* 55 Mich App 90, 93; 222 NW2d 47 (1974).

[19] See, generally, Anno: *Participation in arbitration proceedings as waiver of objections to arbitrability,* 33 ALR3d 1242, 1244. But cf. *Silverman v Benmor Coats, Inc,* 61 NY2d 299; 461 NE2d 1261 (1984); *Firestone Tire & Rubber Co v United Rubber Workers,* 168 Cal App 2d 444; 335 P2d 990 (1959); *Gulf Oil Corp v Guidry,* 160 Tex 139; 327 SW2d 406 (1959). Cf. also *Electrical Workers Union v Collins Radio Co,* 317 F2d 214 (CA 5, 1963).

boundaries of the "submission."[20] That a particular grievance is arbitrable "on its face" does not empower an arbitrator to disregard the terms and conditions of his commission; nor does it preclude a party to the arbitration contract from having that contractual agreement enforced in accordance with those specific terms and conditions.

The policy of this state is in favor of arbitration. While questions of "arbitrability" in the first instance are appropriate for judicial resolution unless otherwise agreed,[21] a court's function in this regard is limited:

> [W]hile the question whether a dispute is arbitrable is for the court, the judicial inquiry "is confined to ascertaining whether the party seeking arbitration is making a *claim which on its face* is governed by the contract." Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.
>
> * * *
>
> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the *arbitration clause* is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." . . . Absent an "*express provision* excluding [a] particular grievance from arbitration" or the "*most forceful evidence* of a pur-

[20] See, e.g., *Electrical Workers Union v Magnavox Co,* 286 F2d 465 (CA 6, 1961); *Retail Store Employees Union v Sav-On Groceries,* 508 F2d 500 (CA 10, 1975). See also St. Antoine, *supra,* 75 Mich L R 1151, in which the author offers the following example:

> For example, an arbitrator who is empowered to decide whether an employer has unreasonably increased assembly-line quotas is not authorized to order the parties to negotiate for engineering studies to guide further quota disputes. [Citing *Magnavox Co, supra.*]

[21] Parties may agree to arbitrate the contractual issue of arbitrability.

> pose to exclude the claim," . . . the matter should go to arbitration. [*Kaleva, supra,* 591-592 (quoting *United Steelworkers of America v American Mfg Co,* 363 US 564, 568; 80 S Ct 1343; 4 L Ed 2d 1403 [1960]).]

It follows that an order compelling arbitration may not be denied by accepting an employer's assertion that a perfect contractual defense to the grievance exists. See, e.g., *Butte Miners' Union v Anaconda Co,* 159 F Supp 431 (D Mont, 1958) (discussed in *Firestone Tire & Rubber Co v United Rubber Workers,* 168 Cal App 2d 444; 335 P2d 990 [1959]).[22] The issue in such cases is not whether the grievance is meritorious, but whether the party is entitled to have the issue determined in the forum designated in the agreement.[23]

In the present case, the school district has not contested the arbitrability of the grievance on its

[22] It also follows that a party may not achieve, in effect, the arbitration of a dispute categorically excluded from arbitration by narrowly contriving a grievance which is, on its face, within the arbitration agreement. See *Collins Radio Co,* n 19 *supra,* 219.

[23] The typical arbitration contract in a collective bargaining agreement does not restrict arbitration to meritorious grievances. In *Firestone Tire & Rubber Co, supra,* the court quoted the following passage from Cox, *Current problems in the law of grievance arbitration,* 30 Rocky Mtn L R 247, 261 (1958), to express this point:

> [The typical arbitration clause] do[es] not restrict its scope to meritorious disputes or two-sided disputes, still less are they limited to disputes which a judge will consider two-sided. Frivolous cases are often taken, and are expected to be taken, to arbitration. What one man considers frivolous another may find meritorious, and it is common knowledge in industrial relations circles that grievance arbitration often serves as a safety valve for troublesome complaints. Under these circumstances it seems proper to read the typical arbitration clause as a promise to arbitrate every claim, meritorious or frivolous, which the complainant bases upon the contract. The objection that equity will not order a party to do a useless act is outweighed by the cathartic value of arbitrating even a frivolous grievance and by the dangers of excessive judicial intervention.

face in the first instance. The school district emphasizes that the submitted grievance did not implicate the preamble: nor did it require the arbitrator to determine the reasonableness and necessity of policy decisions within the scope of management rights specifically reserved, and to order, by implication, the school district to increase its staff.[24]

In exceeding his authority, the arbitrator went beyond the specific provisions alleged to have been violated by the grievant. It could not have been "said with positive assurance," however, "that the arbitration clause [was] not susceptible of an interpretation that cover[ed] the asserted dispute." *Kaleva, supra,* 591-592 (quoting *American Mfg Co, supra,* 568). The school district did not waive its right to meaningful judicial review, however limited, by not anticipating that the arbitrator would disregard express provisions of the arbitration contract circumscribing his jurisdiction and authority.

The school district did not waive its legal right to have the arbitration agreement between itself and the association enforced in accordance with its terms by not challenging the arbitrability of the grievance in the first instance. Whether the grievance was arbitrable on its face is entirely distinguishable from the issue whether the award was properly vacated on the ground asserted by the school district.

IV

In conclusion we note that, while the analysis of

[24] The grievance stated:

> On or about August 21, 1980 a vacancy arose for which I was qualified. This position was not offered to me in accordance with Article II, Section 3, Paragraph C[3][e] (Page 13).

the dissent is arguably not illogical to the extent that it expands upon the Court of Appeals reasoning, we are persuaded that taken to its logical conclusion that analysis would defeat the clearly expressed intent of the parties concerning the scope and terms of their arbitration agreement.

The dissent's conclusion that the arbitrator was "required" to construe § F of the preamble (which reflects the "mutual pledge" of "[t]he District and the Association . . . to continue to recognize the full constitutional and civil rights of all teachers") *notwithstanding* the parties' clearly expressed intent not to entrust the appropriate interpretation of that provision to final and binding arbitration, is problematic. As noted by the dissent, the grievance *did not* assert "sex discrimination"; *nor* did it specifically challenge the school district's authority to establish gender as a bona fide occupational qualification for the position of girls' physical education teacher. The grievance was narrowly confined to the seniority and recall provisions, and, as the dissent also notes, had it asserted "sex discrimination" it would not have been arbitrable, because disputes concerning such matters were expressly excepted from the arbitration agreement. The dissent fails to acknowledge, however, that the answer filed in response to that narrowly confined grievance was equally confined; the school district did not defend by asserting that it was entitled to make gender a bona fide occupational qualification any more than the grievance contended otherwise. To the extent that the grievance did not make such an assertion, it was unnecessary for the school district to defend against it. In deciding that narrowly confined and, therefore, arbitrable grievance, the arbitrator was not required to interpret § F of the preamble and to decide the bona fide occupational qualification

question which all agree would not have been arbitrable if implicated in the grievance.

Nevertheless, the arbitrator's award was dependent upon his conclusion that sex could not be made a qualification in this case because the school district failed to shoulder its burden of establishing the "reasonableness and necessity" of that qualification.[25] In our judgment, in so concluding, the arbitrator exceeded the narrow confines of the submission which rendered the grievance arbitrable in the first instance. To agree with the dissent that the arbitrator was actually "required" to do so would nullify the parties' express agreement excepting such matters from their arbitration contract. Pursuant to that agreement, *neither* party could compel the other to submit to final and binding arbitration concerning such matters.

Notwithstanding whether "all would agree that race, creed, religion, color, or national origin should not be a job qualification in a public school," *post,* p 173, the parties agreed, by express provision in their arbitration contract, to exclude such matters from those subject to final and binding arbitration. Without discussing whether "[s]ex or age may in some cases appropriately be made a job qualification," *post,* p 174, a question entirely irrelevant to the disposition of this case, we agree and it has not been disputed that "[w]hether a school district may properly [do so] in a particular case is a question [at least in part] of the construction of the agreement." The proper forum in which to resolve such a constructional issue, however, is an entirely separate matter which, in the present

[25] The arbitrator's analysis in this regard seems to have been an attempt to apply the bona fide occupational qualification provision of the Michigan Civil Rights Act, MCL 37.2208; MSA 3.548(208), which imposes upon an employer "the burden of establishing that the qualification is *reasonably necessary* to the normal operation of the business." *Id.* (Emphasis added.) See n 13.

case, was expressly agreed upon in the parties' arbitration agreement.

The discussion set forth in parts IV and V of the dissenting opinion is, for the most part, misplaced. With regard to the discussion in part IV, we express no opinion concerning the soundness of any of the specific provisions of the arbitration agreement, or the construction of the collective bargaining agreement as a whole. Nor do we comment on the merits of the arbitral award granted in this case. Respecting part V, we note that the arbitrator's award has not been challenged as "unreasonable," or as "unsupported by principles of contract construction [or] the law of the shop." Finally, we express no opinion concerning the dissent's comment with regard to the hypothetical possibility, or likelihood, of another arbitral decision in this case except to note that that question is entirely irrelevant to our decision.

We reverse the decision of the Court of Appeals, and reinstate the circuit court's decision vacating the award on the ground that the arbitrator clearly exceeded his authority which was expressly and unambiguously circumscribed in the arbitration contract.

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

LEVIN, J. The question presented is not whether a male physical education teacher should or will supervise a high school girls' locker and shower room. However this appeal were to be decided, one can be assured that the supervisor of the girls' locker and shower room will be a female.

Enforcement of the school district's decision to include locker and shower room supervision as a duty of a physical education teacher and a qualifi-

cation of the job would—because quite obviously a male cannot appropriately supervise a girls' locker or shower room—deprive Larry Grinder, a male teacher, of the job to which, all concede, he otherwise would be entitled under the seniority clause of the collective bargaining agreement. Conversely, failure to enforce the school district's decision would most likely mean that the school district would be obliged to provide female supervision of the locker and shower room.

The arbitration award upholding Grinder's grievance states that he "must be permitted" to exercise his seniority rights without regard to sex. Because Grinder could not appropriately supervise the girls' locker and shower room, the award in effect means that the school district could not make locker and shower room supervision a duty and qualification of the job, when to do so would deprive a teacher of a job to which he would otherwise be entitled under the seniority clause.

The question presented is whether the arbitrator misunderstood or exceeded his authority in deciding that the seniority clause of the collective bargaining agreement required that the position of physical education teacher be assigned without regard to the sex of the teacher, although this in effect rendered unenforceable, in the case of a male teacher, the school district's decision to include locker and shower room supervision as a duty and qualification of the job. I would hold that the arbitrator did not exceed his authority.

I

The circuit judge set aside the award on the ground that the arbitrator exceeded his authority in relying, in reaching his decision, on the statement in the preamble of the collective bargaining

agreement that "[t]he provisions of this Agreement shall be applied without regard to race, creed, religion, color, *sex,* age or national origin." (Emphasis supplied.)

The Court of Appeals reversed, stating that "an arbitrator is justified in taking the parties' recitals, such as are contained in the preamble in the present case, into consideration to determine the parties' intentions."[1] The Court also said that the school district's reliance on the provision of the collective bargaining agreement stating that "grievances based on" the "preamble shall not proceed past step 5 of the grievance procedure"—which means that grievances concerning the preamble are not arbitrable—"[was] misplaced" because the grievance was based on the seniority clause and "was not based on the preamble." The Court also rejected the school district's argument that the arbitrator exceeded his authority by failing to give full recognition to the management rights clause of the collective bargaining agreement, stating that "[i]n finding that the [school district] was not empowered by the management rights provision to make gender a qualification for the job at issue, the arbitrator was merely interpreting the contract, and thus acting within his authority." I agree with the analysis of the Court of Appeals and would affirm.

II

The collective bargaining agreement provided that if a teacher resigns, the position shall be awarded to "the next available teacher on the Seniority List who *qualifies* for the vacancy." (Em-

[1] *Port Huron Area School Dist v Port Huron Ed Ass'n,* unpublished opinion per curiam of the Court of Appeals, decided September 9, 1983 (Docket No. 63636).

phasis supplied.) Grinder filed a grievance asserting that a vacancy arose for which he was qualified, but the position was not offered to him although he was the next available teacher on the seniority list. The school district responded that Grinder did not meet the qualifications required to fill the position because "[o]ne of the qualifications used by the [district] during the placement and staffing process was that a teacher who teaches girls' physical education classes must be a female instructor in order to provide locker room supervision."

The arbitrator noted the seniority clause of the collective bargaining agreement and the language of the preamble. He concluded that the violation of the seniority clause and "of the Preamble is clear and the competing reference to the use of the management rights clause" was not persuasive.

The management rights clause provided that the school district "retains all rights, power and authority exercised or had by it prior to the date hereof, *except as specifically limited by express provisions of this Agreement and under* [*the public employees relations act*]."[2] (Emphasis supplied.) The school district claimed that it had retained under the management rights clause the right to establish qualifications for the job of physical education teacher. Although it had in the past provided for locker room supervision by aides or teachers of the same sex as the students, and teachers then could have qualified as physical education instructors without regard to sex, the school district claimed that it had retained the right to include as a qualification for the job that a physical education teacher be of the same sex as the students so that the teacher could supervise the locker and shower rooms.

[2] MCL 423.201; MSA 17.455(1).

In upholding the grievance, the arbitrator said that locker room supervision had always been one of the responsibilities of a physical education teacher and part of the job, with the exception of the use of aides for one year. It had not, however, "been *applied* as a sex qualification up to this point only because it had been possible to arrange assignments in the past so that locker room supervision was done by same-sex teachers." (Emphasis supplied.)

The arbitrator said that the "use of sex in the application" of the seniority provision "is not authorized" and—referencing the management rights clause—is "specifically limited by express provisions of this agreement," namely, the provision of the preamble which "forbids use of sex in applying provisions of the agreement." He said that the school district's "power under the management rights clause to establish sex as a bona fide occupational requirement is juxtaposed against the clear limitations expressed in the recall and nondiscrimination provisions. Under these circumstances, especially considering the traditional importance any union places on seniority protection, the District has some affirmative burden to persuade the arbitrator of the operational reasonableness and necessity for its action."

The arbitrator said that while "making sex a bona fide occupational requirement" might "be desirable and to not do so might be inconvenient," "in the face of such clear and express contractual language limiting the District's rights and in the absence of compelling reasons to the contrary the conclusion must be made that the contract has been violated."

The arbitrator rejected the school district's claim that locker and shower room responsibility is a significant part of the teachers' total responsi-

bility, saying that while such responsibility consumes twenty-five percent of the class period, "it is difficult to conclude that the time involved remotely is representative of the educational content involved in the other seventy-five percent."

The arbitrator added that the award does not authorize other-sex supervision of locker and shower rooms, but rather provides that in "the fact situation presented sex cannot be used as an occupational requirement here."

III

The opinion of the Court reverses the judgment of the Court of Appeals and reinstates the circuit court's decision vacating the award on the ground that the arbitrator, in relying in construing the collective bargaining agreement on the language of the preamble requiring that the provisions of the agreement be applied without regard to sex, exceeded his authority because the agreement expressly provided that a grievance concerning a violation of the preamble was not subject to arbitration.

Grinder's grievance did not, however, "concern" a violation of the language of the preamble requiring that the agreement be applied without regard to sex. His grievance concerned an asserted violation of the seniority clause of the agreement.

The question whether Grinder's seniority rights were violated depends on whether he was "qualif[ied] for the vacancy." Whether he was qualified or not depends in turn on whether the school district retained the right under the management rights clause to establish sex as a job qualification. The arbitrator, in construing the contract, decided that the school district did not retain the right to establish sex as a job qualifica-

tion because the school district's rights under the management rights clause were limited by the words, "except as specifically limited by express provisions of this Agreement," and the preamble, requiring that the provisions of the agreement shall be applied without regard to sex, was a specific limitation by express provision of the agreement.

Because the preamble is a specific limitation by express provision of the agreement, the arbitrator did not exceed his authority in considering the language of the preamble—indeed he was required to do so—in deciding the correct construction of the agreement. Although a grievance could not be based on the preamble, it was nonetheless a specific limitation to be considered in the construction of the agreement.

If the school district had made race, creed, religion, color, or national origin a qualification for becoming a physical education teacher and the arbitrator had, in upholding a grievance on the basis of the seniority clause, relied on the language of the preamble stating that "[t]he Provisions of this Agreement shall be applied without regard to race, creed, religion, color, sex, age, or national origin" in deciding that the school district could not do so, it would I think be clear—because all would agree that race, creed, religion, color, or national origin should not be a job qualification in a public school—that reliance on the language of the preamble in construing the agreement, where the grievance was not based on the preamble, was entirely proper.

If Grinder had filed a grievance asserting sex discrimination or discrimination on the basis of race, creed, religion, color, age, or national origin, the grievance could not have been taken beyond Step 5 and hence would not have been arbitrable.

In claiming that the seniority provisions of the agreement had been violated, Grinder did not assert sex discrimination. It was rather the school district that defended against his grievance on the basis that it had a right to establish sex as a job qualification. The question whether it did or did not have the right to establish sex as a job qualification under the circumstances of the instant case was a question concerning the construction of the agreement and not a question of arbitral authority; the preamble—being a specific limitation in the agreement—was properly considered in deciding the correct construction without regard to whether a grievance could be based on the preamble.

Sex or age may in some cases appropriately be made a job qualification. Whether a school district may properly make sex a job qualification in a particular case is a question of the construction of the agreement. On that question, the limitation in the agreement requiring that the provisions of the agreement shall be applied without regard to sex was properly, indeed was required to be, considered by the arbitrator in construing the agreement. The arbitrator did not exceed his authority in deciding, in partial reliance on the preamble, that the correct construction of the agreement was that the school district could not make sex a job qualification where to enforce a same-sex limitation would deprive a male teacher of the job he would otherwise be entitled under the seniority clause of the agreement, the grievance having been based on the seniority clause and not the preamble.

IV

The school district also contends that the arbi-

trator exceeded his authority in substituting his judgment for that of the school district concerning the reasonableness of the decision of the district to establish sex as a job qualification.

The collective bargaining agreement provided that the arbitrator "shall be limited to deciding whether the District has violated the specific Articles or Sections of this Agreement. It is agreed (except as to the provisions set forth in this Agreement) he shall have no power to change any practice, policy or rule of the District through substituting his judgment for that of the District as to the *reasonableness* of any practice, policy, rule or any action taken by the District." (Emphasis supplied.) The arbitrator stated, as previously noted, that "the District has some affirmative burden to persuade the arbitrator of the operational *reasonableness* and necessity for its action," and of "the absence of compelling *reasons* . . . ." (Emphasis supplied.) Earlier in his opinion he said that "many arbitrators seek to determine whether the disputed power is related in a *reasonable* manner to the orderly and efficient operation of the enterprise." (Emphasis supplied.)

The foregoing limitation on the power of the arbitrator, relied on by the school district, by its terms excepts "the provisions set forth" in the collective bargaining agreement. The foregoing limitation thus does not preclude the arbitrator from deciding—on the contrary he is obliged to decide—"whether the District has violated the specific Articles or Sections of this Agreement."

The article or section of the collective bargaining agreement invoked by Grinder was the seniority clause. The seniority clause is a "specific" article or section of the agreement. The "provisions set forth" in the seniority clause were "ex-

cept[ed]" from the foregoing limitation on the authority of the arbitrator.

Grinder's rights under the seniority clause and the school district's prerogatives under the management rights clause were in conflict. The resolution of that conflict required a construction of the collective bargaining agreement read as a whole.

It is not surprising that the arbitrator concluded that the collective bargaining agreement, read as a whole, did not confer on the school district an unbridled power to establish the duties and qualifications of a job. If the agreement were construed as conferring on the school district the power under the management rights clause to establish the duties and qualifications of a job without regard to "reason," "reasonableness," or any standard or limitation, then the school district could at will vary and change, as each job opening arose, the criteria for each job, and the seniority clause would then be considerably reduced in importance if effectual at all.

Nor is it surprising that the arbitrator concluded that read as a whole—including in that reading the preamble barring consideration of sex —the agreement did not confer on the school district an unbridled power to establish sex as a job qualification.

V

In deciding whether, reading the agreement as a whole, the school district properly established sex as a job qualification, the arbitrator necessarily considered the relative importance of the competing rights and prerogatives, and made a judgment based on reason. It does not appear that the arbitrator's decision, although he considered what was

"reasonable" in his assessment of reason, was the result of a misapprehension by him of his powers.

The arbitrator concluded that although the school district could lay off teachers and reduce staff as an austerity measure, it could not, in light of what the arbitrator saw as the relative unimportance of locker and shower room supervision in comparison to the educational responsibility of a physical education teacher, consistent with the "traditional importance" of the seniority clause, establish sex as a job qualification. That decision was not in "manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop . . . ."[3]

The arbitrator did not require the school district to increase or change the staffing requirements. He required that Grinder be assigned as a physical education teacher. How, or if at all, the girls' locker or shower room was supervised was not covered by his award. A senior student or students, a parent volunteer or volunteers, classroom teachers other than physical education teachers or

[3] Bearing this in mind and perceiving that the Supreme Court's announced standards in reviewing commercial awards call for the exercise of judicial restraint, we must conclude that such a philosophy of restricted review compels even less judicial interference in matters arising from labor arbitration. At the very least this means that the interpretation of labor arbitrators must not be disturbed so long as they are not in "manifest disregard" of the law, and that "whether the arbitrators misconstrued a contract" does not open the award to judicial review.

Accordingly, we hold that a labor arbitrator's award does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award. [*Ludwig Honold Mfg Co v Fletcher,* 405 F2d 1123, 1128 (CA 3, 1969).]

administrators might have assumed or shared this responsibility. Then again it might have been or become necessary or advisable to hire part-time or other assistance, but that would be because the school district found that to be the preferable solution. An arbitrator is not necessarily precluded from making an award because one side or another of the controversy might feel constrained thereafter to incur expenditures that the arbitrator could not order.

In reversing the decision of the Court of Appeals and affirming the circuit court's decision vacating the arbitrator's award, the majority acknowledges that "[t]here is no contention, in the present case, that the merits of the award here in question are subject to review."[4] The majority thus does not preclude another arbitral decision in which the arbitrator avoids reference to the preamble, "reasonableness," and other expressions viewed by the majority as indicating that the arbitrator exceeded his contractual authority.

I would affirm the decision of the Court of Appeals.

[4] *Ante*, p 151.

TUCKER v EATON

Docket No. 77860. Decided October 3, 1986. On application by the defendant for leave to appeal, the Supreme Court, in lieu of granting leave, reversed in part the judgment of the Court of Appeals denying the defendant's motion for accelerated judgment and remanded the case to the circuit court for further proceedings.

Kathleen A. Tucker, as administratrix of the estate of Edward J. Tucker, deceased, brought an action in the Wayne Circuit Court against Edward E. Eaton, alleging assault and battery and the wrongful death of the decedent following a stabbing in a bar. A second amended complaint named Detroit General Hospital as an additional defendant, alleging malpractice in the treatment of the decedent. Following the hospital's failure to answer, the plaintiff filed a default. The City of Detroit, on behalf of the hospital, moved to set aside the default and quash service and the second amended complaint, and for accelerated judgment, asserting that the period of limitations for medical malpractice actions had expired. The court, Roland L. Olzark, J., denied the motion to set aside the default. The Court of Appeals, D. E. HOLBROOK, P.J., and T. M. BURNS and CAPRATHE, JJ., reversed, finding that although the plaintiff failed to effect service of process upon the city in the manner prescribed by court rule, the city was estopped from asserting improper service because it had established a systematic alternative method for accepting service with which the plaintiff had complied. It held that the default should have been set aside, but ruled that the city's motion for accelerated judgment should have been denied (Docket No. 74924). The city applies for leave to appeal.

In an opinion per curiam, signed by Chief Justice WILLIAMS and Justices BRICKLEY, CAVANAGH, BOYLE, and RILEY, the Supreme Court *held:*

A case of estoppel is not made out where there is no showing that the party asserting estoppel had knowledge of the action or inaction of the party being estopped. In this case, there is no evidence that a proper city official had notice of the lawsuit within the limitation period or that a conscious decision was

made to delay the raising of the defect in service until after the limitation period had run.

Reversed and remanded.

Justices LEVIN and ARCHER would grant leave to appeal.

147 Mich App 363; 383 NW2d 203 (1985) reversed.

Lakin, Worsham & Victor, P.C. (by *Larry A. Smith*), for the plaintiffs.

Law Offices of James S. Goulding, P.C. (by *Gregory W. Finley*), for the defendants.

PER CURIAM. The Court of Appeals has ruled that defendant City of Detroit is estopped from denying service of process in this case. We hold that plaintiffs have failed to make out a case of estoppel. We reverse the judgment of the Court of Appeals in part and remand the case to the Wayne Circuit Court for further proceedings not inconsistent with this opinion.

I

On September 10, 1980, plaintiff Kathleen Tucker, as administratrix of the estate of Edward J. Tucker, filed a complaint against defendant Edward Eaton, alleging assault and battery and wrongful death in the stabbing of plaintiff's decedent. The complaint alleges that the stabbing occurred at a bar in Detroit on December 16, 1978. Mr. Tucker languished until he died of his wounds January 9, 1979. Defendant Eaton never answered the complaint.

On December 16, 1980, plaintiff filed a first amended complaint alleging dramshop actions[1] against two bars and their operators. These claims were later settled.

On January 6, 1981, plaintiff Tucker filed a

[1] MCL 436.22; MSA 18.993.

second amended complaint.[2] The second amended complaint added Count IV and named Detroit General Hospital[3] as an additional defendant. Count IV alleged medical malpractice contributing to Mr. Tucker's death. This case is concerned with Count IV and those aspects of Counts V and VI which relate to defendant city.

The return of service of the second amended complaint was filed January 8, 1981. The deponent indicated that the summons and complaint were served on "Detroit General Hospital Administrative Secretary." The settled statement of facts identifies this secretary as Ella Alston.[4]

On June 26, 1981, by leave granted, plaintiff Tucker filed a third amended complaint adding Counts V and VI which alleged causes of action for

[2] No answer had been received to the prior complaints as of the filing of the second amended complaint. Plaintiff did not seek leave of the Court before filing the second amended complaint. See former GCR 1963, 118.1, currently MCR 2.118(A).

[3] Plaintiff does not dispute the city's representation that Detroit General Hospital was not a separate corporate entity, but merely a facility operated by the City of Detroit. The Court of Appeals directed the circuit court to allow amendment of the pleadings to name the proper defendant. The city does not claim error on this basis at this level. We shall refer to the City of Detroit and Detroit General Hospital as defendant in the rest of this opinion.

[4] Ms. Alston was deposed by plaintiff. During the time in question, she was secretary to the hospital controller, Stanley Rich, who was also deposed. They stated that the hospital was in the process of closing down from June 1980 through February 1981. Ms. Alston remembered receiving from thirty-five to fifty requests for medical records daily. Ms. Alston turned the requests over to the medical records supervisor. She did not remember receiving any summons or complaint. In answer to a hypothetical question, she said that if she had received a legal document that she did not know how to process, she would have given it to Mr. Rich. Ms. Alston further indicated that the controller's office was not labeled by any sign and that it was the third in a series of three business-related offices situated on a corridor leading from an entrance to the hospital. The office was not generally open to the public.

Mr. Rich did not remember receiving any summons or complaint. If he had noticed receiving any, he would have turned them over to the city law department. He indicated that during the close-out period, his hospital received ten to fifteen requests for records daily, which were turned over to a reduced records staff.

herself and for Edward W. Tucker, decedent's son. Peculiarly, the third amended complaint fails to list Detroit General Hospital as a defendant; nor does it make direct reference to Detroit General Hospital. However, it incorporates by reference Count IV of the second amended complaint.

On May 13, 1982, plaintiff filed a default against Detroit General Hospital accurately reciting that Detroit General Hospital had failed to appear, answer, or file a motion in lieu of an answer. On May 11, 1982, counsel for plaintiff sent a letter to an assistant corporation counsel for the City of Detroit giving notice of the default against Detroit General Hospital.[5] On July 12, 1982, counsel for plaintiff mailed a copy of the summons and second amended complaint to the City of Detroit, Law Department. On September 8, 1982, counsel for plaintiff mailed a copy of the second amended complaint to present counsel for the City of Detroit, followed by a copy of the summons on September 28, 1982.

On April 26, 1983, the City of Detroit appeared and filed motions on behalf of Detroit General Hospital to set aside the default, to quash service, and to quash the second amended complaint. The motions were adjourned to allow discovery as to service of process. The city filed a motion for accelerated judgment, raising the statute of limitations[6] on behalf of both the city and the hospital. On August 19, 1983, the circuit court denied the motion to set aside the default, rendering the

[5] The Certified Concise Statement of Facts indicates that plaintiff offered to set aside the default if the city would answer. A copy of the letter is not in the file. We do not know if the letter required defense on the merits or would have permitted raising a defense under the statute of limitations.

[6] The period of limitations for medical malpractice is two years, MCL 600.5805; MSA 27A.5805. But see *Hawkins v Regional Medical Laboratories, PC,* 415 Mich 420; 329 NW2d 729 (1982).

other motions moot. The order was entered on September 6, 1983.

The City of Detroit applied to the Court of Appeals for leave to appeal, which that Court granted. The city argued that the circuit court should have set aside the default and granted accelerated judgment. The Court of Appeals agreed that the default should have been set aside. However, it ruled that the city's motion for accelerated judgment should have been denied. 147 Mich App 363; 383 NW2d 203 (1985).

The city has filed a timely application for leave to appeal with this Court.

II

The Court of Appeals decision to deny accelerated judgment turns on the propriety of service of process on Ms. Alston. That service occurred on January 8, 1981, within two years of Mr. Tucker's death on January 9, 1979. If that service was proper, then the period of limitation had not expired.[7]

Former GCR 1963, 105.6,[8] in effect at the time, indicated:

> Service of process upon public, municipal, quasi-municipal, or governmental corporations, unincorporated boards, or public bodies, may be made by leaving a summons and a copy of the complaint with
>
> * * *
>
> (2) the mayor, city clerk, or city attorney, in the case of cities . . . .

Service must be made upon one of the listed

[7] See n 6.

[8] MCR 2.105(G) currently contains a similar requirement.

officials, *Brooke v Brooke,* 272 Mich 627; 262 NW 426 (1935). Ms. Alston does not hold any of the listed offices.

The Court of Appeals held that the facts of this case created an exception to the requirements of former GCR 1963, 105.6:

> Nonetheless, we find that plaintiff's failure to serve the city in the manner required by the court rule was not fatal, because service in this case falls within an exception to that rule. The exception is that a defendant who has established a systematic alternative method of accepting service of process is estopped from asserting that service in accordance with that method was improper. This exception was recognized in dicta in *Fulton* [*v Citizens Mutual Ins Co,* 62 Mich App 600, 604; 233 NW2d 820 (1975)]:
>
> "Plaintiff contends that the defendant has established a systematic method of accepting service of process through its receptionist-telephone operator and has led the public in general and process servers in particular to believe that valid service is accomplished by leaving the specific documents in the possession of this agent of the defendant. There was insufficient time to conduct discovery to determine whether the switchboard operator actually had the authority to accept service. Substantiating this allegation, however, is the fact that the defendant in the instant case was also the defendant in *Guastello* [*v Citizens Mutual Ins Co,* 11 Mich App 120; 160 NW2d 725 (1968)], and there it was also represented by counsel that 'an employee' of the company accepted service." 62 Mich App 606-607.
>
> Plaintiff in the present case cites at least 13 instances since 1975 wherein the hospital was named as a defendant and service of process was made and accepted by administrative personnel at the hospital. Plaintiff claims that 11 of these 13 cases were defended on the merits. We also note that there was evidence in the present case that

> the hospital received and accepted numerous subpoenas for medical records which were served upon administrative personnel. This further buttresses plaintiff's argument that the city established a systematic alternative method of accepting service, both as to the service of summons and complaints and the service of subpoenas for medical records. Because of this established system of accepting service, we find that the city is estopped from asserting that service on administrative personnel at the hospital was improper. We thus conclude that the court had in personam jurisdiction over the city. See *Dogan v Michigan Basic Property Ins Ass'n,* 130 Mich App 313, 318; 343 NW2d 532 (1983). [147 Mich App 370-371.]

The Court of Appeals analysis has two flaws. First, a case of estoppel is not made out where there is no showing that the party asserting estoppel had knowledge of the action or inaction of the party being estopped. Second, in contrast to the cited cases, there is no evidence that a proper official had notice of the action within the limitation period.

A

In *Fulton v Citizens Mutual Ins Co,* 62 Mich App 600; 233 NW2d 820 (1975), plaintiff Fulton's residence suffered a fire. Defendant insurer refused to reimburse the loss. Plaintiff Fulton filed a complaint eight months after the fire and served process on the receptionist-switchboard operator at the defendant's office. Defendant insurer admitted it had timely knowledge of the action. After the insurance policy's limitation period had run, the insurer filed a motion for accelerated judgment alleging that there was no effective service within the limitation period. Plaintiff Fulton argued that the defendant insurer had established an alternate

means of accepting service through a receptionist-stenographer. The Court of Appeals did not accept this argument, noting that the authority of the receptionist-stenographer to accept service had not been established because of lack of discovery. The Court concluded that the issue of proper service was irrelevant. It found the defendant insurer estopped to assert the limitations period because it waited until after the period had expired to file its motion for accelerated judgment.

In *Dogan v Michigan Basic Property Ins Ass'n,* 130 Mich App 313; 343 NW2d 532 (1983), a fire occurred in property owned by plaintiff Dogan and insured by defendant. After denial of a prompt claim, plaintiff filed suit. The process server averred that defendant's receptionist directed him to Sharon Smith as the "person designated to accept such service," 130 Mich App 316. Ms. Smith was served with the summons and complaint. Copies were also mailed to defendant insurer's office. Defendant insurer failed to answer. The trial court granted a motion for default. Defendant insurer moved to set aside the default. The trial court denied that motion and rehearing. The Court of Appeals affirmed, stating:

> In *Wilson v California Wine Co,* 95 Mich 117; 54 NW 643 (1893), wherein plaintiff's process server was directed by an officer of defendant company to serve another individual, by stating that the individual was the person to be served with the summons, and this evidence was uncontradicted, the Michigan Supreme Court held that defendants were estopped from denying that service was proper under the circumstances.
>
> In the present case, we find *Wilson, supra,* is applicable. Thus, we find that the defendant is estopped from raising the defense of improper service due to its representation to plaintiff's proc-

> ess server that valid service was accomplished by leaving the summons and copy of the complaint with its clerk, Sharon Smith. Plaintiff has presented sufficient evidence to sustain a conclusion that the defendant caused the plaintiff to detrimentally rely upon the validity of the service. [130 Mich App 318.]

In *Wilson, supra,* the process server was told by William Cunningham, secretary-treasurer-general manager of defendant company, and Lawrence J. Quinn, one of its stockholders, that James Quinn was the president of the company. Process was served on both Quinns. Defendants argued that James Quinn was not the company's president and that service on the company had not been achieved. This Court stated, "[A] more complete estoppel in fact could not be shown . . . ." 95 Mich 120.

B

"[I]t is the general rule that exceptions to statutes of limitation are to be strictly construed." *Mair v Consumers Power Co,* 419 Mich 74, 80; 348 NW2d 256 (1984). *Fulton* and *Dogan* each relied on the doctrine of estoppel. Long ago Justice COOLEY explained:

> The doctrine of estoppel rests upon a party having directly or indirectly made assertions, promises or assurances upon which another has acted under such circumstances that he would be seriously prejudiced if the assertions were suffered to be disproved or the promises or assurances to be withdrawn. But as the doctrine when applied operates to take away legal rights, it is no more than common justice to require that the facts which are supposed to call for its application shall be unquestionable, and the wrong which is to be prevented

shall be undoubted. [*Maxwell v Bay City Bridge Co,* 41 Mich 453, 467-468; 2 NW 639 (1879).]

More recently, Justice COLEMAN wrote for the Court:

> Generally, to justify the application of estoppel, one must establish that there has been a false representation or concealment of material fact, coupled with an expectation that the other party will rely upon this conduct, and knowledge of the actual facts on the part of the representing or concealing party. [*Lothian v Detroit,* 414 Mich 160, 177; 324 NW2d 9 (1982).]

In this case, there appears to be no indication that plaintiff was misled by any representation or concealment of fact by defendant. Plaintiff did not assert estoppel until August 18, 1983, on the basis of information gathered by an investigator for plaintiff's counsel on or after August 11, 1983. There is no indication that plaintiff or plaintiff's process server had this information or relied on it on January 8, 1981, the date of service on Ella Alston.[9] Thus there is no showing of detrimental reliance.

[9] The investigator's affidavit indicates she found seventy-five Wayne Circuit Court files naming Detroit General Hospital as a defendant from 1975 to 1980. She stated that thirteen files contained returns indicating service on administrative personnel of Detroit General Hospital. There is no indication whether appropriate city officials were otherwise served. Copies of some of the materials from the files are attached to the investigator's affidavit. In no instance was service made upon Ella Alston. In no case was service made by plaintiff's process server. Two of the sets of materials are not analogous. Of the remaining eleven, service was made six times upon Geraldine Green, secretary to the commissioner's office; three times upon Betty Edgecomb, secretary to the director; once upon the hospital director, personally; and once upon an assistant administrator, personally. In his deposition, hospital controller Rich identified Ms. Green, Ms. Edgecomb, and Mr. Himmelsbach as working in the same office at the "Administrative Seat" of the hospital.

C

The Court of Appeals in this case said it relied on dicta in *Fulton.* Actually, it relied on a summary of an argument of a party rejected by the *Fulton* panel. The only dicta in *Fulton* recognizing an exception to the statute of limitations is:

> While in dictum, this Court agrees that the defendant's knowledge of the defective service and its failure to file a motion to quash, waiting instead until the expiration of the 12-month period, estops the company from asserting the same, this Court has ruled to the contrary. *Mason v Letts* [14 Mich App 330; 165 NW2d 481 (1968).] [62 Mich App 608.]

This case is distinguished[10] from *Fulton* because plaintiff has failed to establish that defendant waited until the limitation period had expired with knowledge of defective service. The parties are satisfied that Ms. Alston received the summons and complaint. Ms. Alston said she did not remember the documents and she did not demonstrate knowledge of the significance of documents of this sort at her deposition. Plaintiffs have not established that any person with authority to act for defendant in this type of matter had knowledge of the lawsuit or that defendant made a conscious decision to delay raising the defect in service until after the limitation period had run.[11]

Pursuant to MCR 7.302(F)(1), in lieu of granting

[10] We do not comment on whether these dicta were correct. See *Roberts v Auto-Owners Ins Co,* 422 Mich 594; 374 NW2d 905 (1985).

[11] Plaintiff asserts that defendant answered and defended on the merits eleven of the thirteen cases described in n 9. This is similar to the argument of plaintiff in *Fulton* summarized by the Court of Appeals in that case but not adopted, even in dicta. If anything, the action of the city in the eleven cases was consistent with the duty described in the *Fulton* dicta, quoted in the text above. The city

leave to appeal, we reverse that portion of the Court of Appeals judgment which denies defendant's motion for accelerated judgment. We remand the case to the Wayne Circuit Court for further proceedings not inconsistent with this opinion. In all other respects, the application for leave to appeal is denied.

WILLIAMS, C.J., and BRICKLEY, CAVANAGH, BOYLE, and RILEY, JJ., concurred.

LEVIN and ARCHER, JJ. We would grant leave to appeal to decide the questions presented following briefing and argument by the parties.

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apparently answered those cases of which it had timely notice, rather than waiting to ensnare the unwitting plaintiff. The city's willingness to defend suits of which it has timely notice should not be punished by default in a case of which it had no timely notice, absent clear grounds for estoppel. Moreover, to the extent that any practice is shown by the city's defense of those cases, the practice deals only with service on the hospital's main administrative office, not the controller's office.

PARKS v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE

Docket Nos. 75437, 75438. Argued March 4, 1986 (Calendar No. 2). Decided October 3, 1986.

Wayne Parks brought an action in the Muskegon Circuit Court against the Detroit Automobile Inter-Insurance Exchange, his personal automobile insurer, and Roadway Express, Inc., his self-insured employer, seeking no-fault benefits for injuries suffered in the course of his employment in a trailer owned by his employer. The plaintiff subsequently added the Michigan Department of State Assigned Claims Facility as a defendant. The court, James M. Graves, Jr., J., granted summary judgment for the employer, finding that, because the trailer in which the plaintiff was injured was not required to be registered in Michigan pursuant to a multistate registration agreement and because it had been operated in Michigan for less than thirty days within the calendar year in which the plaintiff was injured, the employer's ownership of the trailer could not subject it to liability under the no-fault act. The court further held that the DAIIE was required to provide no-fault benefits for the plaintiff. The Court of Appeals, MACKENZIE, P.J., and J. H. GILLIS and FITZGERALD, JJ., reversed (Docket Nos. 69520, 70751). The employer appeals.

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

An out-of-state vehicle not required to be registered in Michigan and not operated within the state for more than thirty days in a calendar year is not subject to the security or payment priority provisions of the no-fault act; where an employee is injured while an occupant of such a vehicle owned

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REFERENCES

Am Jur 2d, Automobile Insurance §§ 20 *et seq.*, 28 *et seq.*, 340 *et seq.*, 348 *et seq.*, 351 *et seq.*, 357.

Validity and construction of "no-fault" automobile insurance plans. 42 ALR3d 229.

See also the annotations in the ALR3d/4th Quick Index under No-fault Insurance.

by an employer, the personal automobile insurer of the employee is liable to pay personal protection benefits.

1. Owners or registrants of motor vehicles required to be registered in Michigan must maintain security for payment of personal protection benefits under § 3101(1) of the no-fault act. Nonresident owners or registrants of motor vehicles not registered in the state may not operate or permit such vehicles to be operated within the state for more than thirty days in any calendar year under § 3102(1) unless security for payment of benefits is continuously maintained. However, the state may enter into reciprocal compacts with other states regarding the operation and registration of trailers in interstate commerce. Under a compact applicable in this case, the trailer in which the plaintiff was injured was not required to be registered in Michigan. Thus, it was not subject to the mandatory security requirement of § 3101(1). In addition, the trailer was not operated within the state in excess of thirty days at the time of the plaintiff's injury and, thus, was not subject to the mandatory security requirements of § 3102(1).

2. Generally, persons injured in automobile accidents must look to their own insurers for no-fault benefits. The provision of § 3114 that employees injured in vehicles owned by their employers should look to the insurer of the employer's vehicle for payment of benefits applies only to vehicles required to be registered in Michigan. Thus, where, as in this case, the vehicle in which an injury occurs was not required to be registered in the state, the general rule applies.

3. The employer in this case, as a self-insurer, is not an insurer authorized to transact business within the state, and thus it is not required to provide personal protection insurance under § 3163. That section applies to cases in which injury arises out of the ownership, operation, maintenance, or use of a motor vehicle by an out-of-state resident. The plaintiff's injury arose out of the use of the trailer by the plaintiff, a Michigan resident. The employer is not subjected to liability merely because it owned the trailer. Under § 3163, it would be liable only if it were an insurer authorized to transact automobile liability insurance in the state.

4. A person entitled to no-fault benefits may obtain benefits from the Assigned Claims Facility under § 3172 where no personal protection insurance is applicable to the injury, no such insurance can be identified, or the only identifiable insurance is inadequate because of the financial inability of one or more insurers to fulfill their obligations. In this case, it is clear that the plaintiff's own personal protection insurance is appli-

cable to the injury, and his insurer cannot escape liability or shift its burden of coverage to the Assigned Claims Facility.

Reversed.

Justice CAVANAGH, joined by Justice ARCHER, dissenting, stated that where an employer's vehicle is not insured the no-fault insurer of an injured employee's personal automobile is liable for payment of personal protection insurance benefits. However, where an employer's vehicle is insured, including situations in which the vehicle is self-insured, the employer's insurer is liable to pay such benefits. An employee need only show that the injury occurred while occupying a motor vehicle owned or registered by the employer to recover benefits. The employer's vehicle is not required to be registered in the state or subject to the state's no-fault mandatory security provisions.

Justice LEVIN, dissenting, stated that the term "owner or registrant of a motor vehicle" as used in § 3114 of the no-fault act is not qualified by the concept "required to be registered in this state." There is no basis consistent with § 3163 of the act for differentiating the liability of insurers depending on whether an insured vehicle was registered in this state. Nor is there a basis to construe the act to provide that a self-insured under § 3101(4) has less responsibility than an insurer or to transfer the responsibility of a self-insured to an insurer.

138 Mich App 520; 360 NW2d 238 (1984) reversed.

OPINION OF THE COURT

1. INSURANCE — NO-FAULT — OUT-OF-STATE VEHICLES — INJURED EMPLOYEES.

An out-of-state vehicle not required to be registered in Michigan and not operated within the state for more than thirty days in a calendar year is not subject to the security or payment priority provisions of the no-fault act; where an employee is injured while an occupant of such a vehicle owned by an employer, the personal automobile insurer of the employee is liable to pay personal protection benefits (MCL 500.3101[1], 500.3102[1], 500.3114; MSA 24.13101[1], 24.13102[1], 24.13114).

2. INSURANCE — NO-FAULT — OUT-OF-STATE VEHICLES — INTERSTATE COMPACTS — MANDATORY SECURITY.

Entry by the state into a reciprocal compact with another state regarding the operation and registration of trailers in interstate commerce rendered a trailer which was not required to be registered in Michigan under the compact not subject to the mandatory security requirement of the no-fault act (MCL 500.3101[1]; MSA 24.13101[1]).

3. INSURANCE — NO-FAULT — OUT-OF-STATE VEHICLES — MANDATORY SECURITY.

Owners or registrants of motor vehicles required to be registered in Michigan must maintain security for payment of personal protection benefits; nonresident owners or registrants of motor vehicles not registered in the state may not operate or permit such vehicles to be operated within the state for more than thirty days in any calendar year unless security for payment of benefits is continuously maintained (MCL 500.3101[1], 500.3102[1]; MSA 24.13101[1], 24.13102[1]).

4. INSURANCE — NO-FAULT — ASSIGNED CLAIMS FACILITY.

A person entitled to no-fault benefits may obtain benefits from the Assigned Claims Facility where no personal protection insurance is applicable to the injury, no such insurance can be identified, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of one or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed (MCL 500.3172; MSA 24.13172).

DISSENTING OPINION BY CAVANAGH, J.

5. INSURANCE — NO-FAULT — INJURED EMPLOYEES.

Where an employer's vehicle is not insured the no-fault insurer of an injured employee's personal automobile is liable for payment of personal protection insurance benefits; however, where an employer's vehicle is insured, including situations in which the vehicle is self-insured, the employer's insurer is liable to pay such benefits (MCL 500.3114; MSA 24.13114).

6. INSURANCE — NO-FAULT — INJURED EMPLOYEES — OUT-OF-STATE VEHICLES.

An employee need only show that an injury occurred while occupying a motor vehicle owned or registered by the employer to recover personal protection insurance benefits from the employer's insurer; the employer's vehicle is not required to be registered in the state or subject to the state's no-fault mandatory security provisions (MCL 500.3114[1], [3]; MSA 24.13114[1], [3]).

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William J. Hipkiss Law Office (by *William J. Hipkiss*) for defendant Detroit Automobile Inter-Insurance Exchange.

Frank J. Kelley, Attorney General, *Louis J. Caruso,* Solicitor General, and *Harry G. Iwasko* and *Warren R. Snyder,* Assistant Attorneys General, for defendant Michigan Department of State Assigned Claims Facility.

Allaben, Massie, VanderWeyden & Timmer (by *Keith A. VanderWeyden*), of counsel, for defendant Roadway Express, Inc.

WILLIAMS, C.J. The issue in this case is whether the no-fault act requires an employee's personal no-fault insurer, the employee's self-insured employer, or the Assigned Claims Facility to provide personal protection insurance benefits when a personally insured employee is injured while occupying an employer-owned vehicle that is not required to be registered in Michigan.

Involved in the resolution of this question are §§ 3101(1), 3102(1), and 3114(1), (3) of the no-fault act.[1] MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.* Section 3101(1) states, in part, "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 . . . ." Section 3102(1) provides, "A nonresident owner or registrant of a motor vehicle not registered in this state shall not operate . . . the vehicle . . . in this state . . . more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits." And, critically, § 3114(1) provides, in part, "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." Subsections

[1] See pertinent texts of these sections, *infra,* pp 199, 202.

2 and 5 refer, respectively, to motor vehicles transporting passengers and to motorcycles, neither of which is relevant here.

The critical portion of § 3114 is subsection 3. This subsection provides that an employee "who suffers accidental bodily injury while an occupant of a motor vehicle *owned or registered by the employer,* shall receive personal protection insurance benefits to which the employee is entitled *from the insurer of the furnished vehicle.*" (Emphasis added.) We find, however, that an out-of-state vehicle not required to be registered in Michigan and not operated in this state for more than thirty days is not subject to the security provisions or § 3114(3) of the no-fault act and that when an employee is injured while an occupant of such a vehicle, the employee's personal insurer, if there is one, must pay the employee's personal protection benefits under § 3101(1).

I. FACTS

Roadway Express, a Delaware corporation with its principal place of business in Ohio, is engaged in the interstate transportation of goods. Roadway employed Wayne Parks, a resident of Michigan, as a driver, salesperson, and dock worker. On March 13, 1981, Parks was working inside a Roadway trailer located at Roadway's Muskegon terminal. In the course of lifting a carton of brass fittings, he suffered an injury subsequently diagnosed as an hiatal hernia.

The trailer in which Parks was injured, No. 95836, was owned by Roadway and registered in the State of Tennessee and several states other than Michigan. The tractor to which the trailer was attached was owned by Roadway and licensed and registered in the State of Michigan. Roadway

was self-insured, and thus no no-fault insurance policy covered trailer No. 95836. An uncontested affidavit from Roadway's director of systems and procedures established that the trailer had been operated in Michigan for only three days in 1981, up to and including March 13, 1981. An uncontested affidavit from Roadway's director of equipment registration established that the trailer was not required to be registered under a multistate agreement between the States of Michigan and Tennessee.

On July 15, 1981, Parks filed suit to recover no-fault benefits against Roadway, his self-insured employer, and against the Detroit Automobile Inter-Insurance Exchange, his personal automobile insurer. Parks subsequently added the Department of State Assigned Claims Facility as a defendant. The trial court granted Roadway's motion for summary judgment, finding that Roadway's ownership of trailer No. 95836 could not subject Roadway to liability under the no-fault act because the trailer was not subject to the act's security requirements. The trailer was not required to be registered in Michigan because a multistate registration agreement between Michigan and Tennessee exempted the trailer from the registration requirement and because the trailer had been operated in Michigan for less than thirty days within the calendar year when Parks was injured. The trial court held, without indicating its rationale, that the no-fault act required the DAIIE to provide Parks with no-fault benefits.

The Court of Appeals reversed, finding that the act required Roadway to assume responsibility for Parks' no-fault benefits because Roadway was the self-insured owner of the vehicle furnished to Parks. *Parks v DAIIE,* 138 Mich App 520, 527-529; 360 NW2d 238 (1984). The Court of Appeals rea-

soned that the question whether an owner is *required* to register a vehicle and subject itself to the mandatory security requirements of § 3101 has no bearing on the question whether the owner could be held liable for benefits under §§ 3105 and 3114. *Id.* On June 26, 1985, we granted leave to appeal. 422 Mich 937.

II. STATUTORY PROVISIONS

The parties are in agreement about two preliminary conclusions. First, the trailer in which Parks was injured was a "motor vehicle" with an identity separate from that of the tractor to which it was attached. Under the no-fault act, "motor vehicle" is defined as "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." MCL 500.3101(2)(c); MSA 24.13101(2)(c). Accord *Kelly v Inter-City Truck Lines, Inc,* 121 Mich App 208, 209-211; 328 NW2d 406 (1982). For this reason, we look to the registration of the *trailer* to determine which insurer is liable. Second, Parks is entitled to personal protection benefits under the no-fault act because he was using a parked motor vehicle at the time of his injury, and this situation falls within the statutory exception for injuries resulting from contact with property being unloaded from the vehicle. MCL 500.3105, 500.3106(b); MSA 24.13105, 24.13106(b). The only question remaining is which of the three insurers is required to pay Parks benefits, his personal automobile insurer (DAIIE) pursuant to § 3101(1), his employer, as a self-insurer (Roadway) pursuant to §§ 3102(1) and 3114(3), or, if neither of these is liable, the Assigned Claims Facility pursuant to MCL 500.3171 *et seq.;* MSA 24.13171 *et seq.*

To resolve this question, the no-fault act and other relevant statutory provisions must be examined. Our task throughout is to give expression to the underlying legislative purpose by harmonizing different provisions of the same statute, and by construing statutes in pari materia to give the fullest effect to each provision. *People v Smith,* 423 Mich 427, 441; 378 NW2d 384 (1985).

We begin with the first two sections of the no-fault act, which identify vehicles subject to the mandatory security provisions of the act. The first provides:

> 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 added.]

The second, applicable particularly to nonresident owners or registrants of motor vehicles, provides:

> A nonresident owner or registrant of a motor vehicle not registered in this state shall not operate or permit the vehicle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits. [MCL 500.3102(1); MSA 24.13102(1).]

The trailer in which Parks was injured does not appear to be subject to the mandatory security requirements of the act under either of these two provisions. First, § 3101(1) applies only to owners or registrants of vehicles "required to be registered in this state." The Legislature created the High-

way Reciprocity Board and has authorized it to enter into reciprocal compacts with other states regarding the operation of trailers engaged in interstate commerce. MCL 3.161 *et seq.;* MSA 9.1735 *et seq.* Under a compact entered into by the State of Michigan and the State of Tennessee, the trailer in which Parks was injured was *not* required to be registered in Michigan.[2] Therefore, the trailer was not subject to the mandatory security requirement in § 3101(1).

Second, § 3102(1) applies only to vehicles owned by nonresidents and not registered in this state. Security must be maintained for vehicles operated in this state for more than thirty days in a single calendar year. Roadway falls within § 3102(1) because it is a nonresident corporation and because

[2] Pursuant to the Michigan vehicle act and the multistate agreement authorized by the highway reciprocity act, Roadway's trailer was not required to be registered in this state. The applicable section of the motor vehicle act 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 . . . :
>
> (a) A vehicle driven or moved upon a highway in conformance with the provisions of this act relating to manufacturers, transporters, dealers, or nonresidents. [MCL 257.216; MSA 9.1916.]

The highway reciprocity act authorizes reciprocal agreements between and among other jurisdictions:

> Notwithstanding any other provision of law to the contrary, the [highway reciprocity] board may enter into and make such reciprocal compacts, agreements or arrangements as the board deems proper or expedient and in the interests of the people of this state, with the proper authorities of other jurisdictions, either individually or with a group of jurisdictions, concerning the fees, charges, taxation, operation and regulation of trucks, tractors, trailers, automobiles, buses, and all other automotive equipment engaged in international, interstate or intrastate commerce upon and over the public highways. [MCL 3.163; MSA 9.1737.]

trailer No. 95836 was not registered in Michigan. However, Roadway's director of systems and procedures attested that trailer No. 95836 had been operated in Michigan for only three days in 1981, up to and including March 13, 1981, the date of Parks' injury. Thus, the trailer was not subject to the mandatory security requirements of § 3102(1) at the time of the injury.

The trailer in which Parks was injured was not subject to the vehicle registration requirements of this state; nor was it subject to the mandatory security requirements of the no-fault act. Nevertheless, the DAIIE contends that the plain language and judicial construction of the priority provisions of the no-fault act permit Roadway to be held responsible for Parks' benefits. Thus, the priority provisions for insurance liability and the case law interpreting them must be examined.

III. PRIORITY OF PAYMENT

The no-fault act begins with § 3101(1), which for the convenience of the reader is quoted again as follows:

> 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.

The no-fault act then specifies the order in which various potentially liable insurers will be required to cover a claim for benefits. The relevant sections are set forth below to clarify the legislative plan:

(1) *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,* the person's spouse, and a relative of either domiciled in the same household, *if the injury arises from a motor vehicle accident.* . . .

(2) [Addresses motor vehicles transporting passengers; not relevant here.]

(3) An *employee,* his or her spouse, or a relative of either domiciled in the same household, *who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits* to which the employee is entitled *from the insurer of the furnished vehicle.*

(4) Except as provided in subsections (1) to (3), 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.

(5) [Addresses motorcycle operators or passengers; not relevant here.] [MCL 500.3114; MSA 24.13114.]

Sections 3101(1) and 3114(1) set forth the general rule of priority: A no-fault insurance policy, which owners of vehicles required to be registered in the state must maintain as security, covers all injuries arising from the use of motor vehicles suffered by persons named in the policy. In other words, the general rule is that one looks to a person's own insurer for no-fault benefits unless one of the statutory exceptions, subsections 2, 3,

and 5, applies.[3] Thus, under subsection 1, Parks would have to look to his personal insurer, DAIIE, for coverage of his benefits unless one of the statutory exceptions applies.

The only rule of exception that may be applicable to the facts of this case is subsection 3, which deals with employees injured while occupying motor vehicles furnished by their employer. The DAIIE contends that because Parks suffered "bodily injury while an occupant of a motor vehicle owned or registered by" Roadway, Parks should look to Roadway as "the insurer of the furnished vehicle" for benefits. Roadway does not deny that it is the owner and insurer of the vehicle furnished to Parks, but responds that it does not come within the priority provision subsection 3 because the vehicle in which Parks was injured was not required to be registered under the no-fault act.

The problem before us is one of examining the mandatory security provisions and the priority provisions, both of which are central to the purposes of the act. While the act's priority section does not directly address the situation in which security is not required, an analysis of the general provisions of the act and the Legislature's intention reveals who is liable for Parks' no-fault benefits.

Case law confirms our construction of the priority provisions of the no-fault act. This Court has recently held that when an employee is injured by occupying a vehicle not required to be registered

[3] Subsection 4 reinforces this conclusion. Those injured while *occupants* of motor vehicles must look to the rules provided in subsections 1, 2, and 3 before applying the priorities listed in subsection 4. The implication of the phrase "owner *or* registrant" was not extensively argued. But we assume subsection 4 does not apply because we read the phrase "owner or registrant of the vehicle occupied" within subsection 4 to be part of the more complete requirement as stated in § 3101(1): "The owner or registrant of a motor vehicle *required to be registered in this state*" (emphasis added).

in this state, the employee's personal insurer should be looked to for coverage. *Lee v DAIIE,* 412 Mich 505; 315 NW2d 413 (1982). In *Lee,* an employee of the United States Postal Service injured his back unloading mail from a government-owned mail truck. Because government-owned vehicles are not subject to registration requirements, MCL 257.216(f); MSA 9.1916(f), the vehicle was not subject to the mandatory security requirements of § 3101(1) of the no-fault act, and hence was uninsured. The Court of Appeals held that the employee's personal insurer could not be held liable for benefits, reasoning that the Legislature did not intend to compensate persons injured in uninsured vehicles. We disagreed, finding that the broad language of § 3105(1), providing that benefits must be paid "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" required a personal automobile insurer to pay benefits under circumstances in which the vehicle involved was not registered or insured. *Id.,* p 512. We reasoned that this reading of the no-fault act furthered the Legislature's purposes:

> [T]he 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.* [*Id.,* p 515. Emphasis added.]

The emphasized portion of the quotation makes clear that our decision was based on the legislative

decision to impose primary responsibility upon the employee's personal insurer. The decision did not turn on the absence of coverage for the employer's vehicle. This distinction is critical in this case, because, while Roadway's trailer is not *required* to be registered, Roadway *is self-insured,* and therefore trailer No. 95836 cannot be considered uninsured in the same sense as the postal vehicle in *Lee.*

Two Court of Appeals opinions support our analysis in *Lee.* In *Covington v Interstate System,* 88 Mich App 492; 277 NW2d 4 (1979), the Court of Appeals also held that an employee could not recover personal protection benefits from his employer's insurer when the employer's vehicle was not required to be registered in this state. The facts in *Covington* are nearly identical to those in this case. An employee was driving his employer's vehicle, which was registered and licensed in another state. The employer was self-insured, and refused to provide benefits on the ground that the truck being driven by the employee was not a vehicle subject to the requirements of the no-fault act. *Id.,* p 493. The Court of Appeals agreed with the employer, reasoning that the express language of § 3101(1) subjected only vehicles required to be registered in this state to the requirements of the act. *Id.,* pp 493-494.

While *Covington* was decided before *Lee,* another decision released following *Lee* furthers this analysis of the act. In *Citizens Ins Co v Roadway Express, Inc,* 135 Mich App 465; 354 NW2d 385 (1984), lv den 421 Mich 857 (1985), the Court of Appeals again held that an employee's personal automobile insurer rather than the self-insured employer was liable for no-fault benefits. The facts in *Citizens* are remarkably similar to those in the case at bar: Roadway's employee was injured in a

trailer that was licensed in another state and had not been in this state long enough to require insurance coverage under § 3102(1). The primary issue in the case was whether the trailer was a "motor vehicle" separate from the tractor. After finding that the trailer was a separate "motor vehicle," the Court concluded that the trailer was "uninsured" for purposes of the no-fault act and held the employee's personal automobile insurer liable for benefits. *Id.,* pp 469, 471.

From a clear reading of the no-fault act and the reasoning of the cited case law, we find the following: First, the plain language of § 3101(1) subjects only those vehicles required to be registered in this state to the mandatory security requirements. The fact that a vehicle is actually covered by an insurance policy, or that the owner of the vehicle is self-insured, does not alter whether the vehicle itself need or need not conform to the requirements of the act. Second, the policy of the Legislature was to provide a method whereby persons injured in automobile accidents would be readily provided relief from the results of their injury. Third, the primary method of accomplishing this result, from the general rule in § 3114(1), is that one looks to one's own insurer for no-fault benefits unless one of the statutory exceptions applies. Fourth, the exception of an employee injured in an employer's vehicle contained in subsection 3 of § 3114 applies only in the case in which the insured vehicle is required to be registered in this state. Fifth, because the vehicle was not registered in this state and thus the exception of subsection 3 does not apply, we look to the general intention of the Legislature in § 3114(1) to provide compensation for liability through the injured person's personal insurer.

The no-fault act was intended to minimize uncertainties and to provide a relatively simple means of compensating those injured in automobile accidents. Holding the employee's personal insurer liable for benefits when the employer's vehicle is not required to be registered best effects this goal.[4]

In conclusion, we hold that when an employee is injured in an employer's out-of-state vehicle, which is not required to be registered in this state under the motor vehicle registration act and the pertinent multistate agreement, and when the vehicle is not subject to the security provisions of the no-fault act because it has not been operated in this state for more than thirty days within the calendar year, the employee's personal automobile insurer, in this case the DAIIE, is liable for no-fault benefits under §§ 3105 and 3114(1).

IV. REMAINING ISSUES

Two ancillary issues remain in this case. The first is whether § 3163 of the no-fault act subjects

[4] We have previously held that an employee can recover no-fault benefits from the employee's self-insured employer when injured in the employer's vehicle, despite the exclusivity provision in the Workers' Disability Compensation Act. *Mathis v Interstate Motor Freight,* 408 Mich 164; 289 NW2d 708 (1980). In *Mathis* and the cases consolidated with it, the primary question was whether the exclusive remedy provision of the Workers' Disability Compensation Act precluded an employee from recovering no-fault benefits from a self-insured employer when the employee was injured in the course of employment while occupying an employer-owned vehicle. We held that liability for no-fault benefits was based on the employer's status *as an insurer* rather than as an employer, and therefore the exclusive remedy provision was not a bar. *Id.,* p 184. None of the cases in *Mathis* raised the question regarding vehicles not required to be registered in this state; thus, *Mathis* cannot be cited as controlling the question in the case at bar. See also *Becker v Wolverine Ins Co,* 113 Mich App 572; 317 NW2d 344 (1982) (*Mathis* does not preclude liability of an employee's own insurer for no-fault benefits when the employer's vehicle is not insured).

Roadway to liability for Parks' no-fault benefits.[5] That section states:

> An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies, shall be subject to the personal and property protection insurance system set forth in this act. [MCL 500.3163(1); MSA 24.13163(1).]

The DAIIE contends that Roadway was required to file the § 3163 certificate because it was an "insurer." The DAIIE also argues that Parks' injury arose out of the use of the trailer by an out-of-state resident because Roadway is a Delaware corporation with its principal place of business in Ohio. Assuming this to be true, then Roadway is "subject to the . . . insurance system" and must cover Parks' benefits.

This argument must fail under the plain language of the statute. First, Roadway's status as a self-insurer does not place it in the category of "[a]n insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state . . . ." MCL 500.3163(1); MSA 24.13163(1). See also MCL 500.3101(3); MSA 24.13101(3) (specifically addressing insurers "duly authorized to transact business"; by contrast, self-insurers are addressed in § 3101(4) with language stating that the required

[5] This issue was not timely raised in the circuit court, in the Court of Appeals, or in this Court. However, it occupied considerable time at the oral argument before this Court, and for purposes of judicial economy, we address it here.

security "may be provided by any other method approved by the secretary of state as affording security equivalent to that afforded by a policy of insurance"). Cf. MCL 500.3105(1); MSA 24.13105(1) (referring generally to an insurer's liability to pay benefits). Because the language of § 3163 is specific to "authorized" insurers, this is not a situation in which the "context" permits treating self-insurers as insurance companies, pursuant to § 3101(4).

Second, § 3163 applies to situations in which the injury arises out of the ownership, operation, maintenance, or use of a motor vehicle by an out-of-state resident. *Mills v Auto-Owners Ins, Inc,* 413 Mich 567, 571-572; 321 NW2d 651 (1982). In *Mills,* the injured out-of-state motorcyclist was entitled to no-fault benefits because, even though a motorcycle is not a "motor vehicle" as defined in the no-fault act, the other party involved in the accident was using a motor vehicle. The *Mills* Court held that § 3163 did not require the insurer of the out-of-state motorcyclist to cover his injuries because the injuries did not arise from the use of a "motor vehicle" *by* the out-of-state resident; rather, the insurer of the Michigan-insured vehicle was required to cover the motorcyclist's injuries. Accord *Guibord v Farmers Ins Exchange,* 110 Mich App 218; 312 NW2d 219 (1981). Because the injury at issue in the case at bar arose out of the use of the trailer by Parks, a Michigan resident, § 3163 is simply not applicable.

Some may consider § 3163 to apply to Roadway because the accident arose from Roadway's *ownership* of the motor vehicle. However, the mere fact that Roadway owned trailer No. 95836 would not subject it to liability for Parks' injury. The critical word is the possessive "its" in the phrase "who is insured under its automobile liability insurance policies." The "its" refers to the "insurer" in the

opening phrase of the section; therefore Roadway, as the out-of-state resident owner of the implicated motor vehicle, would be subject to liability only if it were an "insurer authorized to transact automobile liability insurance . . . in this state." Because Roadway is not "an insurer authorized to transact automobile liability insurance," it is not subject to "the personal and property protection insurance system set forth in this act." Thus, Roadway is not liable for Parks' injury.

The final question to be resolved in this case is whether the DAIIE can escape liability for Parks' injuries and shift the burden of coverage to the Assigned Claims Facility. A person entitled to no-fault benefits may obtain them through an assigned claims plan "if no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, . . . or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed." MCL 500.3172; MSA 24.13172.

The preceding analysis of the no-fault act and the decisions interpreting it make clear that Parks' own personal protection insurance is "applicable to the injury." To reiterate: Roadway cannot be held liable for Parks' no-fault benefits as the self-insured employer which furnished the vehicle because the vehicle was not required to be registered in Michigan. However, this does not mean that no personal protection insurance applies to the injury. On the contrary, §§ 3105 and 3114(1) permit Parks' personal automobile insurer, the DAIIE, to be held liable for injuries arising out of Parks' use of the trailer, in spite of the fact that

Roadway did "cover" the vehicle as a self-insurer. See *Lee, supra,* pp 515-516; *Citizens, supra,* p 471.

For all the reasons above, we reverse the decision of the Court of Appeals and find that Parks' personal liability insurer, DAIIE, must pay his personal protection benefits because Roadway's trailer No. 95836 was a vehicle which was not required to be registered in Michigan and was not subject to the security provisions of the no-fault act.

BRICKLEY, BOYLE, and RILEY, JJ., concurred with WILLIAMS, C.J.

CAVANAGH, J. (*dissenting*). The majority holds that an employee's personal no-fault insurance carrier is liable for no-fault benefits when the employee is injured while occupying an employer-owned motor vehicle that is not required to be registered in this state or subject to the state's mandatory security provisions under the no-fault act. I dissent from this holding because the unambiguous language of the priority provisions of the no-fault act evinces a legislative intent to hold an employer's insurer primarily liable for personal protection insurance benefits when an employee is injured while occupying a motor vehicle owned or registered by his employer. Since Roadway, the injured employee's employer, is self-insured, Roadway should be held liable for the payment of plaintiff's personal protection insurance benefits.

I

The no-fault act specifies the order of priority between insurers to pay personal protection insurance benefits. Section 3114 of the act establishes this priority:

(1) 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, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. . . .

(2) [Addresses motor vehicles transporting passengers; not relevant here.]

(3) An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.

(4) Except as provided in subsections (1) to (3), 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.

(5) [Addresses motorcycle operators or passengers; not relevant here.] [MCL 500.3114; MSA 24.13114.]

The personal protection insurance policy described in § 3101(1) refers to the mandatory security requirement for an owner or registrant of a motor vehicle required to be registered in this state. MCL 500.3101(1); MSA 24.13101(1).[1] Hence, §§ 3101(1) and 3114 establish, as a general rule of priority, that one's personal no-fault insurer is

[1] Section 3101(1) provides that "[t]he 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."

liable for benefits for all injuries arising out of the use of any motor vehicle by the named insured. However, § 3114(2), (3), and (5) are exceptions to this general rule. Subsection (3) is relevant to the facts of this case. To repeat, this subsection provides as follows:

> An *employee,* his or her spouse, or a relative of either domiciled in the same household, *who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits* to which the employee is entitled *from the insurer of the furnished vehicle.* [Emphasis added.]

Pursuant to the unambiguous language of this subsection, an employee need only show that he was injured while occupying a motor vehicle owned or registered by his employer in order to recover benefits from his employer's insurer. The plain language of the statute does not require that the employer's motor vehicle be registered in this state or subject to the state's mandatory security provisions under the no-fault act. Furthermore, as defined in the act, a motor vehicle does not have to be registered in this state:

> "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. [MCL 500.3101(2)(c); MSA 24.13101(2)(c).]

Where, as here, "the Legislature uses certain and unambiguous language, the plain meaning of the statute must be followed." *Browder v Int'l Fidelity Ins Co,* 413 Mich 603, 611; 321 NW2d 668 (1982), citing *Grand Rapids v Crocker,* 219 Mich 178, 182; 188 NW 221 (1922); *Dussia v Monroe Co*

Employees Retirement System, 386 Mich 244, 248; 191 NW2d 307 (1971); 2A Sands, Sutherland Statutory Construction (4th ed), §§ 46.01 and 46.04. The certain and unambiguous language of § 3114(1) and (3) establishes that the Legislature intended that the insurers of employers be liable for personal protection insurance benefits when an employee is injured while occupying an employer-owned or registered motor vehicle. Unlike the majority, I do not believe that the Legislature intended that an employer's insurer's liability for no-fault benefits be conditioned upon the employer's vehicle being registered in this state or subject to this state's mandatory security provisions.

II

We have previously held that an employee can recover no-fault benefits from a self-insured employer when the employee is injured in the employer's vehicle despite the exclusivity provision in the Workers' Disability Compensation Act. *Mathis v Interstate Motor Freight,* 408 Mich 164, 175; 289 NW2d 708 (1980). In *Lee v DAIIE,* 412 Mich 505, 516; 315 NW2d 413 (1982), we held that an employee's personal no-fault insurer may be liable for no-fault benefits when the employer's vehicle is uninsured. Our holding in *Lee* was specifically limited to the facts of that case, which involved an uninsured motor vehicle. Furthermore, in concluding that the sections of the no-fault act requiring certain vehicles to be insured have nothing to do with those sections setting forth whether benefits are payable and which insurer is liable, we stated the following:

> *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, § 3102(2)(c) . . . .

* * *

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]

[4] It is interesting to note that while mopeds, like other categories of vehicles . . . 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.*

[412 Mich 512-513. Emphasis added.]

A consistent reading of both *Mathis* and *Lee* establishes the rule that where there is no insurer of an employer's vehicle, the no-fault insurer of the injured employee's personal automobile may be liable for payment of personal protection insurance benefits. However, where the employer's vehicle is insured, the employer's insurer is liable for the payment of personal protection insurance ben-

efits. Since Roadway self-insured the trailer upon which plaintiff was injured, § 3114(3) would apply, and Roadway, rather than DAIIE, is liable for the payment of plaintiff's personal protection insurance benefits.

CONCLUSION

This analysis furthers the legislative purposes in enacting the no-fault act. Where an employer's vehicle is uninsured, the employee's personal insurer is liable for the payment of benefits, thus giving effect to the broad purpose of the no-fault act "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 . . . ." *Lee, supra,* 515. When an employer has insured a motor vehicle, the employer's insurer is liable for the payment of benefits, thus giving effect to the priority established by the Legislature in § 3114(1) and (3). For these reasons, I would affirm the Court of Appeals reversal of the trial court.

ARCHER, J., concurred with CAVANAGH, J.

LEVIN, J. Wayne Parks was injured while working in a trailer owned by his employer, Roadway Express, Inc. The parties are in agreement that Parks is entitled to receive personal protection (no-fault) benefits pursuant to § 3107 of the no-fault automobile liability act.[1]

The question presented is whether such benefits are payable by Detroit Automobile Inter-Insurance Exchange, the insurer of Parks' personal automobile, or by Roadway Express, his self-insured em-

[1] MCL 500.3107; MSA 24.13107.

ployer, or by an insurer assigned by the Assigned Claims Facility.[2]

Section 3114 of the no-fault act provides that a no-fault insurance policy applies to accidental bodily injury to the person named in the policy, but that an employee who suffers accidental bodily injury while an occupant of "a motor vehicle *owned or registered* by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle."[3] (Emphasis supplied.)

The trailer was not registered or required to be registered by Roadway because Roadway is a foreign corporation, and such an owner or registrant of a motor vehicle is not required to register it if it is operated in this state—as was the trailer—for less than thirty days in any calendar year.[4]

Roadway Express, pursuant to § 3101(4) of the no-fault act, had qualified as a self-insured.[5]

I

Roadway Express, and the majority, would read the term "owner or registrant of a motor vehicle" as meaning "owner or registrant of a motor vehicle required to be registered in this state,"[6] viewing the omission of the words "required to be

[2] MCL 500.3171; MSA 24.13171.

[3] MCL 500.3114(3); MSA 24.13114(3).

[4] MCL 500.3102; MSA 24.13102.

[5] MCL 500.3101(4); MSA 24.13101(4).

[6] *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.]

registered in this state" in § 3114 and other sections of the act where the words "owner or registrant" appear[7] as intending no change in meaning, but rather as a shorthand version of the full expression.

I agree with DAIIE, the Department of State (on behalf of the Assigned Claims Facility), and Justice CAVANAGH that the term "owner or registrant of [a] motor vehicle," as used in § 3114, is not qualified by the concept "required to be registered in this state."

A

While either construction of the act is maintainable, I reach this conclusion because I think it is more consonant with a reading of the act as a whole.

The act provides that a person is not entitled to no-fault benefits in three circumstances: (1) where the person was using a vehicle he had taken unlawfully, (2) where the person was the owner or registrant of a motor vehicle involved in the accident with respect to which no-fault insurance or security was not in effect, or (3) where the person was "not a resident of this state, was an occupant of a motor vehicle not registered in this state and was not insured by an insurer which has filed a certification in compliance with section 3163."[8]

Section 3163 provides that an insurer authorized to transact automobile liability insurance and personal and property protection (no-fault) insurance in this state shall be subject to the personal and property protection (no-fault) insurance system set forth in the no-fault act in respect to a motor

[7] See ns 10 and 11 and accompanying text.

[8] MCL 500.3113(c); MSA 24.13113(c).

vehicle owned, operated, maintained, or used by an out-of-state resident insured by the insurer.[9]

The Legislature thus indicated an intention that an insurer who has been authorized to write no-fault insurance in this state shall provide no-fault benefits in respect to vehicles not registered in this state operated by out-of-state residents. Nonresident occupants of a motor vehicle not registered in this state are generally entitled to no-fault benefits from the insurer of the out-of-state vehicle.

B

The concept "owned or registered" is repeated in the priority sections of the act applicable, for example, where the injured person does not have a policy of no-fault insurance. The priority sections of the act provide that, in such a case, a person suffering accidental bodily injury shall first claim no-fault benefits from the "insurer of the owner or

[9] (1) An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies, shall be subject to the personal and property protection insurance system set forth in this act.

(2) A nonadmitted insurer may voluntarily file the certification described in subsection (1).

(3) When a certification filed under subsections (1) or (2) applies to accidental bodily injury or property damage, the insurer and its insureds with respect to that injury or damage have the rights and immunities under this act for personal and property protection insureds, and claimants have the rights and benefits of personal and property protection insurance claimants, including the right to receive benefits from the electing insurer as if it were an insurer of personal and property protection insurance applicable to the accidental bodily injury or property damage. [MCL 500.3163; MSA 24.13163.]

registrant of the vehicle" occupied[10] by the injured person or, where not an occupant, of the vehicle involved in the accident,[11] before claiming insurance benefits from the operator of the vehicle occupied or involved in the accident.

Reading the expression "owned or registered" as qualified by the concept "required to be registered" would mean that an insurer of an out-of-state vehicle who had complied with § 3163 would not be subject to liability for the payment of no-fault benefits to a pedestrian who did not have his own no-fault insurance and who was struck by the out-of-state vehicle which it had insured. This might mean that in such a case an insurer assigned by the Assigned Claims Facility rather than the insurer of the out-of-state vehicle would be responsible for the payment of no-fault benefits. That does not appear to be consonant with the apparent purpose of § 3163 to subject insurers of out-of-state vehicles who are authorized to transact automobile insurance in this state to liability for the payment of no-fault benefits in general as if the vehicle had been registered and insured for no-fault benefits. I see no basis, consistent with § 3163, for differentiating the liability of insurers depending on whether an insured vehicle was or was not registered in this state.

II

It is asserted, however, that § 3163 does not govern in the instant case because Roadway Express is self-insured and is not an insurer authorized to transact automobile insurance. Roadway Express qualified as a self-insured pursuant to

[10] MCL 500.3114; MSA 24.13114.

[11] MCL 500.3115; MSA 24.13115.

§ 3101(4) of the no-fault act,[12] and the Department of State issued a certificate of self-insurance stating that the certificate "covers all vehicles owned by Roadway." Presumably, Roadway had at least one vehicle registered in Michigan or it would not have qualified as a self-insured and obtained such certificate.[13] It was, in that sense, like an insurance company that had obtained authorization to transact automobile insurance in this state because it wished to write insurance covering one or more vehicles.

The stated purpose of § 3101(4) is to subject self-insurers to "all the obligations and rights of an insurer under this chapter." "[T]his [the no-fault] chapter" does not purport to provide for obligations and rights of insurers who are not authorized to transact automobile insurance in this state. Since the no-fault chapter does not provide for obligations and rights of an insurer not so authorized to transact insurance business in this state, I would read the expression "all the obligations and rights of an insurer under this chapter" as meaning all the obligations and rights as an insurer authorized to transact automobile insurance in

[12] (4) Security required by subsection (1) may be provided by any other method approved by the secretary of state as affording security equivalent to that afforded by a policy of insurance, if proof of the security is filed and continuously maintained with the secretary of state throughout the registration period. The person filing the security has all the obligations and rights of an insurer under this chapter. When the context permits, "insurer" as used in this chapter, includes any person filing the security as provided in this section. [MCL 500.3101(4); MSA 24.13101(4).]

[13] Roadway's application for self-insured status sworn to August 1, 1980, showed that it had 626 motor vehicles registered in Michigan. The "conditions for qualifying as a self-insurer with the Secretary of State" provide that an applicant must have "at least 26 motor vehicles to be registered in Michigan."

this state, and, thus, as including the obligations of an insurer under § 3163.

Further, it would not, again, be consonant with the objectives of the act to construe it as providing that a self-insured person has less responsibility than an insurer, and to in effect transfer from a self-insured to insurers, such as, in this case, Parks' insurer (DAIIE) or an insurer assigned by the Assigned Claims Facility, responsibility that an insurer of the vehicle would have if it were insured rather than self-insured.

I would affirm the judgment of the Court of Appeals.

HYDE v UNIVERSITY OF MICHIGAN BOARD OF REGENTS
FAIGENBAUM v OAKLAND MEDICAL CENTER
POWERS v PEOPLES COMMUNITY HOSPITAL AUTHORITY

Docket Nos. 74541, 77213, 77815. Argued March 4, 1986 (Calendar Nos. 6-8). Decided October 3, 1986.

James P. Hyde and Marcia Hyde, in 1976, brought a medical malpractice action in the Court of Claims against the University of Michigan Board of Regents, alleging that the negligence of employees of the University of Michigan Hospital in diagnosing and treating Marcia Hyde resulted in a serious post-surgical infection. A pretrial summary filed in 1977 noted that the plaintiffs could amend their pleadings to allege that the injury arose out of the performance of a proprietary function. Further proceedings were held in abeyance pending decision in *Parker v Highland Park,* 404 Mich 183 (1978), and *Murray v Beyer Memorial Hospital,* 409 Mich 217 (1980). In 1982, the plaintiffs amended their complaint, alleging that the hospital had engaged in a proprietary function. The court, Paul R. O'Connell, J., granted accelerated judgment for the defendant on the ground that the plaintiffs had not made or preserved an express challenge to the defense of governmental immunity until after *Parker* was decided and that the holding of *Parker,* that public general hospitals could be held liable for torts committed during day-to-day operations, thus was not applicable. The Court of Appeals, J. H. GILLIS, P.J., and ROBINSON, J. (T. M. BURNS, J., dissenting), affirmed in an unpublished opinion per curiam (Docket No. 69664). The plaintiffs appeal. Their application for leave to appeal was pending at the time *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567 (1984), was issued.

Neil Faigenbaum, as guardian of Anita Katz, a mental incompetent, brought actions in the Wayne Circuit Court alleging

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REFERENCES

Am Jur 2d, Hospitals and Asylums § 20 *et seq.*

Am Jur 2d, Municipal, School, and State Tort Liability § 33 *et seq.*

Am Jur 2d, States, Territories, and Dependencies § 99 *et seq.*

See the annotations in the ALR3d/4th Quick Index under Governmental Immunity or Privilege.

malpractice and products liability against certain doctors, hospitals, and drug companies, and in the Court of Claims against Oakland Medical Center and Clinton Valley Center alleging damages, arising from the treatment of Ms. Katz. The actions were consolidated for trial. Prior to trial, several doctors were dismissed, and the plaintiff settled with the other doctors, the hospitals, and the drug companies. The Wayne Circuit Court, Harold Hood, J., granted summary judgment for Clinton Valley Center on the ground of governmental immunity, and granted judgment for the plaintiff against Oakland Medical Center, finding that it could be held liable under *Parker* because it rendered only general medical care. Oakland's appeal was pending in the Court of Appeals when *Ross* was decided. The Court of Appeals, BRONSON, P.J., and J. H. GILLIS and ALLEN, JJ., reversed, holding that under *Ross* Oakland Medical Center was entitled to governmental immunity on the ground that the medical treatment rendered by it was expressly or impliedly authorized by the state constitution, statutes, and administrative regulations (Docket No. 67356). The plaintiff appeals.

Kathleen Powers, for herself and as personal representative of the estate of Frank R. Powers, deceased, brought an action in the Wayne Circuit Court against Peoples Community Hospital Authority, Bernard Bercu, M.D., and N. Jahan, M.D., alleging medical malpractice in the treatment of Mr. Powers. Settlement was reached with Dr. Bercu prior to trial. The court, Robert J. Colombo, Jr., J., granted partial summary judgment for the hospital authority to the extent that the plaintiff sought to hold it vicariously liable for Dr. Bercu's negligence. Following the decision in *Ross,* the court, Paul S. Teranes, J., granted summary disposition for the hospital authority on the ground of governmental immunity, finding that the operation of the hospital by the authority amounted to a governmental function. The Supreme Court granted the plaintiff leave to appeal prior to decision by the Court of Appeals.

In each of the cases, the plaintiffs seek to hold a public general hospital or medical facility vicariously liable for the negligent diagnoses, treatment, or care rendered by the hospital's employees or agents. The plaintiffs maintain that such facilities can be held liable in tort under *Parker.*

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

The rules articulated in *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567 (1984), apply to all cases commenced after January 22, 1985, and to those cases pending either in

trial or appellate courts on January 22, 1985, in which a governmental immunity issue was properly raised and preserved. To the extent that the diagnosis, treatment, and care of patients at a public general hospital or medical facility are activities which are expressly or impliedly mandated or authorized by constitution, statute, or other law, the hospital or facility is entitled to immunity from tort liability under MCL 691.1407; MSA 3.996(107). To the extent that *Parker v Highland Park,* 404 Mich 183 (1978), held that such activities do not constitute the exercise or discharge of a governmental function, it was impliedly overruled by *Ross.* Only activities which are conducted primarily for the purpose of producing a pecuniary profit and which are not normally supported by taxes or fees can be deemed proprietary functions under MCL 691.1413; MSA 3.996(113).

1. Where case law in general is confused and irreconcilable and a new decision of the Supreme Court overrules prior law or reconstrues a statute, limited retroactive application of the decision is favored. Although no indication was given in *Ross* as to whether its application should be retroactive or prospective only, because of the uncertainty surrounding the law of governmental immunity at the time it was decided, it is to be given only limited retroactive effect, so as to apply to cases commenced after the date of decision and to those pending in trial or appellate courts on that date in which a governmental immunity issue was raised and preserved. Thus, in these cases, *Ross* applies.

2. The holding in *Parker* that the operation of a public general hospital was not a governmental function under the governmental immunity act was impliedly overruled by *Ross.* Under *Ross,* a public general hospital or medical facility is engaged in the exercise or discharge of a governmental function whenever its activities are expressly or impliedly mandated or authorized by constitution, statute, or other law. 1986 PA 175, enacted in response to *Ross,* codified the definition of governmental function provided in *Ross.* The act, however, specifically permits imposition of tort liability upon a governmental agency which owns or operates a public general hospital or county medical facility. Thus, the effect of the decision in these cases, extension of governmental immunity from tort liability to a governmental agency operating a public general hospital or medical facility, is limited to causes of action accruing prior to July 1, 1986, which were pending on January 22, 1985, or commenced on or after that date. In causes accruing on or after July 1, 1986, a governmental agency may be

held liable for torts arising out of the ownership or operation of a public general hospital or a county medical facility.

3. Vicarious tort liability may only be imposed upon a governmental agency where: the employee or agent committed a tort while acting in the course of employment and within the scope of authority, and the employee or agent committed the tort while engaged in an activity which was nongovernmental or proprietary or which fell within an exception to the governmental immunity act. Before an activity may be deemed proprietary, it must have been conducted primarily for the purpose of producing a pecuniary profit, and it must be an activity not normally supported by taxes or fees. An activity need not generate a profit to be deemed a proprietary function, but tort liability may be imposed only where the primary purpose of the activity is to generate a pecuniary profit. Also relevant is where a profit is deposited and how it is spent.

4. In these cases, there is no suggestion that the employees or agents were acting outside the course of employment or scope of authority when the alleged torts were committed. In each case, the diagnoses and treatment of the patients were activities implicitly authorized by statute, and, thus, the employees were engaged in the exercise or discharge of a governmental function. In *Hyde,* the lower courts never passed on the merits of the plaintiffs' proprietary function claim, and their amended complaint failed as a matter of law to state a cause of action within the proprietary function exception of § 13 of the governmental immunity act. In *Faigenbaum,* the proprietary function argument was not preserved for review. In *Powers,* the conclusion of the trial court that the primary purpose of the authority in operating its hospitals was not for profit was not clearly erroneous.

Hyde and *Powers,* affirmed.

Faigenbaum, affirmed in part, reversed in part, and remanded.

Justice LEVIN, joined by Justice ARCHER, dissenting, stated that a governmental agency operating a general hospital is subject to tort liability under *Parker v Highland Park,* where the cause of action arose before July 1, 1986, the effective date of 1986 PA 175. *Parker* held that the operation of a general hospital was not a governmental function within the meaning of the governmental tort liability act. *Ross v Consumers Power* held that operations without an equivalent counterpart in the private sector and largely funded by taxes are governmental functions within the intendment of the act, and defined "governmental function" as an activity expressly or impliedly mandated or authorized by constitution, statute, or other law. The

question whether a governmental agency is immune from or subject to tort liability in respect to the operation of a hospital was not presented and could not have been decided in *Ross.*

The Legislature, in enacting 1986 PA 175, adopted both the definition of governmental function articulated in *Ross* and the concept expressed in *Parker* that a governmental agency operating a general hospital was subject to tort liability. In so doing, it did not mean to imply that it believed *Ross* impliedly overruled *Parker,* but rather that the *Ross* definition was deficient and inconsistent with sound public policy with respect to general hospitals.

The codification of the *Ross* definition in 1986 PA 175 as amended by the exception for general hospitals did not become effective until July 1, 1986. The effective date provides no basis to draw the inference that the unamended *Ross* definition is to be in effect before July 1, 1986, or that it is codified for the period of January 22, 1985, to June 30, 1986. It can as readily be argued that the application of the *Ross* definition of governmental function before July 1, 1986, was rejected by the Legislature, as that the continued application of *Parker* through June 30, 1986, was rejected.

Justice ARCHER, dissenting, stated that the Legislature, in providing in 1986 PA 175 that tort liability may be imposed upon a governmental agency that owns or operates a public general hospital or county medical facility, approved the continuing validity of the rule of *Parker* that public general hospitals are not immune from tort liability. None of the cases in *Ross* involved that issue. Extending governmental immunity in these cases is particularly unjust in light of the remedy provided by *Parker* and the redress afforded similarly situated plaintiffs whose causes arise after 1986 PA 175. Agency liability should be determined by focusing upon the specific act or omission of the agency, not its overall governmental objective. To state that an activity is mandated or authorized by law adds little to the analysis required to determine the nature of an agency's responsibilities and whether its specific acts went beyond its public mandate.

143 Mich App 303; 373 NW2d 161 (1985) affirmed in part and reversed in part.

Parker v Highland Park, 404 Mich 183; 273 NW2d 413 (1978), overruled.

OPINION OF THE COURT

1. GOVERNMENTAL IMMUNITY — GOVERNMENTAL AGENCIES.

The rules articulated in *Ross v Consumers Power Co (On Rehear-*

ing), 420 Mich 567 (1984), apply to all cases commenced after January 22, 1985, and to those cases pending either in trial or appellate courts on January 22, 1985, in which a governmental immunity issue was properly raised and preserved.

2. GOVERNMENTAL IMMUNITY — PUBLIC HOSPITALS — GOVERNMENTAL FUNCTION — CARE OF PATIENTS.

In cases commenced after January 22, 1985, invoking causes of action accruing prior to July 1, 1986, and cases pending in trial or appellate courts on January 22, 1985, in which a governmental immunity issue was properly raised and preserved, a public general hospital or medical facility is engaged in the exercise or discharge of a governmental function and thus immune from liability in tort to the extent that the diagnosis, treatment, and care of its patients were activities expressly or impliedly mandated or authorized by constitution, statute, or other law (MCL 691.1407; MSA 3.996[107]).

3. GOVERNMENTAL IMMUNITY — GOVERNMENTAL AGENCIES — PROPRIETARY FUNCTION.

Activities conducted by a governmental agency primarily for the purpose of producing a pecuniary profit and which are not normally supported by taxes or fees are proprietary functions to which governmental immunity does not apply (MCL 691.1413; MSA 3.996[113]).

4. GOVERNMENTAL IMMUNITY — PUBLIC HOSPITALS — GOVERNMENTAL AGENCIES.

A governmental agency and its agents and employees can be held liable in tort for activities arising out of the ownership or operation of a public general hospital or county medical facility where a cause of action accrues on or after July 1, 1986 (1986 PA 175, MCL 691.1407[4]; MSA 3.996[107][4]).

DISSENTING OPINION BY LEVIN, J.

5. GOVERNMENTAL IMMUNITY — PUBLIC HOSPITALS — GOVERNMENTAL AGENCIES.

A governmental agency operating a general hospital should be subject to tort liability where the cause of action arose before July 1, 1986 (1986 PA 175, MCL 691.1401; MSA 3.996[101]).

Lopatin, Miller, Freedman, Bluestone, Erlich, Rosen & Bartnick (by *Richard E. Shaw*) for plaintiffs Hyde.

Fieger & Fieger, P.C. (by *Geoffrey N. Fieger*), for plaintiff Faigenbaum.

William S. Stern, P.C., for plaintiff Powers.

Kitch, Saurbier, Drutchas, Wagner & Kenney, P.C. (by *Mark D. Willmarth* and *James D. Zazakis*), for defendant University of Michigan Board of Regents.

Frank J. Kelley, Attorney General, *Louis J. Caruso,* Solicitor General, and *George L. McCargar* and *Alan Hoffman,* Assistant Attorneys General, for defendant Oakland Medical Center.

Cozadd, Shangle, Smith & Andrews (by *B. Ward Smith* and *John R. Day*) for defendant Peoples Community Hospital Authority.

Amici Curiae:

Richard M. Goodman, P.C. (by *Susan E. Lister*), for Michigan Trial Lawyers Association.

Sommers, Schwartz, Silver & Schwartz, P.C. (by *Richard D. Toth*).

CAVANAGH, J. In *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567; 363 NW2d 641 (1984), this Court attempted to clarify the parameters of sovereign, governmental, and individual immunity from tort liability granted by the governmental tort liability act, MCL 691.1401 *et seq.;* MSA 3.996(101) *et seq.,* and common law. In particular, we redefined the term "governmental function," which appears in § 7 of the act, MCL 691.1407; MSA 3.996(107), as we believed the Leg-

islature intended it to be defined.[1] None of the nine consolidated cases decided in *Ross* involved the tort liability of a public general hospital, however.

In each of these cases, the plaintiffs seek to hold a public general hospital or medical facility vicariously liable for the negligent diagnosis, treatment, or care rendered by the hospital's employees or agents. Plaintiffs maintain that such hospitals can be held liable in a tort cause of action pursuant to *Parker v Highland Park,* 404 Mich 183; 273 NW2d 413 (1978). Two common questions are presented:

1) Should *Ross* be given prospective effect only or retroactive effect?

2) Did *Ross* impliedly overrule that portion of *Parker* which held that the day-to-day operation of a public general hospital is not a governmental function?

We must also decide whether, and under what circumstances, the operation of a public general hospital or medical facility constitutes a proprietary function, which is not entitled to immunity from tort liability under § 13 of the act, MCL 691.1413; MSA 3.996(113).

We hold that the rules articulated in *Ross* apply to all cases commenced after January 22, 1985, the date our opinion was issued, and to those cases pending either in trial or appellate courts on January 22, 1985, in which a governmental immunity issue was properly raised and preserved.

[1] Under § 7, state and local governmental agencies are immune from tort liability only when they are engaged in a governmental function:

> Except as in this act otherwise provided, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function.

We further hold that to the extent that the diagnosis, treatment, and care of patients at a public general hospital or medical facility are activities which are expressly or impliedly mandated or authorized by constitution, statute, or other law, the hospital or facility is entitled to immunity from tort liability under § 7. To the extent that *Parker* held that such activities do not constitute the exercise or discharge of a governmental function, it was impliedly overruled by *Ross*. In light of 1986 PA 175, however, a governmental agency can be held liable for torts arising out of the ownership or operation of a hospital or county medical facility where the cause of action accrues on or after July 1, 1986.

Finally, we hold that only activities which are conducted primarily for the purpose of producing a pecuniary profit, *and* which are not normally supported by taxes or fees, are proprietary functions under § 13. The fact that a governmental agency produces a pecuniary profit may be evidence that the agency is engaged in a proprietary function, but it is not conclusive evidence. The focus instead should be on the primary intended purpose of the governmental activity and how the activity is normally funded.

I. FACTS

A. HYDE

Plaintiff Marcia Hyde was treated at the University of Michigan Hospital on July 8, 1974. On June 28, 1976, plaintiffs filed a medical malpractice suit in the Court of Claims, alleging that the hospital employees' negligent diagnoses and medical treatment caused Ms. Hyde to develop a serious post-surgical infection. Defendant Board of Regents asserted governmental immunity as an affirmative

defense in its answer. Following a pretrial conference, a pretrial summary was filed on March 30, 1977. The summary indicated that the trial court had given plaintiffs permission to amend their pleadings to allege that the injury had arisen out of the performance of a proprietary function.[2] Further proceedings apparently were held in abeyance pending this Court's decision in *Parker*.

After *Parker* was decided, defendant moved for accelerated judgment in April, 1979. Although *Parker* had held that public general hospitals are not immune from tort liability, defendant argued that this holding should not be given retroactive effect. Before a decision was rendered, this precise issue was resolved by *Murray v Beyer Memorial Hospital,* 409 Mich 217; 293 NW2d 341 (1980). *Murray* held that *Parker* was to be applied to all cases pending on December 27, 1978, in which an express challenge to governmental immunity had been made and preserved.

Plaintiffs did not file an amended complaint alleging that defendant had been engaged in a proprietary function until October 29, 1982. Defendant moved again for accelerated judgment, claiming that plaintiffs had not made or preserved an express challenge to its governmental immunity until the amended complaint was filed. Since the filing occurred long after *Parker* was decided, defendant argued that *Parker* was inapplicable. Plaintiffs countered that they had expressly challenged defendant's immunity prior to *Parker* at

[2] The pretrial summary contained the following statements:

PLEADINGS SATISFACTORY? No. Plaintiff is given the right to amend his pleadings to show the proprietary function of Defendant.

ARE THERE ANY DEFENSES UNDER RULE 116? Yes. Governmental immunity and statute of limitations.

the pretrial conference and the challenge had been preserved by the pretrial summary.

The trial court accepted defendant's argument and entered a judgment for defendant in an order filed February 9, 1983. A majority of the Court of Appeals affirmed.[3] Plaintiffs' application for leave to appeal was pending in this Court when *Ross* was issued. We thereafter granted leave to appeal. 424 Mich 858 (1985).

B. FAIGENBAUM

Plaintiff is the guardian of his mother, Anita Katz. Ms. Katz has a long history of mental illness and has been hospitalized several times. On November 20, 1976, she was admitted to Clinton Valley Center, a state psychiatric facility, exhibiting abnormal twitching and movements of her mouth, face, limbs, and tongue.

In February, 1977, Ms. Katz was referred to Oakland Medical Center for a physical examination. The center was administered by the Department of Mental Health and provided general medical services to psychiatric patients. Dr. Joseph Chandler, a neurologist at the center, concluded that Ms. Katz was suffering from a degenerative nerve disease known as Huntington's chorea. Dr. Chandler prescribed Haldol for the condition. Ms. Katz had previously been treated for her mental illness with Haldol and other neuroleptic drugs, such as Thorazine, Stelazine, and Mellaril. When Ms. Katz' condition did not improve, her family insisted that the Clinton Valley Center discontinue administering any neuroleptic drugs. However, her condition did not substantially improve.

In 1979, plaintiff sued eleven doctors, two hospi-

[3] Unpublished opinion per curiam of the Court of Appeals, decided June 8, 1984 (Docket No. 69664).

tals, and three drug companies in the Wayne Circuit Court, alleging, inter alia, malpractice and products liability. A suit was also commenced in the Court of Claims against the Oakland Medical Center and Clinton Valley Center. Plaintiff alleged that the doctors had failed to diagnose and treat Ms. Katz for tardive dyskinesia, a motion disorder caused by neuroleptic drugs such as Haldol.[4] It was further alleged that a psychiatrist or neurologist should consider tardive dyskinesia as a possible diagnosis when presented with a patient exhibiting abnormal bodily movements who has a history of exposure to neuroleptic drugs. Proper treatment requires discontinuation of all neuroleptic drugs to prevent the condition from becoming permanent. Plaintiff maintained that Ms. Katz had sustained severe and permanent brain damage and irreversible motor disturbances from repeated administrations of Haldol.

The two actions were joined for trial. Clinton Valley Center was granted summary judgment on the ground of governmental immunity.[5] Several doctors employed by the center were dismissed either on governmental immunity grounds or because plaintiffs failed to show at trial that the doctors were responsible for Ms. Katz' care. A contract claim against the Oakland Medical Center was struck as being duplicative of plaintiff's tort claim. Plaintiff eventually settled with six

[4] Tardive dyskinesia occurs late in the course of neuroleptic drug treatment. The symptoms include protrusion and rolling of the tongue, chewing movements, smacking and pouting of the lips, opening and closing of the mouth, puffing cheeks, grimacing, eye blinking, rocking movements, choreoathetoid movements of the limbs, repeated swallowing, and respiratory dyskinesia. Persons suffering from Huntington's chorea may display similar symptoms. Ms. Katz' chief complaints were an inability to swallow, tense neck muscles, curling of the tongue, pacing and rocking, nervousness, and jerky movements.

[5] Clinton Valley Center was found to be immune from tort liability under *Perry v Kalamazoo State Hospital,* 404 Mich 205; 273 NW2d 421 (1978), because it was a state psychiatric hospital.

doctors (including Dr. Chandler), the two hospitals, and the drug companies for $378,000. The only defendant remaining at the close of proofs was Oakland Medical Center. A key issue at trial was whether the center was immune from tort liability under *Perry v Kalamazoo State Hospital,* 404 Mich 205; 273 NW2d 421 (1978), because the center treated psychiatric patients and was run by the Department of Mental Health.

On July 27, 1982, the circuit court concluded that the Oakland Medical Center could be held liable under *Parker* because it rendered only general medical care. The court also concluded that Dr. Chandler had been negligent in failing to obtain a complete medical and drug history, to consider tardive dyskinesia as a possible diagnosis, and to familiarize himself with the potential side effects of Haldol. Plaintiff was awarded $1,000,000 in damages (less settlements), $30,000 in attorney fees, and over $15,000 in expert witness and other fees.

The center's appeal was pending in the Court of Appeals when *Ross* was decided. The Court initially concluded that *Ross* should be applied to those cases pending on appeal when *Ross* was decided. Applying the new definition of "governmental function," the Court held that the center was entitled to immunity because the medical treatment rendered was expressly and impliedly authorized by the state constitution, statutes, and administrative regulations. It rejected the argument that the operation of a governmental care facility is a proprietary function because a fee is charged for medical services or an incidental profit is generated. Plaintiff's belated argument that the center could be held liable for breach of contract was rejected because plaintiff had failed to cross-appeal the dismissal of the contract count. The

judgment for plaintiff was therefore reversed. 143 Mich App 303; 373 NW2d 161 (1985). We granted plaintiff's application for leave to appeal. 424 Mich 857 (1985).

C. POWERS

On January 10, 1981, Frank Powers was admitted to Annapolis Hospital, a public general hospital operated by defendant Peoples Community Hospital Authority (PCHA). Mr. Powers was diagnosed as suffering from a myocardial infarction. He died several days later, allegedly after his pacemaker malfunctioned.

Plaintiff, decedent's wife, filed suit in April, 1982, against the PCHA and two of its physicians, Drs. Bercu and Jahan. She alleged that the doctors and staff had failed to monitor and treat decedent's heart condition properly. Plaintiff and Dr. Bercu settled for $25,000. The PCHA was granted partial summary judgment to the extent that plaintiff sought to hold it vicariously liable for Dr. Bercu's negligence.[6]

After *Ross* was decided, the PCHA moved for summary disposition on the ground of governmental immunity.[7] An evidentiary hearing was held, primarily to determine whether Mr. Powers' death

[6] The PCHA and Dr. Jahan unsuccessfully moved for summary and accelerated judgment on the ground that the release executed between plaintiff and Dr. Bercu also released them of liability. The Court of Appeals denied defendants' application for leave to appeal on February 21, 1985.

[7] This was the first time that the PCHA had raised the "defense" of governmental immunity. However, the PCHA's failure to raise the issue in its first responsive pleading did not waive it. See n 35. Plaintiff's complaint, filed prior to *Ross*, contained sufficient facts to raise a governmental immunity issue, or more specifically, a lack thereof. The complaint indicated that the PCHA operated a public general hospital, which was not entitled to immunity from tort liability pursuant to *Parker*. Moreover, paragraph two alleged that the PCHA was a profit-making institution. This allegation was sufficient to invoke the statutory "proprietary function" exception.

arose during the performance of a proprietary function. The undisputed evidence showed that Annapolis Hospital charged for its medical services. It also received tax money from the twenty-four southeastern Michigan communities which participate in the PCHA. The PCHA had amassed substantial sums in its depreciation, excess revenue, and bond and interest accounts. However, none of these funds had been distributed to the state, the participating communities, or the directors and officers of the PCHA or the hospital.

Relying on *Faigenbaum,* the circuit court concluded that *Ross,* rather than *Parker,* should be applied. It found that the operation of the hospital by the PCHA constituted a governmental function because it was expressly authorized by statute. The court further concluded that under § 13 of the governmental immunity act, it had to determine whether the hospital's rendering of medical care for a fee was conducted primarily for the purpose of producing a pecuniary profit. It found that the primary purpose of the PCHA and Annapolis Hospital was to provide health care to the surrounding communities. The PCHA's motion for summary disposition was therefore granted.[8]

Plaintiff filed an application for leave to appeal with the Court of Appeals. This Court sua sponte granted leave to appeal prior to the decision of the Court of Appeals. 424 Mich 858 (1985).

II. RETROACTIVITY OF *ROSS*

Our first task is to determine what case law is applicable in each case. Prior to *Parker,* the operation of a public general hospital was considered a governmental function under both common law and § 7 of the governmental immunity act. See

[8] The suit against Dr. Jahan is apparently still pending.

Parker, 404 Mich 190-191; *Martinson v Alpena,* 328 Mich 595; 44 NW2d 148 (1950); *Nicholson v Detroit,* 129 Mich 246; 88 NW 695 (1902). *Parker* rejected this well-established case law and concluded that a public general hospital can be held liable for torts committed during its day-to-day operations. Although *Parker* did not state whether its new rule of law should be given retroactive effect, the question was resolved in *Murray v Beyer Memorial Hospital:*

> [T]he rule of *Parker* is to be applied to all cases pending on December 27, 1978, in which an express challenge to the defense of governmental immunity was made and preserved as well as all cases started after that date. [409 Mich 221.]

The Court justified this limited retroactive application as follows:

> Defendant [hospital] . . . urges that *Parker v Highland Park, supra,* be applied prospectively from the date the opinion was released and not cover other cases pending on that date.
>
> We are satisfied that the adventitious disposition of *Parker* while we held plaintiffs' application in abeyance should not deprive plaintiffs of the benefit of the rule or make available to defendant a defense we will no longer enforce for others.
>
> We acknowledge that whenever a new rule of law is promulgated some unfairness to those who have relied on the old rule may be claimed. Courts, however, do not alter an established rule of law without thorough evaluation of the policy considerations involved. When the decision to overrule precedent is finally made, the Court is satisfied that the importance of the result reached outweighs any unfairness to those negatively affected by the decision. Applying the ruling prospectively with the exception of that case and cases pending on appeal in which the issue was

raised and preserved is an attempt to limit any such unfairness. [*Id.*, pp 222-223.][9]

Justice WILLIAMS further noted:

> [U]nfortunately, the state of the law as to what constitutes governmental immunity, without further legislative definition, has for some years been in flux. . . . [T]he opinions of this Court have been such as should warn those who might possibly be affected that they had better seek protection either through insurance or through legislative redefinition. [*Id.*, p 224.]

Like *Parker, Ross* did not indicate whether it should be applied retroactively. Nevertheless, the opinion repeatedly noted that the rules and definitions articulated therein are new[10] and that the judiciary has the power to redefine the term "governmental function." 420 Mich 609-610.

Plaintiffs present several reasons why *Ross* should be applied only to cases commenced after the opinion was issued. First, *Parker* clearly held that immunity from tort liability did not extend to public general hospitals. This holding has never been seriously challenged in the courts or by the Legislature. Second, there was no indication that *Ross* would overrule *Parker,* since none of the nine consolidated cases decided in *Ross* involved the immunity of a public general hospital. Finally, plaintiffs note that other decisions have been given prospective effect only. See, e.g., *Putney v Haskins,* 414 Mich 181; 324 NW2d 729 (1982); *Tebo v Havlik,* 418 Mich 350; 343 NW2d 181 (1984).

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[9] Although *Murray* initially stated that *Parker* should be applied to all pending cases which had raised an express challenge, subsequent language referred only to cases pending on appeal. This Court did not intend to distinguish between cases pending at the trial and appellate levels for purposes of applying *Parker.* See *Scudder v Annapolis Hospital,* 129 Mich App 280, 284-286; 341 NW2d 504 (1983).

[10] 420 Mich 613, 617, 620-621, 631, 633, 635.

Similar arguments were unsuccessfully presented by public general hospitals to the *Murray* Court in an effort to limit the effect of *Parker.* Although the tort liability of public general hospitals may not have been seriously questioned after *Parker,* the definition of "governmental function" was vigorously debated. The judiciary has wrestled with this problem for over a century with little guidance from the Legislature.[11] We therefore place little reliance on plaintiffs' "legislative acquiescence" argument.

Furthermore, the consolidation of nine factually diverse cases should have signaled to the bench and bar that this Court was reevaluating the definition of "governmental function." Beginning with *Parker,* no single definition had been adopted by a majority of this Court. In addition, the case law in general was "confused [and] often irreconcilable." *Ross,* 420 Mich 596. Given the uncertainty of the law in this area, the bench and bar should have realized that some of our prior decisions, including *Parker,* might not survive after *Ross.*

Finally, the general rule is that judicial decisions are to be given complete retroactive effect. We often have limited the application of decisions which have overruled prior law or reconstrued statutes. *Tebo,* 418 Mich 360-361. Complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law. *Id.,* pp 361-363.[12]

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[11] The Legislature has recently codified the *Ross* definition of "governmental function." See 1986 PA 175, discussed at n 16 and accompanying text.

[12] For example, in *Putney v Haskins,* this Court interpreted the "name and retain" provision of the dramshop act (MCL 436.22; MSA 18.993) as requiring the allegedly intoxicated defendant to be retained as an interested party defendant throughout an action against the dramshop defendant. 414 Mich 188. *Tebo v Havlik* held that *Putney*

We believe that *Ross* should be given the same limited retroactive effect that *Parker* was given by *Murray*. We therefore hold that the rules articulated in *Ross* should be applied to all cases commenced after the date our opinion was issued (January 22, 1985), and to those cases pending either in trial or appellate courts on that date which properly raised and preserved a governmental immunity issue.

In *Hyde,* the initial complaint was filed prior to *Parker*. The amended complaint, which alleged that the University Hospital had been engaged in a proprietary function, was filed after *Parker,* but before *Ross*. The amended complaint was filed with the trial court's permission, and defendant has never argued that the pleading should be struck. Defendant only claimed that plaintiffs' challenge to its immunity came too late to take advantage of *Parker*. Even if we were to accept defendant's argument, the fact remains that this case was pending in this Court when *Ross* was issued.[13] Since plaintiffs properly raised and preserved a challenge to defendant's immunity from tort liability in their amended complaint and subsequent appeals, plaintiffs' malpractice claim should be decided pursuant to *Ross*.

In *Faigenbaum,* plaintiff's complaint against the Oakland Medical Center was filed after *Parker*

should be applied only to cases where the settlement agreement with the allegedly intoxicated defendant was entered into after *Putney* was decided. 418 Mich 364. We refused to apply *Putney* retroactively to the statute's effective date because the Court of Appeals had clearly and consistently held that such settlements were permissible, and the bench and bar had justifiably relied upon this precedent.

[13] Since the amended complaint was properly filed prior to *Ross,* we need not decide whether plaintiffs' oral assertion of the "proprietary function" exception at or before the pretrial conference, coupled with defendant's knowledge thereof and the trial court's permission to amend the complaint, also constituted an "express challenge" to defendant's immunity.

was decided. The center unsuccessfully argued that it was engaged in a governmental function under *Perry*. The center's appeal was pending in the Court of Appeals when *Ross* was decided. Since the center properly raised a governmental immunity issue in that appeal, the Court of Appeals correctly concluded that the case should be decided pursuant to *Ross*.

In *Powers*, plaintiff's malpractice claim was filed after *Parker* was decided. *Ross* was issued while the case was still pending in circuit court. The court correctly concluded that plaintiff's claim should be decided pursuant to *Ross*.

III. VIABILITY OF *PARKER* AFTER *ROSS*

Our second task is to determine whether *Ross* impliedly overruled *Parker*'s holding that the operation of a public general hospital is not a governmental function under § 7 of the governmental immunity act.

Three opinions were written in *Parker*, each adopting a different definition of "governmental function." Justice FITZGERALD, joined by Chief Justice KAVANAGH and Justice LEVIN, adopted the narrow "of essence to government" test, i.e., the activity must be of such a peculiar nature that it can only be performed by government. Justice FITZGERALD concluded that the operation of a hospital is essentially a business, regardless of who operates it. Therefore, a governmental agency which decides to engage in such activities should not be entitled to immunity from tort liability. 404 Mich 194-195.

Justice MOODY concurred, but applied the broader "essence of governing" test, i.e., the activity must be one which can be effectively accomplished only by government. Noting the large

number of private general hospitals and the governmental agency's lack of direct involvement in a hospital's day-to-day operations, Justice MOODY concluded that public general hospitals are not entitled to immunity. *Id.,* pp 200-202.

Justice RYAN, joined by Justices WILLIAMS and COLEMAN, dissented. Applying the "common good of all" test, Justice RYAN concluded that the examination, diagnosis, and treatment of patients are activities entitled to immunity because they promote the general public health. *Id.,* pp 203-204.

None of the cases decided in *Ross* involved the tort liability of a public general hospital. However, *Ross* explicitly rejected each of the definitions of "governmental function" used in *Parker.* 420 Mich 614-619. "Governmental function" was redefined as

> an activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law. [*Id.,* p 620.]

We noted that this definition "is broad and encompasses most of the activities undertaken by governmental agencies." *Id.,* p 621.

Under *Ross,* a public general hospital or medical facility is engaged in the exercise or discharge of a governmental function whenever its activities are expressly or impliedly mandated or authorized by constitution, statute, or other law. To the extent that *Parker* held that such activities do not constitute a governmental function, *Parker* was impliedly overruled by *Ross.*[14]

[14] Plaintiffs note that earlier in the *Ross* opinion, this Court declined to overrule "this aspect of *Parker.*" Plaintiffs maintain that the aspect of *Parker* we intended to affirm was its holding that public general hospitals are not immune from tort liability. This argument ignores the context in which the statement was made. The immediately preceding discussion focused on whether this Court has the

Plaintiffs vehemently argue that it is "unjust" to overrule *Parker* and deny an injured person the right to recover damages merely because he sought medical care from a public hospital.[15] We are not unsympathetic to these arguments. However, the parameters of sovereign and governmental immunity are governed by statute. Our duty is to interpret the statutory language in the manner intended by the Legislature which enacted § 7 in 1964 and amended it in 1970.

> "The controlling test as to the meaning of a statutory provision is always the legislative intent when fairly ascertainable. But the 'intent' referred to is the one entertained by the legislature at the time of the passage of the act, and not the intent expressed by a subsequent amendment. In the instant case, to interpret the subsequent amendment as an indication of the legislature's original intent would be mere speculation, not judicial construction." [*Detroit Edison Co v Dep't of Revenue,* 320 Mich 506, 519; 31 NW2d 809 (1948).]

See also *People v Gilbert,* 414 Mich 191, 200; 324 NW2d 834 (1982).

The governmental immunity act was passed in 1964 to halt this Court's attempts to abolish sovereign and governmental immunity. See *Ross,* pp 603-606. In both 1964 and 1970, the operation of a public general hospital was considered a governmental function. *Parker,* 404 Mich 190-191. There is no indication, either in the words of the act or

power to redefine "governmental function," or is bound by the prior common-law definition. We noted that a majority of the *Parker* Court had concluded that this Court could redefine the term. *Id.,* pp 609-610. We intended to affirm only this "aspect" of *Parker.*

[15] Plaintiffs raise several equal protection and due process arguments. We do not decide these questions because they were not raised in, or decided by, the lower courts. *Ross* noted, however, that the Legislature's disparate treatment of public and private tortfeasors is not totally unjustifiable. *Id.,* pp 618-619.

the legislative history, that these Legislatures intended to abrogate a public general hospital's immunity from tort liability. As noted in *Ross:*

> The consensus which our efforts produce today should not be viewed as this Court's individual or collective determinations of what would be most fair or just or the best public policy. The consensus does reflect, however, what we believe the Legislature intended the law to be in this area. [*Id.,* p 596.]

We suggested in *Ross* that plaintiffs' arguments would be better addressed to the Legislature. *Id.,* p 621. In response to *Ross,* 1986 PA 175 was enacted, effective July 1, 1986. The *Ross* definition of "governmental function" is codified in § 1(f).[16] However, § 7(4) specifically allows tort liability to be imposed on a governmental agency which owns or operates a public general hospital or county medical facility.[17] By adopting this narrow exception to the

[16] MCL 691.1401(f); MSA 3.996(101)(f) provides:

> "Governmental function" is an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.

[17] MCL 691.1407(4); MSA 3.996(107)(4) provides:

> This act does not grant immunity to a governmental agency with respect to the ownership or operation of a hospital or county medical care facility or to the agents or employees of such hospital or county medical care facility. As used in this subsection:
>
> (a) "County medical care facility" means that term as defined in section 20104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.20104 of the Michigan Compiled Laws.
>
> (b) "Hospital" means a facility offering inpatient, overnight care, and services for observation, diagnosis, and active treatment of an individual with a medical, surgical, obstetric, chronic, or rehabilitative condition requiring the daily direction or supervision of a physician. The term does not include a hospital owned or operated by the department of mental health or a hospital operated by the department of corrections.

broad immunity granted by *Ross* and codified by 1986 PA 175, it is clear that the Legislature believed that *Ross* had impliedly overruled *Parker.*

In light of this recent legislative activity, today's holding will have limited effect. Sovereign or governmental immunity from tort liability will be extended to a governmental agency operating a public general hospital or medical facility only in those cases involving a cause of action accruing prior to July 1, 1986, which was pending on January 22, 1985, or commenced on or after that date.[18] Where the cause of action accrues on or after July 1, 1986, a governmental agency may be held liable for torts arising out of the ownership or operation of a hospital or county medical facility.

IV. APPLICATION OF *ROSS*

In each case, plaintiffs seek to hold the defendant vicariously liable for the negligence of its employees or agents. Vicarious tort liability can only be imposed upon a governmental agency where:

1) the employee or agent committed a tort while acting during the course of employment and within the scope of his authority, and

2) the employee or agent committed the tort while engaged in an activity which was nongovernmental or proprietary or which fell within an

1986 PA 175 also modifies the tests for individual immunity from tort liability articulated in *Ross.*

[18] Even though a plaintiff is unable to recover directly from a governmental agency on a tort cause of action arising prior to July 1, 1986, this does not necessarily mean that he is without a remedy. A plaintiff may be able to allege a nontort claim or a cause of action falling within one of the exceptions to the governmental immunity act. See *Ross,* pp 647-648. Furthermore, the plaintiff can recover from the individual tortfeasor who caused the injury in certain circumstances. *Id.,* pp 633-634. Plaintiff may ultimately be paid by a governmental agency if the agency has agreed to indemnify its officers, employees, or agents. *Id.,* p 635; MCL 691.1408; MSA 3.996(108).

exception to the governmental immunity act. *Ross,* pp 623-625.

There is no suggestion that the employees or agents in each case were acting outside the course of employment or scope of authority when the alleged torts were committed. Other than the "proprietary function" exception, plaintiffs have not alleged that any other exception is applicable. We first decide whether the diagnosis, treatment, and care rendered by each hospital, through its employees and agents, constituted the exercise or discharge of a governmental function.

HYDE

Plaintiffs alleged that the employees of the University Hospital negligently diagnosed and treated Ms. Hyde's fracture. The question is whether the diagnosis and treatment of patients were activities which were expressly or impliedly mandated or authorized by constitution, statute, or other law.

The University of Michigan is statutorily required to maintain a department of medicine. MCL 390.8; MSA 15.908. The Legislature expressly authorized the construction and operation of the University Hospital through several appropriation acts.[19] The operation of a hospital implicitly includes the diagnosis and treatment of patients. Since these activities were implicitly authorized by statute, the employees were engaged in the exercise or discharge of a governmental function when the alleged tort was committed.

FAIGENBAUM

Plaintiff argues that the operation of defendant

[19] See, e.g., 1917 PA 96; 1919 PA 178; 1921 PA 351; 1923 PA 310. For further information on the University Hospital, see Shaw, *University of Michigan: An Encyclopedic Survey* (Ann Arbor: U of M Press, 1951).

Oakland Medical Center by the Department of Mental Health was an unauthorized, ultra vires activity. Thus, any diagnosis and treatment rendered to Ms. Katz as part of the center's general medical operations did not constitute the exercise or discharge of a governmental function. To evaluate this argument fully, the history and purpose of the center must be detailed.

Oakland Medical Center at all times was operated by the DMH. The center was established in 1968 as the medical-surgical unit of the Clinton Valley Center (then the Pontiac State Hospital). It became a separate administrative unit within the DMH in 1971. The center was created because local medical facilities were reluctant to render medical treatment to mentally ill and developmentally disabled persons residing in state facilities. The center rendered medical treatment primarily to patients from Clinton Valley Center, other state psychiatric facilities, and centers for the developmentally disabled.[20] By 1978, several community hospitals had contracted with the DMH to provide medical and surgical services to mentally ill and developmentally disabled patients. The Oakland Medical Center thereafter discontinued operations.

Plaintiff argues that there is no constitutional or statutory authority which permitted the DMH to establish and operate a general medical care facility. Plaintiff believes that the Court of Appeals incorrectly relied upon § 116 of the Mental Health Code, MCL 330.1116; MSA 14.800(116). That stat-

[20] On occasion, state prison inmates were treated at the Oakland Medical Center. Emergency care was also rendered to employees of the Clinton Valley Center, but this occurred very infrequently. These facts are not relevant to our determination of whether the DMH was authorized to establish and operate the medical center. We need not decide whether the center was authorized to treat inmates and employees, since the center was authorized to treat patients of mental health facilities, such as Ms. Katz.

ute allegedly permits the DMH to function only in areas concerning mental health.

We do not interpret the DMH's powers so narrowly. The Legislature expressly authorized the creation and operation of a general medical-surgical unit within the DMH through several appropriations acts. See, e.g., 1967 PA 32; 1971 PA 126. The latter act specifically noted:

> The goal of the medical services component [program] is to restore and maintain the physical well-being of the hospital patient population by providing diagnostic, laboratory, medical, surgical, dental services and specialized nursing care for infirm patients.

Each resident of a mental health facility must be given a comprehensive physical and mental examination prior to, or soon after, admission and must be reexamined at least annually. MCL 330.1710; MSA 14.800(710). Recipients of mental health services are entitled to "basic human dignity" under MCL 330.1704(3); MSA 14.800(704)(3), which would include the right to prompt and adequate general medical care. Even if these statutes did not exist, the care and treatment of persons residing in state mental health facilities include an implied responsibility to protect both the residents' physical and mental well-being. See *Ross,* pp 641, 643. The DMH was ultimately responsible for ensuring that Ms. Katz received necessary treatment for both her physical and mental conditions.

There is nothing in § 116 of the Mental Health Code which would prevent the DMH from fulfilling its statutory duties by operating a general medical care facility for mentally handicapped patients. Section 116 provides in pertinent part:

Pursuant to section 51 of article 4 of the constitution of 1963, which declares that the health of the people of the state is a matter of primary public concern; and pursuant to section 8 of article 8 of the constitution of 1963, which declares that services for the care, treatment, or rehabilitation of those who are seriously mentally handicapped shall always be fostered and supported; the department shall continually and diligently endeavor to ensure that adequate and appropriate mental health services are available to all citizens throughout the state. To this end the department shall have the following general powers and duties:

(a) It may function in the areas of mental illness, mental retardation, organic brain and other neurological impairment or disease, alcoholism, and substance abuse. Priority shall be given to the areas of mental illness and mental retardation. Within the area of mental illness priority shall be given to the more severe forms of such disability.

(b) It may provide, on a residential or nonresidential basis, any type of patient or client service including but not limited to prevention, diagnosis, treatment, care, education, training, and rehabilitation.

* * *

(d) It may operate directly or through contractual arrangement such facilities as are necessary or appropriate.

* * *

(j) It may enter into any agreement, contract, or arrangement with any public or nonpublic entity that is necessary or appropriate to fulfill those duties or exercise those powers that have by statute been given to the department.

* * *

(l) It shall have such powers as are necessary or appropriate to fulfill those duties and exercise those powers that have by statute been given to the department and which are not otherwise prohibited by law.

Subsection (a) specifically permits the DMH to function in areas of organic brain disease and neurological impairment. (Ms. Katz was referred to the Oakland Medical Center because her treating psychiatrists suspected neurological problems.) Subsection (b) authorizes the DMH to provide *any* type of patient service, including diagnosis, treatment, and care. There is no requirement that the services must be related solely to the patient's mental health. The DMH can provide these services directly, or through contractual arrangement under subsections (d) and (j). Defendant Oakland Medical Center was created because the DMH was unable to provide sufficient medical and surgical services on a contractual basis.

We conclude that the DMH was expressly and impliedly mandated by statute to secure, in some manner, those general medical services necessary for Ms. Katz's physical well-being. The DMH was expressly authorized by statute to provide such services directly through the Oakland Medical Center. The operation of a general medical facility implicitly includes the diagnosis and treatment of patients. Therefore, the employees of defendant center were engaged in the exercise or discharge of a governmental function when the malpractice occurred.

POWERS

Plaintiff initially argues that Annapolis Hospital is not entitled to immunity from tort liability because it is not a "governmental agency." Section 1(d) of the governmental immunity act, MCL 691.1401(d); MSA 3.996(101)(d), defines "governmental agency" as "the state, political subdivisions, and municipal corporations." These terms are also defined in § 1:

(a) "Municipal corporation" means any city, village, township or charter township, or any combination thereof, when acting jointly.

(b) "Political subdivision" means any municipal corporation, county, township, charter township, school district, port district, or metropolitan district, or any combination thereof, when acting jointly, and any district or authority formed by 1 or more political subdivisions.

(c) "State" means the state of Michigan and its agencies, departments, and commissions, and shall include every public university and college of the state, whether established as a constitutional corporation or otherwise.

Although hospitals are not listed in these definitions, plaintiff has overlooked the entity she actually sued. Plaintiff properly sued the Peoples Community Hospital Authority, an entity formed by twenty-four southeastern Michigan communities, which runs five community hospitals, including Annapolis Hospital. An authority formed by one or more political subdivisions is included within § 1(b)'s definition of "political subdivision."[21]

Plaintiff also argues that there is no statute or other law authorizing or mandating the specific types of routine medical care provided by public general hospitals. Plaintiff has misperceived how the *Ross* definition of "governmental function"

[21] Similarly, in *Hyde,* plaintiffs sued the Board of Regents of the University of Michigan, the entity specifically empowered to be sued under MCL 390.4; MSA 15.904. Public universities are included within § 1(c)'s definition of "state."

In *Faigenbaum,* plaintiff sued the Oakland Medical and Clinton Valley Centers, but not the DMH. However, the DMH was the department responsible for running the Oakland Medical Center and will ultimately pay any judgment entered, especially since the center is no longer in existence. The governmental immunity act cannot be circumvented merely by naming a facility as the defendant, rather than the state or local governmental agency which operates the facility. Since a department of the state is included within § 1(c)'s definition of "state," the governmental immunity act is applicable.

should be applied. It is not necessary that there be a specific statutory provision mandating or authorizing a hospital to set bones or deliver babies. Such an interpretation would emasculate the governmental immunity act and *Ross,* as well as result in a proliferation of unnecessarily detailed legislation. *Ross* only requires that there be some constitutional, statutory, or other legal basis for the activity in which the governmental agency was engaged when the alleged tort was committed. The governmental immunity act, as interpreted by *Ross,* permits imposition of tort liability upon a governmental agency only where the agency was engaged in an ultra vires activity, i.e., an activity which is not expressly or impliedly mandated or authorized by constitution, statute, or other law. *Ross,* p 620.

We conclude that the care and treatment of patients by Annapolis Hospital were expressly authorized by statute. Defendant authority was established pursuant to the joint hospital authority act, MCL 331.1 *et seq.;* MSA 5.2456(1) *et seq.* This act authorizes two or more cities, townships, and villages to incorporate a hospital authority in order to construct, own, and operate one or more community hospitals. "Hospital" is specifically defined in the act as a building, structure, or related facility "intended for, incidental, or ancillary to the care of the sick or wounded, or for the care of persons requiring medical treatment . . . ." MCL 331.1(2); MSA 5.2456(1)(2). The employees and agents of Annapolis Hospital were therefore engaged in the exercise or discharge of a governmental function when the alleged torts occurred.

V. "PROPRIETARY FUNCTION" EXCEPTION

Although the employees and agents in each case

were engaged in the exercise or discharge of a governmental function when they allegedly committed a tort, this does not mean that defendants are automatically entitled to immunity from tort liability. It must also be determined whether the activity at issue constituted the performance of a proprietary function. See *Ross,* p 613. If so, defendants can be held vicariously liable under § 13 of the governmental immunity act:

> The immunity of the state shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as herein defined. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the state, excluding, however, any activity normally supported by taxes or fees. No action shall be brought against the state for injury or property damage arising out of the operation of proprietary function, except for injury or loss suffered on or after July 1, 1965. [MCL 691.1413; MSA 3.996(113).][22]

Although § 13 only refers to the state, *Ross* judicially extended the statutory definition of "proprietary function" to nonsovereign governmental agencies. *Id.,* pp 613-614. Thus, the following discussion of the "proprietary function" exception applies to all state and local governmental agencies.

In each case, plaintiffs maintain that the hospital or medical facility was performing a proprietary function because it charged a fee for the diagnosis, treatment, and care rendered to its patients. In *Hyde,* plaintiffs raised this allegation

[22] 1986 PA 175 amended § 13 only insofar as "governmental agency" was substituted for "state" throughout the section. Thus, the subsequent discussion will apply equally to cases decided under the amended version of § 13.

in their amended complaint. However, the lower courts have never passed upon the merits of this allegation. Nor is the record complete enough to permit full review of this claim.

In *Faigenbaum,* the "proprietary function" exception was not raised until after *Ross* was decided and shortly before oral arguments were held by the Court of Appeals. That Court held, apparently as a matter of law, that the operation of a governmental care facility cannot be deemed a "proprietary function," even where the facility charges for its services and produces an incidental profit. 143 Mich App 313-314. However, this precise issue was not fully litigated at trial.

Powers is the only case in which a full evidentiary hearing has been conducted, and findings of fact and law made, as to whether the diagnosis, treatment, and care of patients at Annapolis Hospital constituted a proprietary function. We therefore begin our analysis of the "proprietary function" exception with a summary of the undisputed evidence presented in *Powers.*

Defendant PCHA was organized in 1945 to provide medical services to the rapidly growing western Wayne County communities. The PCHA currently operates five community hospitals, which serve approximately 250,000 patients annually. The number of participating communities has grown from nine to twenty-four. Each community levies an assessment on its residents to redeem construction bonds. In return, the residents are charged a lower fee for medical services than that charged to nonresident patients. Most of the PCHA's revenue is generated from fees charged for medical services rendered.

The PCHA actively competes with other health care providers for both resident and nonresident patients. In response to changing medical needs of

the communities and competition from private health care providers, the PCHA has created an HMO-type health plan, built outpatient health care facilities, and entered into contractual arrangements with non-PCHA hospitals and local employers to gain more patients. Currently, the PCHA is a well-managed and fiscally sound governmental agency. As of June 30, 1983, the PCHA had $9.9 million in its operation, maintenance, and receiving fund; over $30 million in its depreciation (capital expenditures) fund; and $8.3 million in its bond and interest redemption fund.[23] In addition, the revenue over expense account contained over $5.5 million as of June 30, 1983, and $8.4 million as of June 30, 1984.[24] The PCHA has never distributed excess revenues to the state, participating communities, or its board of directors.

The trial court found that § 13 of the governmental immunity act contains two tests: 1) was the activity in question conducted primarily for the purpose of producing a pecuniary profit, and 2) was the activity supported by taxes or fees? The court concluded that even though the PCHA had excess revenues, it did not operate its hospitals primarily to produce a pecuniary profit. Rather, the history of the PCHA clearly indicated that it

[23] The PCHA was required by federal and state statutes and regulations to maintain a certain level of reserves in several accounts. The depreciation fund was used to finance capital expenditures, such as the purchase of new medical equipment and building renovations. A state moratorium on certain expenditures had resulted in a particularly high amount in the depreciation account. The assessments levied by participating communities were deposited only into the bond and interest account. Since the assessments never fully covered the bond and interest payments, money was withdrawn from certain other accounts when necessary. Two members of the PCHA board of directors testified that the PCHA could survive without the tax assessments.

[24] The parties vigorously debated whether the amount in the revenue over expense account was "profit," since the PCHA and its hospitals were nonprofit organizations and had never distributed these funds in the form of dividends.

was established to provide hospital and medical care to the participating communities. The court noted that the excess revenues were channeled into other accounts when necessary and were used solely to operate the hospitals. The fact that the PCHA actively competed with other health care providers went more to Justice MOODY's "essence of governing" test, which the court believed was "ostensibly overruled" by *Ross.* The court also noted that the PCHA was funded in part by taxes. Summary disposition was granted to the PCHA because the operation of the hospitals was a governmental, nonproprietary function.

The trial court correctly interpreted § 13. Prior to the enactment of the governmental immunity act, decisions of this Court had differed as to how much, if any, incidental profit could be generated before an activity was deemed to be a proprietary function.[25] However, the Legislature has specifically defined "proprietary function" in § 13 of the act:

> Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the state,[26] excluding, however, any activity normally supported by taxes or fees.

Unlike the definition of "governmental function," the definition of "proprietary function" is quite specific and needs no interpretation. Before

[25] See Cooperrider, *The Court, the Legislature, and governmental tort liability in Michigan,* 72 Mich L R 187, 229-237 (1973), and cases discussed therein.

[26] In cases involving nonsovereign governmental agencies, an activity conducted primarily to produce a pecuniary profit for the governmental agency, rather than the state, could be deemed a proprietary function. This interpretation is consistent with the recent amendments to § 13. See n 22.

an activity is deemed a proprietary function, it must satisfy two tests:

1) The activity must be conducted primarily for the purpose of producing a pecuniary profit, *and*

2) The activity cannot normally be supported by taxes or fees.

There is nothing in § 13 which requires that the activity actually generate a profit before it can be deemed a proprietary function. If the availability of immunity turned solely upon an examination of the ledgers and budgets of a particular activity, a fiscally responsible governmental agency would be "rewarded" with tort liability for its sound management decisions. Such a rule could discourage implementation of cost-efficient measures and encourage deficit spending. Moreover, the rule would be difficult to implement and inconsistent in its results. If an activity operates at a loss one year, but makes a profit the next year, does the availability of immunity from tort liability also change? If one of the hospitals operated by the PCHA consistently operates at a loss, would immunity be granted to that hospital, but not the other fiscally sound hospitals?

The existence of a profit is not an irrelevant consideration, however. The fact that a governmental agency pursues an activity despite consistent losses may be evidence that the primary purpose is not to make a pecuniary profit,[27] but it is not conclusive evidence.[28] Conversely, the fact that the activity consistently generates a profit may evidence an intent to produce a profit. However, § 13 permits imposition of tort liability only

[27] See *Joe Davis v Detroit,* 98 Mich App 705, 711; 296 NW2d 341 (1980), lv den 422 Mich 892 (1985); *Smith v Huron-Clinton Metropolitan Authority Bd of Comm'rs,* 49 Mich App 280, 283; 212 NW2d 32 (1973).

[28] See *Knapp v Dearborn,* 60 Mich App 18, 25; 230 NW2d 293 (1975).

where the *primary* purpose is to produce a pecuniary profit. It does not penalize a governmental agency's legitimate desire to conduct an activity on a self-sustaining basis.

Another relevant consideration is where the profit generated by the activity is deposited and how it is spent. If the profit is deposited in the governmental agency's general fund or used to finance unrelated functions, this could indicate that the activity at issue was intended to be a general revenue-raising device.[29] If the revenue is used only to pay current and long-range expenses involved in operating the activity, this could indicate that the primary purpose of the activity was not to produce a pecuniary profit.[30]

The trial court concluded that the PCHA's primary purpose in operating its hospitals was to provide hospital and medical care to area residents. In light of all the evidence presented, this finding is not clearly erroneous.[31] Even if the funds accumulated in the revenue over expense account are deemed "profit," this is not conclusive evidence that the PCHA's primary purpose was to produce a pecuniary profit. The excess revenues were not distributed to the state, the participating communities, or members of the PCHA. If other accounts were insufficient to meet current expenses, funds were withdrawn from the revenue over expense account. Thus, the first test of § 13 was not satisfied.

Even if we were to conclude that the PCHA's primary purpose was to produce a pecuniary profit, the operation of the hospitals was in fact

[29] For example, the net revenue generated by the state lottery is deposited into the state school aid fund. MCL 432.41; MSA 18.969(41).

[30] See *Davis, supra.*

[31] A similar conclusion was reached in *Bullinger v Gremore,* 343 Mich 516, 559; 72 NW2d 777 (1955).

financed primarily by fees charged for medical services rendered and, to a lesser extent, taxes levied by participating communities.[32] Thus, the second test of § 13 was not satisfied. The trial court properly granted defendant PCHA's motion for summary disposition.[33]

The Legislature has defined "proprietary function" in a very narrow, unambiguous manner. The focus is on the primary intended purpose of the activity and how the activity is normally funded. A plaintiff who merely alleges that a governmental agency provides goods or services for a fee has not sufficiently alleged that the agency is engaged in a proprietary function. Often, an agency is required by statute or other law to charge a fee for its goods and services.[34] Instead, the plaintiff must allege that the primary purpose of the activity is to produce a pecuniary profit *and* that the activity is not normally supported by taxes or fees.

In *Hyde,* ¶ 5 of plaintiffs' amended complaint stated

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[32] Section 13 does not require that the activity actually be supported by taxes or fees to be immune from tort liability. The activity need only be one which is *normally* supported by taxes or fees.

[33] Plaintiff notes that the operation of Beyer Hospital by the PCHA was deemed a proprietary function in *Lykins v Peoples Community Hospital,* 355 F Supp 52 (ED Mich, 1973). In light of *Ross* and the instant cases, much of the reasoning used in *Lykins* is no longer valid. The *Lykins* court believed that all activities of state agencies are either governmental or proprietary. This strict dichotomy was rejected in *Ross,* p 613 and n 32. Although *Lykins* was decided well before *Parker,* the court essentially adopted the stricter "essence to governing" test in determining that the operation of a general hospital by a governmental agency is not a governmental function. *Ross* rejected this test. Finally, the court did not analyze or apply § 13's definition of "proprietary function."

[34] For example, the PCHA is statutorily required to charge sufficient rates to cover the reasonable cost and value of its services. MCL 331.8i; MSA 5.2456(8i). See also MCL 331.160; MSA 14.1139 (every person who is not a pauper shall pay reasonable compensation to county public hospitals for services rendered); MCL 330.1800 *et seq.;* MSA 14.800(800) *et seq.* (every recipient of mental health services who is able to pay must reimburse the DMH for services received).

> [t]hat the Plaintiff paid valuable consideration for the medical services rendered to her and therefore the Defendants were engaged in a proprietary function by viture [sic] of the fact that there are health care providers in the private sector of society who render the same sort of services.

Plaintiffs bear the burden of pleading facts in their complaint which would justify a finding that recovery in their tort cause of action is not barred by the governmental immunity act. *Ross,* p 621, n 34; *Galli v Kirkeby,* 398 Mich 527, 532, 540-541; 248 NW2d 149 (1976).[35] Paragraph 5 of the plaintiffs' amended complaint merely alleges that plaintiffs paid the University Hospital for medical services which are routinely provided by private medical facilities. Plaintiffs did not allege that the diagnosis, treatment, and care of patients at the hospital was primarily intended to produce a pecuniary profit for the state, and that this activity was not normally supported by taxes or fees. Plaintiffs' amended complaint failed, as a matter of law, to state a tort cause of action which falls within § 13's "proprietary function" exception.

In *Faigenbaum,* plaintiff did not allege in his Court of Claims complaint that the Oakland Medical Center was engaged in a proprietary function when the malpractice occurred. Nor was this issue litigated. Plaintiff first raised the argument in his supplemental brief filed with the Court of Appeals shortly after *Ross* was decided. We will not consider this untimely and unpreserved argument. See *Swartz v Dow Chemical Co,* 414 Mich 433, 446; 326 NW2d 804 (1982).

Plaintiff also asks that his contract claim

[35] Unlike other claims of immunity, sovereign and governmental immunity are not affirmative defenses, but characteristics of government which prevent imposition of tort liability. *Ross, supra; Galli,* p 541, n 5; *McCann v Michigan,* 398 Mich 65, 77, n 1; 247 NW2d 521 (1976). Compare MCR 2.111(F)(3)(a).

against the Oakland Medical Center be reinstated. Prior to trial, the circuit court struck Count II of plaintiff's complaint, and denied his motions for reconsideration, because the contract claim was supposedly duplicative of the tort claim. Plaintiff did not appeal any of these decisions, or raise the contract claim via a cross-appeal. The issue was raised before the Court of Appeals in plaintiff's supplemental brief filed after *Ross* was decided. The Court refused to consider the issue because it had not been properly appealed.

The fact that substantially identical facts underlie a plaintiff's tort and nontort causes of action does not automatically render them duplicative. *Ross,* pp 647-648. The trial court should have instead determined whether plaintiff had properly pleaded and could prove the elements of a breach of contract claim. Although we do not condone plaintiff's failure to appeal this issue in a proper manner, we remand this case to the trial court for a determination on this issue. Plaintiff raised the contract claim in his complaint and its viability will determine the outcome of this litigation. *Swartz, supra.*

VI. CONCLUSION

In *Hyde,* the decision of the Court of Appeals is affirmed on different grounds.

In *Faigenbaum,* the decision of the Court of Appeals is affirmed insofar as it held that *Ross* is to be given limited retroactive effect, and that *Parker* was impliedly overruled by *Ross.* The case is remanded to the Wayne Circuit Court for further proceedings on plaintiff's breach of contract claim. We do not retain jurisdiction.

In *Powers,* the decision of the Wayne Circuit Court is affirmed.

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

LEVIN, J. (*dissenting*). In 1978, this Court ruled, in *Parker v Highland Park,* 404 Mich 183; 273 NW2d 413 (1978), that the operation of a general hospital was not a "governmental function" within the meaning of the governmental tort liability act.[1]

Six years later, in *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567; 363 NW2d 641 (1984), this Court ruled that the construction of a drain, operations of a juvenile-care facility by the Department of Social Services, operations of facilities for emotionally disturbed persons by the Department of Mental Health, operations of a school district, the issuance of dredging permits by the Department of Natural Resources, the police response to a disturbance, and operations of a 911 system, were governmental functions.[2] In so ruling, this Court defined "governmental function" as

[1] MCL 691.1401; MSA 3.996(101).

[2] 1. *Ross, supra,* p 637. The Court posed the issue as involving "only the direct liability of a nonsovereign governmental agency [district and drain commissioner] for its negligence in contracting out, supervising, and inspecting the construction of a drain."

2. *Ross, supra,* p 640 (*Willis v Dep't of Social Services*). The Court said "[t]he question therefore is whether allowing decedent to participate in a swimming outing, and the care and supervision of decedent during the outing [with the juvenile care facility], constitute the exercise or discharge of a nonproprietary, governmental function."

3. *Ross, supra,* pp 642-643 (*Siener v Dep't of Mental Health*). "We must therefore determine whether the control and supervision of emotionally disturbed patients by [the Department of Mental Health in the Hawthorn Center] and their employees during a field trip is expressly or impliedly mandated or authorized by constitution, statute, or other law."

4. *Ross, supra,* p 646 (*Rocco v Dep't of Mental Health*). The Court said the crucial inquiry was "whether the placement of patients within a mental health facility, and the care, control, and supervision of in-patients, are activities which are expressly or impliedly mandated or authorized by constitution, statute, or other law."

5. *Ross, supra,* p 649 (*Regulski v Murphy*). The Court said it was required to "determine whether the instruction and supervision of students enrolled in a building trades class, as well as the provision of

"an activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law . . . ."[3]

In two of these cases, consolidated on appeal, it was held, after *Ross* was decided, that because the operation of a general hospital is an activity that the defendant governmental entities were authorized by law to engage in, they were, pursuant to *Ross,* immune from tort liability.[4]

After argument in this Court, the governmental tort liability act was amended by 1986 PA 175. There was added, for the first time, a definition of

safety devices and measures, constitute the exercise or discharge of a nonproprietary, governmental function."

6. *Ross, supra,* p 653 (*Trezzi v Detroit*). The Court said: "We therefore must determine whether the categorizing of emergency calls by a 911 operator and the dispatch of police vehicles in accordance therewith are activities which are expressly or impliedly mandated or authorized by constitution, statute, or other law."

7. *Ross, supra,* p 655 (*Disappearing Lakes Ass'n v Dep't of Natural Resources*). The Court inquired "whether the issuance of dredging permits and extensions, and activities related thereto, are activities which are expressly or impliedly mandated or authorized by constitution, statute, or other law."

8. *Ross, supra,* p 660 (*Zavala v Zinser*). "[W]e must determine whether [a police] officer's decision to request and await backup assistance is expressly or impliedly mandated or authorized by constitution, statute, or other law."

[3] *Ross, supra,* p 620.

[4] *Faigenbaum v Oakland Medical Center,* 143 Mich App 303; 373 NW2d 161 (1985).

In *Powers v Peoples Community Hospital Authority,* the circuit court concluded, on the basis of *Ross,* that the operation of a general hospital was a governmental function. This Court granted leave to appeal prior to decision of the Court of Appeals. 424 Mich 858 (1985).

In *Hyde v Michigan* (not officially reported), a divided Court of Appeals ruled that *Parker v Highland Park, supra,* did not apply because this Court had subsequently held in *Murray v Beyer Memorial Hospital,* 409 Mich 217, 221; 293 NW2d 341 (1980), that "the rule of *Parker* is to be applied to all cases pending on December 27, 1978, in which an express challenge to the defense of governmental immunity was made and preserved as well as all cases started after that date," and, in the view of the majority, the plaintiff had not made and preserved an express challenge to the defense of governmental immunity. The Court's disposition makes it unnecessary to express an opinion whether *Hyde* was correctly decided by the Court of Appeals.

governmental function. Act 175 adopted the *Ross* definition of governmental function but stated that immunity from tort liability was not granted with respect to the ownership or operation of a hospital except a hospital owned by the Department of Mental Health or the Department of Corrections. The amendments are effective as to causes of action arising on and after July 1, 1986. The amendatory language, in pertinent part, is as follows:

> Sec. 1. As used in this act:
>
> * * *
>
> (f) *"Governmental function" is an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.*
>
> * * *
>
> Sec. 7.
>
> * * *
>
> (4) *This act does not grant immunity to a governmental agency with respect to the ownership or operation of a hospital* or county medical care facility or to the agents or employees of such hospital or county medical care facility. As used in this subsection:
>
> (a) "County medical care facility" means that term as defined in section 20104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.20104 of the Michigan Compiled Laws.
>
> (b) "Hospital" means a facility offering inpatient, overnight care, and services for observation, diagnosis, and active treatment of an individual with a medical, surgical, obstetric, chronic, or rehabilitative condition requiring the daily direction or supervision of a physician. The term does not include a hospital owned or operated by the department of mental health or a hospital operated by the department of corrections.

* * *

Section 2. This amendatory act *shall take effect July 1, 1986.*

Section 3. (1) *Sections 1, 7,* and 13 of Act No. 170 of the Public Acts of 1964, as amended by this amendatory act, being sections 691.1401, 691.1407, and 691.1413 of the Michigan Compiled Laws, *shall not apply to causes of action which arise before July 1, 1986.*[5] [Emphasis supplied.]

The Legislature thereby adopted, for causes of action arising on and after July 1, 1986, both the *Ross* definition of governmental function and the concept (expressed in *Parker*) that a governmental agency operating a general hospital was subject to tort liability and, as well, the concept (expressed in the companion case of *Perry v Kalamazoo State Hospital,* 404 Mich 205; 273 NW2d 421 [1978]), that a governmental agency operating a state mental hospital was not subject to tort liability.

Because Act 175 is not effective as to causes of action arising before July 1, 1986, this Court must decide whether to overrule *Parker* and, if so, whether to make such overruling effective before July 1, 1986.

The question is therefore whether a governmental agency operating a general hospital is subject to tort liability pursuant to *Parker* in respect to causes of action arising before the July 1, 1986, effective date of Act 175. We would hold that it is.

I

The question whether a governmental agency is immune from or subject to tort liability in respect to the operation of a hospital was not presented

[5] 1986 PA 175, amending MCL 691.1401 *et seq.;* MSA 3.996(101) *et seq.*

and therefore could not have been decided in *Ross.* We granted leave to appeal in these consolidated cases to decide whether the rationale developed in the *Ross* opinion should be extended to the operation of a hospital and *Parker* hence overruled.

Before this Court could decide that question, the Legislature indicated its general satisfaction with the results in *Ross, Parker,* and *Perry;* the Legislature adopted in Act 175 the *Ross* definition eliminating tort liability for all lawful governmental operations, but excepted, as set forth in *Parker,* the operation of a general hospital but not, as set forth in *Perry,* the operation of a state mental hospital.

The legislative adoption of the *Ross* definition of governmental function, and of the *Parker/Perry* distinction and qualification respecting general and state mental hospitals, were both made effective as to causes of action arising on and after July 1, 1986. The Legislature did not place its imprimatur on the *Ross* definition unmodified by the *Parker/Perry* distinction and qualification for causes of action arising before July 1, 1986.

We are obliged in construing legislation, in the instant case the governmental tort liability act, to search for and seek to implement the intent of the Legislature.

Where an amendment is enacted after controversy has arisen concerning the construction of an act, the amendment has, at times, been regarded by this Court as an expression of the legislative view of the original enactment—the purpose of the legislation being to clarify, because of the difference of opinion, the meaning of the original act rather than to work a substantive change of law. See *Detroit Edison Co v Dep't of Revenue,* 320 Mich 506, 519-520; 31 NW2d 809 (1948). Such an amendment has been viewed as a legislative ex-

pression of the "true construction and meaning" rather than a change in law. See *Bailey v Clark,* 88 US (21 Wall) 284, 288; 22 L Ed 651 (1875).

Act 175 expresses the legislative judgment, and thus declared as the public policy of the state, that all lawful governmental operations shall be regarded as governmental functions immune from tort liability except, among others, the operation of a general hospital.

II

In none of the nine cases decided in *Ross* was the service provided by government mainly provided in the private sector and largely funded in the same manner as like services provided in the private sector. Because *Ross* did not consider the factual situation presented in *Parker,* it cannot properly be said today that *Parker* was impliedly overruled by *Ross.*

When *Ross* was decided the Court, aware of *Parker,* left open the question of *Parker'*s continued viability in recognition of the impropriety of deciding a question not before it. A question left open to be decided at a later date could not have been impliedly decided when *Ross* was decided.

To be sure, there are situations where, because the facts and context are essentially the same as those in an earlier case, the Court could not properly fail to apply a rule announced in the earlier case and, hence, there has been an implied overruling by the earlier case of any still earlier contrary decision.

This is not such a case. While the language of the *Ross* definition of governmental function in terms left no room for a distinction, what was said in *Ross* should, under long-established principles, be read in the context of what was then before the

Court.[6] *Ross* dealt with governmental operations and services that, while duplicated somewhat in the private sector, are mainly provided and funded by government and operations and services solely provided and funded by government.

What was said in *Ross* could not foreclose this Court from recognizing, when the issue was presented, the difference and distinction between one governmental activity and another—the difference and distinction between a governmental activity mainly provided and funded by government and a governmental activity mainly provided in the private sector funded by users without significant governmental subvention.

The opinion of the Court acknowledges that "[n]one of the nine consolidated cases decided in *Ross* involved the tort liability of a public general hospital . . . ."[7] It nevertheless concludes that *Ross* impliedly overruled *Parker* because *Ross* rejected all the definitions proffered by the justices in *Parker* and because the definition stated in *Ross* "is broad and encompasses most of the activities undertaken by governmental agencies."[8] That explanation begs the question whether *Ross* impliedly overruled *Parker* by bootstrapping on the obiter dictum of *Ross.*

To the extent that the *Ross* definition embraced within its sweeping ambit "governmental" operations and services mainly provided in the private sector and mainly funded by user fees—to the extent it dealt with the question theretofore decided in *Parker*—it went beyond the ambit of what was before the Court for decision and beyond the appropriate exercise of judicial authority.

What the Court says in an opinion beyond what

[6] See *Larzelere v Starkweather,* 38 Mich 96, 100 (1878).

[7] *Ante,* p 230.

[8] *Ante,* p 243, quoting *Ross, supra,* p 621.

is necessary to decision is necessarily obiter dictum. It can be rejected in a later case, as *Ross* rejected all the definitions of governmental function proffered in *Parker.*

What the Court does in a particular case rather than what it says is more likely to stand the test of time. What the Court did in *Ross* was to hold that operations of schools, the Departments of Natural Resources and Mental Health, 911 and police department operations—operations without an equivalent counterpart in the private sector, operations largely funded by taxes—are governmental functions within the intendment of the governmental tort liability act. That is all the Court did or could properly do.

III

The view that *Ross* impliedly overruled *Parker* presupposes either that (i) there is no meaningful difference between such tax-supported governmental operations as police and fire departments, public schools, state-operated mental institutions, and the Department of Natural Resources, on the one hand, and user-supported government operations of a general hospital, on the other, or that (ii) this Court is incapable of defining the term "governmental function" in a manner both consistent with what the Court decided (as distinguished from what it said) in *Ross* and, in recognition of the difference and distinction between such governmental operations, consistent with what was decided in *Parker/Perry.*

The Supreme Courts of Pennsylvania, North Carolina, Kansas, and Minnesota,[9] along with this

[9] *Flagiello v Pennsylvania Hospital,* 417 Pa 486, 491-495; 208 A2d 193 (1965); *Sides v Cabarrus Memorial Hospital,* 287 NC 14, 18-19; 213 SE2d 297 (1975); *Carroll v Kittle,* 203 Kan 841; 457 P2d 21 (1969);

Court in *Parker/Perry,* differentiated between tax-supported governmental operations and the user-supported operations of a general hospital in holding that a general hospital is subject to tort liability.

Justice MOODY recognized the difference and distinction in *Parker/Perry.* By his fourth vote, he implemented the difference and distinction for six years.

It is within the competence of this Court to recognize the difference and distinction and to say, for example, that it is beyond the policy and intent of the Legislature—in excepting from the general rule of tort liability the operations of government that constitute a "governmental function"—to except from the general rule of tort liability the governmental operation of a general hospital because such hospitals, in contradistinction from other governmental operations, generally provide services obtained by most of the state's population in the private sector that are largely funded in the same manner as like services obtained in the private sector.

The Court might thus define (or redefine) "government function" for the period January 22, 1985 (the day *Ross* was announced), through June 30, 1986 (the day before Act 175 became effective), as any government activity, not ultra vires, other than a service mainly provided the state's population in the private sector that is largely funded, where provided in the public sector, in the same manner and from the same sources as like services obtained in the private sector.

If this Court were in these consolidated cases to recognize the distinction between a general hospital and all other government operations, and to so

Stein v *Regents of the Univ of Minnesota,* 282 NW2d 552 (Minn, 1979).

define or redefine *Ross,* the result would be the same as that enacted in Act 175. The exception for services mainly provided by, and largely funded in the same manner as like services obtained in, the private sector would plainly, because of the context in which stated, mean general hospitals.[10]

IV

The legislative adoption of the *Ross* definition was no more than a convenient way of stating what could be said in another way with the same result. Act 175 does not imply that the Legislature viewed *Ross* as overruling *Parker,* and most importantly the enactment of Act 175 did not imply that the Legislature viewed *Ross* as correctly overruling *Parker* and a correct expression of legislative intent.

"By adopting this narrow exception to the broad immunity granted by *Ross* and codified by 1986 PA 175, it is clear"[11]—not "that the Legislature believed that *Ross* had impliedly overruled *Parker*"[12]—but that the Legislature believed that the *Ross* formulation was deficient and inconsistent with sound public policy insofar as general hospitals are concerned.

V

If one focuses on the effective date of July 1, 1986, one could argue, and correctly so, that the Legislature did not make the rules announced in Act 175—the *Ross* definition modified by the *Par-*

[10] It does not appear whether any governmental entity other than the Department of Mental Health or Department of Corrections operates a psychiatric hospital.

[11] *Ante,* pp 245-246.

[12] *Ante,* p 246.

ker/Perry distinction and qualification—effective before July 1, 1986. It does not follow that the *Ross* definition should, to the extent it is obiter dictum, be effective before July 1, 1986, or that *Parker/Perry* are overruled or superseded before July 1, 1986.

This Court should not insist that its word formulation in *Ross,* rejected in this one application by the Legislature, must govern decision in this case. No grand design, plan, or symmetry would be offended by continuing the rule of *Parker* through July 1, 1986, the effective date of the new legislation.

The codification of the *Ross* definition effective July 1, 1986, as amended by the exception for general hospitals, means that the codification of the *Ross* definition as amended did not become effective until July 1, 1986. There is, to repeat, no implication from the July 1, 1986, effective date that the unamended *Ross* formulation is to be effective before July 1, 1986, or that it is codified and written in stone for the period of January 22, 1985, through June 30, 1986.

One can as readily argue that the application before July 1, 1986, of the *Ross* definition was rejected by the Legislature, as that the continued application of *Parker* through June 30, 1986, was rejected.

The question when, if at all, the obiter dictum of *Ross* becomes effective is a separate question which the Legislature left to the courts. This Court can readily justify delaying the effective date of the *Ross* dictum or modifying the dictum in recognition that it is dictum and the impolicy of creating a window of immunity by overruling *Parker.* There is nothing in the legislatively ordained July 1, 1986, effective date that militates for or against either result.

VI

Parker should not be overruled. The result of *Parker* is now the law for causes of action that arise on and after July 1, 1986. *Parker* has governed, since 1978, in hundreds, perhaps thousands, of lawsuits settled or tried on the basis of *Parker.* There are hundreds or perhaps thousands of cases pending in the courts where litigants and lawyers in reliance of *Parker* have expended considerable energy and large sums in cases awaiting trial. Partial settlements have been entered into and nonhospital defendants not named or released from liability in reliance on the rule of *Parker* in the expectation of a day in court against a governmental hospital defendant.

The argument that *Parker* was not precedentially binding because "no single definition had been adopted by a majority of this Court,"[13] ignores both the reliance by bench and bar on the rule of *Parker* and that the *Ross* definition is not precedentially binding beyond what was before the Court in *Ross* and properly then decided. The argument that "the consolidation of nine factually diverse cases should have signaled to the bench and bar that this Court was reevaluating the definition of 'governmental function' "[14] ignores that the Court could not properly reevaluate the definition of "governmental function" as applied to a general hospital because none of the nine factually diverse cases concerned the activities of a general hospital. The argument that litigants were warned by judicial dictum assumes that dictum is precedent. The argument that litigants were warned by the inability of four justices to agree on a rationale ignores the need, recognized in *Tebo v*

[13] *Ante,* p 240.

[14] *Ante,* p 240.

Havlik, 418 Mich 350; 343 NW2d 181 (1984), and *Gusler v Fairview Tubular Products,* 412 Mich 270; 315 NW2d 388 (1981),[15] of bench and bar to proceed in reliance on the last word from this Court until it speaks more decisively.

VII

Even if *Ross* impliedly overruled *Parker* it would not be consequential if it is not overruled effective before July 1, 1986. The same considerations of fairness that prompted this Court to delay the effective date of the new rules announced in *Tebo* and *Gusler* require, at least, that the effective date of any overruling of *Parker* be delayed until January 22, 1985, the day the *Ross* definition (together with the *Ross* obiter dictum) was announced.

VIII

The opinion of the Court states:

> We hold that the rules articulated in *Ross* apply to all cases commenced after January 22, 1985, the date our opinion was issued, and to those cases pending either in trial or appellate courts on January 22, 1985, in which a governmental immunity issue was properly raised and preserved.[16]

Footnote 35 of the opinion states:

> Unlike other claims of immunity, sovereign and

[15] Considered in terms of the justification for reliance by bench and bar, and thus considered in terms of "fairness," a decision of this Court, until reversed, whether or not four justices can agree on a rationale, should be regarded as at least as "clear and uncontradicted" (*ante,* p 240) as a decision of the Court of Appeals following which the sole action of this Court was to deny leave to appeal.

[16] *Ante,* p 230.

governmental immunity are not affirmative defenses, but characteristics of government which prevent imposition of tort liability. [Citations omitted.]

It thus appears that a governmental hospital need not plead governmental immunity as an affirmative defense and that the failure to plead an affirmative defense would not be a failure to "preserve" the governmental immunity issue. Nevertheless, under the Court's formulation, the issue must be "properly raised." The opinion does not state whether this might have been done by motion for summary judgment, in the pretrial statement,[17] or otherwise.

It appears, since the opinion of the Court speaks in the past tense—"*was* properly raised and preserved" (emphasis supplied)—that the governmental immunity issue must have been properly raised and preserved by January 22, 1985. If that is a correct reading, then if a motion for summary judgment were filed after January 22, 1985, it would be too late. And since the governmental immunity issue need not be raised as an affirmative defense, raising it by answer on or before January 22, 1985, might not be to "properly" "preserve" it.[18] (At least those are some of the arguments one can foresee in the trial courts in the hundreds, perhaps thousands, of cases affected by what is said in today's decision.)

If, as appears, the window of immunity announced by the Court today applies only to cases where motions for summary judgment were filed on or before January 22, 1985, the effect of the

[17] The Court of Appeals concluded in *Hyde* that the judge's statement in the pretrial statement did not "raise and preserve the challenge" absent plaintiffs' amending their complaint. See n 4.

[18] But see *Scudder v Annapolis Hospital*, 129 Mich App 280; 341 NW2d 504 (1983).

decision will indeed be less because there was no reason before this Court's decision in *Ross* to file such a motion.

Parker thus is *not* overruled as to cases commenced on or before January 22, 1985, in which the defendant hospital failed to file a premature motion for summary judgment and, possibly, also is not overruled as to cases in which the defendant hospital filed a superfluous affirmative defense. If a case was filed on, say, January 15, 1985, *Parker* would probably govern because the defendant hospital's answer was not due until after January 22, 1985. If, however, the defendant hospital filed a premature motion for summary judgment that was denied, *Parker* governs despite the expenditure of energy and money preparing the case for trial in reliance on that denial which presumably would have been predicated on *Parker*.

The Court has not adequately explained why it has reached such a peculiar result now that the Legislature has spoken and clearly said that the public policy of this state is that general hospitals are not immune from and rather are subject to tort liability.

ARCHER, J., concurred with LEVIN, J.

ARCHER, J. (*dissenting*). While I concur with Justice LEVIN's dissent, I write separately.

The Legislature has specifically provided that tort liability may be imposed upon a governmental agency that owns or operates a public general hospital or county medical facility. 1986 PA 175.[1]

[1] MCL 691.1407(4); MSA 3.996(107)(4) provides:

> This act does not grant immunity to a governmental agency with respect to the ownership or operation of a hospital or county medical care facility or to the agents or employees of such hospital or county medical care facility. As used in this subsection:

In providing that these public hospitals cannot claim governmental immunity, the Legislature has approved the continuing validity of this Court's decision in *Parker v Highland Park,* 404 Mich 183; 273 NW2d 413 (1978). Although the act does not apply to these cases, the decision of the Legislature which will apply to future cases is a helpful and valuable guide.

In *Parker,* the majority held that public general hospitals are not immune from tort liability. None of the nine cases decided in *Ross* involved that issue. The Legislature decided not to grant immunity to governmental agencies that own or operate hospitals or county medical facilities and provided that the agents or employees of such hospitals were not immune from liability.

Months after the *Ross* decision, the Legislature held hearings on proposals to reform tort law in this state. Although the Legislature limited the noneconomic damages that some plaintiffs could recover in medical malpractice cases, other reforms were not enacted. The Legislature decided to retain tort liability for governmental agencies that own or operate certain general hospitals. Since the Legislature has expressed a clear judgment requiring certain public general hospitals to remain liable, this Court should respect that judgment. Legislators are elected representatives of the peo-

(a) "County medical care facility" means that term as defined in section 20104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.20104 of the Michigan Compiled Laws.

(b) "Hospital" means a facility offering inpatient, overnight care, and services for observation, diagnosis, and active treatment of an individual with a medical, surgical, obstetric, chronic, or rehabilitative condition requiring the daily direction or supervision of a physician. The term does not include a hospital owned or operated by the department of mental health or a hospital operated by the department of corrections.

The act became effective July 1, 1986.

ple of this state. This decision is particularly unjust since *Parker* provides the plaintiffs with a remedy, and the Legislature has specifically provided redress for plaintiffs who are similarly situated whose causes of action happen to arise after 1986 PA 175 takes effect.

The government and its agents have a duty to act responsibly in the name of the people who authorize them to act. This is especially true in the area of public health where the sick and injured are especially vulnerable and must rely upon the professional expertise of their caretakers. In expanding the scope of governmental immunity in these cases, the Court is protecting the government and its agents from the legal consequences of negligent acts.

While absolute immunity from liability may be required in limited instances in order to allow some governmental agencies and employees the freedom in which to exercise their mandate from the people, such freedom is not justified in this case.

By authorizing the government to engage in certain activities, such as operating a public hospital, the public has not at the same time relieved the government of its duty to act with care.

As Justice LEVIN correctly observed in his partial dissent in *Ross:*

> Virtually all government activity is expressly or impliedly mandated or authorized by the constitution, a statute, or other law. By perusing the statute books rather than focusing on the specific activity complained of by the plaintiff, the Court casts the net of governmental immunity too far, enabling a governmental entity to expand the scope of its immunity by promulgating an ordinance or other law relating to its activities. [*Ross* at 684.]

The majority here cites statutory authority which empowers public hospitals to function in the name of the people and then maintains that the same statute immunizes the agency and its employees when they breach the very responsibilities the statute created. The answer to the agency's liability should be determined by focusing upon the specific act or omission of the agency, not by citing the overall governmental objective of the agency.

The determination whether a governmental agency acted within the limits of its authority still requires judicial interpretation. To state that an activity is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law adds little to the analysis we must use to determine the nature of the responsibilities of the agency and whether the specific acts alleged were beyond the public mandate.

Because the majority ignores the precedence of *Parker,* and extends the immunity of government to an unacceptable degree, I dissent.

CAMAJ v S S KRESGE COMPANY

Docket No. 76703. Argued March 6, 1986 (Calendar No. 17). Decided October 7, 1986.

Toma Camaj brought an action in the 48th District Court against the S. S. Kresge Company for malicious prosecution, following the dropping of charges of larceny in a building brought against him by Kresge. The jury awarded damages, including exemplary damages. The court, Gus Cifelli, J., trebled the award of damages under § 2907 of the Revised Judicature Act. The Oakland Circuit Court, Richard D. Kuhn, J., ordered vacation of the judgment or, at the option of the plaintiff, entry of the original award. The Court of Appeals, BRONSON, P.J., and J. H. GILLIS and ALLEN, JJ., reversed and reinstated the judgment of treble damages, and certified conflict with *Zmija v Baron*, 119 Mich App 524 (1982) (Docket No. 72925). The defendant appeals.

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

An award of treble damages for malicious prosecution under § 2907 of the Revised Judicature Act may be had only in actions in which a party brings suit against a person who had instituted proceedings against that party in the name of another, without the named person's consent, or where no such person is known. This type of malicious prosecution was not shown in this case.

Because this interpretation of § 2907 is new, it is to apply prospectively only to this case and to all cases in which no final decision has been reached in the trial courts before October 7, 1986.

Justice LEVIN, concurring, stated that the question whether a new construction of a statute should be given prospective effect

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REFERENCES

Am Jur 2d, Malicious Prosecution, § 104 *et seq.*

Liability of perpetrator of crime for damages to innocent persons subjected to prosecution for the commission of such crime. 40 ALR3d 1005.

is separate from whether it should be so construed and should not be decided without briefing and advocacy.

Reversed.

Justice ARCHER, concurring in part and dissenting in part, stated that most, if not all, cases underlying actions for malicious prosecution are criminal and thus are always brought in the name of another, i.e., the people. In this case, the underlying criminal action was also brought without the consent of the people in that the prosecutor was not fully and truthfully informed by S. S. Kresge of all pertinent facts, and therefore S. S. Kresge or its agents, and not the prosecutor, was the initiator of the criminal prosecution and the proper defendant in the civil action. It follows, then, that the plaintiff, who was injured by the egregious conduct of S. S. Kresge is entitled to treble damages.

143 Mich App 604; 372 NW2d 359 (1985) reversed.

OPINION OF THE COURT

1. MALICIOUS PROSECUTION — DAMAGES — TREBLE DAMAGES.

An award of treble damages for malicious prosecution under § 2907 of the Revised Judicature Act may be had only in actions in which a party brings suit against a person who had instituted proceedings against that party in another's name, without the named person's consent, or where no such person is known (MCL 600.2907; MSA 27A.2907).

OPINION CONCURRING IN PART AND DISSENTING IN PART BY ARCHER, J.

2. MALICIOUS PROSECUTION — TREBLE DAMAGES.

Where an action underlying an action for malicious prosecution was brought by a prosecutor in the name of the people without a knowing, intelligent, and informed decision, free from false assertions by the giver of information, there was no consent on the part of the people, and the plaintiff should be entitled to recover treble damages (MCL 600.2907; MSA 27A.2907).

Lakin, Worsham & Victor, P.C. (by *Larry A. Smith*), for the plaintiff.

Wilson, Portnoy, Leader, Pidgeon & Roth, P.C. (by *Robert P. Roth*), for the defendant.

BOYLE, J. We are asked to decide in this case whether the trebling of damages, pursuant to MCL

600.2907; MSA 27A.2907, is proper in a civil action for malicious prosecution when the jury verdict includes an award for exemplary damages. The Court of Appeals has certified a conflict between its decision in this case (affirming the lower court's trebling of the jury verdict) and its decision in *Zmija v Baron,* 119 Mich App 524; 326 NW2d 908 (1982) (requiring the plaintiff to elect either to have the jury consider exemplary damages or to treble the jury verdict pursuant to the statute). Because we find that § 2907 only applies to a particular type of malicious prosecution not in evidence in this case, we reverse the decision of the Court of Appeals and affirm the judgment of the Oakland Circuit Court.

Plaintiff Toma Camaj began the instant suit after an incident in which he was apprehended leaving a K mart store and accused by the security guard of trying to steal the sportcoat he was wearing. Plaintiff was detained until the police arrived and then released, but was later charged with larceny from a building. Mr. Camaj refused an offer to plead guilty to a lesser charge and the prosecution was continued. The charge was eventually dismissed when the security guard, after repeated attempts by both the prosecutor and defense counsel to force her appearance, failed to appear for trial.

After the charges were dropped, Mr. Camaj began this action against S. S. Kresge Company for malicious prosecution. The case was heard in the 48th District Court, where a jury verdict of $7,500 was returned for the plaintiff, which was trebled by the court pursuant to § 2907. The plaintiff had requested the trebling before the jury was instructed that they could return a verdict which included damages for mental anguish, humiliation, degradation, mortification, and loss of social enjoy-

ment and pleasure, as well as for out-of-pocket expenses.

Defendant appealed in the Oakland Circuit Court, which ordered a vacation of the judgment or, at the plaintiff's option, entry of a judgment in the amount of $7,500. The Court of Appeals granted plaintiff leave to appeal and subsequently reversed the decision of the circuit court and reinstated the trebled judgment. We granted leave to appeal to resolve the conflict in the Court of Appeals as to the correct application of § 2907.

After oral arguments and further consideration, this Court directed the parties to file supplemental briefs on the question whether or not § 2907 was intended to apply to all malicious prosecution actions or only to those in which a suit or proceeding had been fraudulently filed under another's name.[1] Supplemental briefs were filed by both parties.

Section 2907 was first enacted by the Legislature in 1846. It currently reads:

> Every person who shall, for vexation and trouble or maliciously, cause or procure any other to be arrested, attached, or in any way proceeded against, by any process or civil or criminal action, or in any other manner prescribed by law, to

[1] Specifically, the Court's order directed:

> It appears to the Court that it is necessary to a decision in this case to resolve the issue of whether MCL 600.2907; MSA 27A.2907 applies to all malicious prosecution actions or just to a particular type, that is, where the original proceeding or suit had been brought, by the defendant in the malicious prosecution case, in another person's name "without the consent of such person, or when there is no such person known." IT IS THEREFORE ORDERED that the parties shall submit to the Court supplemental briefs on this issue within 45 days of the date of this order. The parties are advised, for further direction, to consult New York Civil Rights Laws §§ 70 and 71 which appear to be parallel provisions to the Michigan statute.

> answer to the suit or prosecution of any person, without the consent of such person, or where there is no such person known, shall be liable to the person so arrested, attached or proceeded against, in treble the amount of the damages and expenses which, by any verdict, shall be found to have been sustained and incurred by him; and shall be liable to the person in whose name such arrest or proceeding was had in the sum of $200.00 damages, and shall be deemed guilty of a misdemeanor, punishable on conviction by imprisonment in the county jail for a term not exceeding 6 months.

The current version reflects some changes from the version originally enacted:

> Every person who shall, for vexation and trouble, or maliciously, cause or procure any other to be arrested, attached, or in any way proceeded against, by any process or proceeding at law, or in equity, or in any other manner prescribed by law, to answer to the suit or prosecution of any person, without the consent of such person, or where there is no such person known, shall be liable to the person, so arrested, attached or proceeded against, in treble the amount of the damages and expenses which, by any verdict, shall be found to have been sustained and incurred by him; and shall be liable to the person in whose name such arrest or proceeding was had in the sum of two hundred dollars damages, and shall be deemed guilty of a misdemeanor, punishable, on conviction, by imprisonment in the county jail for a term not exceeding six months.

It is obvious from the language of § 2907, especially the phrases "without the consent of such person, or where there is no such person known," "shall be liable to the person in whose name such arrest or proceeding was had," and "shall be deemed guilty of a misdemeanor" that this statute was intended to provide, at least in part, a remedy

for a particularly egregious type of malicious prosecution.[2]

Malicious prosecution actions generally have their basis in early common law. Originally the Anglo-Saxon courts fixed a monetary penalty which was paid to the opponent when a plaintiff was found to have brought a false suit. This later was changed to a system which assessed penalties for false suits which were paid to the court.

Courts were unable, however, to assess penalties against a person who brought a false suit in the name of another. Often, this involved a lord who would falsely sue in the name of a propertyless freeman, against whom penalties were not collectable. In response to these "straw-party" suits (as they were known), the English legal system formulated the writ of conspiracy. As one commentator noted:

> Unlike its modern descendants, conspiracy took aim not at all malicious suits, nor even at those causing special hardships, but solely at straw-party actions. The writ granted wronged defendants limited rights to sue those who procured third parties to instigate groundless actions, but granted no remedy against an individual plaintiff who sued without ground. Moreover, the writ required not only a showing that false claims had been made in court but also a further showing of malice: the subsequent sanction was limited to the most egregious of groundless actions, and did not extend, as

[2] It must be noted that it is only recently that § 2907 has been proposed in malicious prosecution actions. As one commentator noted,

> The purpose of the statute seems to be lost in the mists of the past, and for more than a century, the statute seems to have been ignored by the bar and the courts. [Plant, Torts, 19 Wayne L R 703, 751 (1973).]

did amercement, to simple false suits.[3] [Note, *Groundless litigation and the malicious prosecution debate: A historical analysis,* 88 Yale L J 1218, 1224-1225 (1979).]

Although this type of suit is no longer as prevalent, the remedy for "straw-party" suits is still in evidence in laws such as the New York Civil Rights Laws, §§ 70 and 71 which provide:

> If a person vexatiously or maliciously, in the name of another but without the latter's consent, or in the name of an unknown person, commences or continues, or causes to be commenced or continued, an action or special proceeding, in a court, of record or not of record, or a special proceeding before a judge or a justice of the peace; or takes, or causes to be taken, any proceeding, in the course of an action or special proceeding in such a court, or before such an officer, either before or after judgment or other final determination; an action to recover damages therefor may be maintained against him by the adverse party to the action or special proceeding; and a like action may be maintained by the person, if any, whose name was thus used. He is also guilty of a misdemeanor, punishable by imprisonment not exceeding six months. [NY Civ Rights Law, § 70 (McKinney, 1976).]
>
> In an action, brought by the adverse party, as prescribed in the last section, the plaintiff, if he recovers final judgment, is entitled to recover treble damages. In an action, brought by the person whose name was used, as prescribed in the last section, the plaintiff is entitled to recover his actual damages, and two hundred and fifty dollars in addition thereto. [NY Civ Rights Law, § 71 (McKinney, 1976).]

Section 2907 appears, in phraseology, to resem-

[3] Courts later expanded the use of action on the case in the nature of conspiracy to allow an assessment of damages against those filing false suits in their own name when the taxing of costs to the court was inadequate to compensate for the damages to the wronged party.

ble these New York statutes and to be aimed at remedying the same type of situation.[4] Plaintiff, in fact, concedes that § 2907 does cover "straw-party" suits, but urges this Court to read the statute as applicable both to suits fraudulently filed in the name of another and to ordinary malicious prosecution actions. As plaintiff argues:

> The statute's language on its face provides for a cause of action and treble damages against "every person who shall, for vexation and trouble or maliciously, cause or procure any other to be arrested, attached, or in any way proceeded against, by any process or civil or criminal action." That first phrase is complete in and of itself and is not modified by or conditioned upon the subsequent language "OR in any other manner prescribed by law, to answer to the suit or prosecution of any person, without the consent of such person, or where there is no such person known."

We decline to read the statute in such a convoluted manner. Were we to accept plaintiff's argument, suits against those who fraudulently brought suit in the name of another could only be brought if the party in the underlying action had proceeded in *other* than a civil or criminal action. This clearly cannot be a correct reading of the statute.

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[4] In the early years of statehood, Michigan adopted many of New York's laws. One historian noted:

> A high percentage of the state's settlers had come from New York, and they sought to reproduce the economy of relative abundance that was rapidly emerging in the western part of their native state. A major ingredient in Michigan's development strategy, therefore, was an almost slavish borrowing of New York's statutory and constitutional laws . . . . [Seavoy, "Borrowed Laws to Speed Development: Michigan, 1835-1863," 59 *Michigan History* 39, 40 (Michigan Department of State [Spring-Summer, 1975]).]

The words "by any process or civil or criminal action, or in any other manner prescribed by law" logically must be viewed as one phrase modifying the words "arrested, attached, or in any way proceeded against." Therefore, in order to make proper sense of § 2907, it must be read as applying only to "[e]very person who shall, for vexation and trouble or maliciously, cause or procure any other to be arrested, attached, or in any way proceeded against . . . to answer to the suit or prosecution of any person, without the consent of such person, or where there is no such person known . . . ."[5]

This Court is further persuaded that § 2907 was intended as a paranormal remedy for a particular type of malicious prosecution action by evidence that early courts routinely applied a different standard for damages in "straw-party" suits. In fact, "[i]n *Savile v Roberts* [1 Ld Raym 374; 91 Eng Rep 1147 (1698)], Lord Holt organized the kinds of damages previously recognized in actions on the case in the nature of conspiracy into two categories, one of particular or 'special' damage, the other of straw-party suits." Note, *supra,* p 1228.

Lastly, it must also be noted that the original statute, as organized in the Revised Statutes of 1846, included a marginal notation which clearly delineates this statute as dealing with "Suing &c., in name of another." While headings are normally not to be used as a conclusive proof of the purpose of a statute, in the absence of any other evidence of legislative intent, we find this expression of the understanding in 1846 as additionally persuasive.

In light of the foregoing evidence and in view of

[5] We further note that the two other sanctions in § 2907 can only apply in a malicious action involving a straw-party suit. The $200 to be paid "to the person in whose name such arrest or proceeding was had" and the imposition of a misdemeanor status and a possible jail sentence are additional intrinsic evidence of the proper focus of this statute.

the longstanding disfavor of punishment-type damages in this state, *Peisner v Detroit Free Press,* 421 Mich 125; 364 NW2d 600 (1984); *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich 401; 259 NW2d 50 (1980); *McChesney v Wilson,* 132 Mich 252; 93 NW 627 (1903), we are persuaded that the Legislature intended a narrow focus in this statute which allows for an increased amount of damages beyond that awarded by the jury. We, therefore, hold that § 2907 is intended only to reach those actions in which a party brings suit against a person who had instituted proceedings against the current plaintiff in the name of another, without the named person's consent, or where there is no such person known.[6]

Plaintiff further contends, however, that even if this Court finds that § 2907 only applies to remedy fraudulently filed "straw-party" suits, he will still be entitled to treble damages because the suit in his case was brought in the name of the people. We reject this argument. Were we to so find, we would be turning virtually every malicious prosecution action filed because of criminal proceedings into a "straw-party" suit. We are not persuaded that this was the intent of the Legislature in enacting § 2907 and find that the Court of Appeals has incorrectly applied the statute in this case.

Finally, we acknowledge that this decision sets forth a totally new interpretation of § 2907 which has, heretofore, not been advanced by any appel-

[6] Our analysis of this statute compels this result, despite defendant's concession in its supplemental brief that § 2907 covers all malicious prosecution actions. This Court is not bound by the defendant's interpretation of the case and may consider and analyze the facts and issues independent of such concession. We agree with the United States Supreme Court in *Sibron v New York,* 392 US 40, 58-59; 88 S Ct 1889; 20 L Ed 2d 917 (1968), that our judgments are precedents which " 'cannot be left mainly to the stipulation of the parties.' " For us to accept a view blindly, would be "an abdication of our obligation to lower courts . . . ."

late court in this state. Therefore, in the interest of justice and fairness, we hold that this decision shall have prospective effect only, applicable solely to the instant case and to all cases in which no final decision has been reached in the trial courts before October 7, 1986, the date of the filing of this opinion. *Tebo v Havlik,* 418 Mich 350; 343 NW2d 181 (1984).

Reversed.

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

LEVIN, J. I concur in the opinion of the Court except the final paragraph.

The question whether a new construction of a statute should be given prospective effect is a separate question from whether the statute should be so construed. There has been no briefing or advocacy on whether the new construction should be given prospective effect. That question should not be decided without briefing and advocacy.

ARCHER, J. (*concurring in part and dissenting in part*). I agree with the majority's conclusion that in an action for malicious prosecution, the underlying action must have been brought "in the name of another" and "without the consent of such person" in order to fall within the provisions of § 2907. The history of MCL 600.2907; MSA 27A.2907 and similar statutes in other jurisdictions involving remedies for such "straw-party" suits, support this conclusion. I also agree that § 2907 was intended to provide a remedy for a particularly egregious type of malicious prosecution.

However, I disagree with the majority's conclusion with respect to suits brought in the name of

the People of the State of Michigan. Plaintiff contends that he is still entitled to treble damages because the underlying criminal suit in his case was brought in the name of another, i.e., the people. The majority rejects this argument, stating that to do so would turn virtually "every malicious prosecution action filed because of criminal proceedings into a 'straw-party' suit." On the other hand, not to do so, on the basis of such reasoning, would bar every plaintiff in a malicious prosecution action from ever being awarded treble damages, no matter how egregious the defendant's conduct because most, if not all, cases underlying malicious prosecution cases are criminal and are therefore always brought by the people.

Interpretation of the "in the name of another" and "without the consent of such person" language when applying § 2907 is of first impression. Cases interpreting statutes similar to § 2907 have dealt with defamation actions which are rarely, if ever, brought in the name of another. Even where the defamation actions were brought in the name of another, the issue of "consent" determined the outcome of the action.[1]

In the instant case, the underlying criminal action was brought in the name of another, to wit: the People of the State of Michigan. It was also

[1] See *Fischer v Maloney*, 56 AD2d 884; 392 NYS2d 666 (1977). In *Fischer*, the president of a coöperative corporation unsuccessfully pursued a defamation action against the plaintiff, Mr. Fischer. Subsequently, Mr. Fischer sued Mr. Maloney, the president, and the members of the board of directors of the coöperative for violation of § 70 of the Civil Rights Laws (the New York statute similar to § 2907) regarding vexatious suits brought in the name of another without permission. The court dismissed plaintiff's action against the members of the board of directors.

In affirming the trial court, the appellate court held that since the previous action was commenced by the president of the coöperative, the plaintiff could not now claim that the suit was commenced *without* the coöperative's consent. As such, it could not violate the statute.

brought without the consent of the people because the prosecutor was not fully and truthfully informed by S. S. Kresge of all pertinent facts.[2] Since S. S. Kresge or agents of S. S. Kresge informed the prosecutor by making false statements, S. S. Kresge or its agents, and not the prosecutor, was the initiator of the criminal prosecution and the proper defendant in the civil action for malicious prosecution. See *Renda v Int'l Union, UAW,* 366 Mich 58; 114 NW2d 343 (1962). This principle is also stated in 3 Restatement Torts, § 653, and quoted in *Renda, supra* at 83.

> The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.
>
> *If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible and a prosecution based thereon is procured by the person giving the false information.* [Emphasis added.]

It follows, therefore, that plaintiffs who have been injured by egregious conduct of defendants for malicious prosecution are entitled to treble damages under MCL 600.2907; MSA 27A.2907. I am persuaded that this was the intent of the Legislature. If the underlying action in the malicious prosecution action was brought by the people, the question then becomes whether the action

[2] There was evidence that a K mart security guard refused to confront plaintiff Camaj and testify after plaintiff would not accept a plea and probation at the preliminary examination. There was also a conflict between the security guard's testimony and that of another K mart employee regarding plaintiff's possession of the allegedly stolen sports coat. Defendant Kresge also failed to produce the sports coat for inspection, before the trial, even though ordered by the court to do so. Additionally, three of plaintiff's witnesses testified that the security guard's version of the store incident was false.

was brought with the "consent" of the people. "Consent" will generally mean that the decision on the part of the prosecutor was a knowing, intelligent, and informed decision, free of false assertions by the giver of information. If it is determined there was consent on the part of the people, then the plaintiff will be barred. If no consent is found, then the plaintiff's case will stand. Using this method would allow treble damages, without "turning virtually every malicious prosecution action filed because of criminal proceedings into a 'straw party' suit."

SCHWARTZ v CITY OF FLINT

Docket No. 70806. Argued March 5, 1985 (Calendar No. 3). Decided October 28, 1986.

Joseph Schwartz and Lillian Schwartz, owners of certain undeveloped property within the City of Flint, brought an action in the Genesee Circuit Court against the city, seeking a declaration that the zoning classification of the property which limited use to construction of single-family homes with minimum lot sizes of 5,000 square feet was unconstitutional, and an order requiring the city to issue a building permit for the construction on the property of multiple-family garden apartments and townhouses.

The court, Harry B. McAra, J., initially declared the classification unconstitutional as applied to the Schwartz property, but set aside the judgment on the city's motion and permitted several neighboring landowners to intervene. Thereafter, the city rezoned the property so as to allow construction of only single-family homes with minimum lot sizes of 10,000 square feet, and the court sustained the classification. The Court of Appeals, D. E. HOLBROOK and T. M. BURNS, JJ. (ALLEN, P.J., dissenting), reversed, holding the rezoning classification unconstitutional as applied to the property, and, consistent with the procedure prescribed by *Ed Zaagman, Inc v City of Kentwood,* 406 Mich 137 (1979), remanded the case to the city zoning board for further proceedings (Docket No. 55563).

The city did not offer a proposal for use of the plaintiffs' land or an amendatory ordinance to the circuit court within the sixty-day time period as prescribed by *Zaagman.* Subsequently, following reception of proposals from both parties and an evidentiary hearing to determine the most equitable or midsatisfactory use of the property, the circuit court ordered different uses for various "tiers" of the plaintiffs' property, including single-family homes on lots of 10,000 square feet at the minimum in the first tier, duplexes in the second, and townhouses in the third. The order also limited the means of access to the

REFERENCES

Am Jur 2d, Zoning and Planning §§ 11 *et seq.*, 18 *et seq.*

See the annotations in the ALR3d/4th Quick Index under Zoning.

property and required the plaintiffs to obtain a right-of-way over adjoining property. The Court of Appeals, ALLEN, P.J., and CYNAR and MARTIN, JJ., affirmed, but modified the order to permit townhouses as well as duplexes in the second tier (Docket No. 55563). The plaintiffs appeal.

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

A court, after declaring a zoning ordinance to be unconstitutional, additionally may declare a proposed land use reasonable and enjoin interference with the use, where the plaintiff has shown the use to be reasonable by a preponderance of the evidence. For doctrinal and practical reasons the procedure established in *Ed Zaagman, Inc v Kentwood,* 406 Mich 137 (1979), for providing relief in such cases is repudiated.

1. Zoning is primarily a legislative function, subject to judicial review only to determine whether the power as exercised involves an undue invasion of private constitutional rights without reasonable justification in relation to the public welfare. The power of the judiciary should extend far enough in zoning cases to allow shaping of necessary relief without usurping legislative prerogative. The procedure established in *Zaagman* resulted in improper usurpation by the judiciary of legislative functions and impermissibly offended the doctrine of separation of powers. In addition, its application has resulted in excessive delays.

2. Courts may declare zoning ordinances unconstitutional, but should not move into the realm of a municipal legislature in fashioning relief for plaintiffs that have successfully challenged the ordinances. Where an ordinance is found to be unconstitutional, and the plaintiff has shown by a preponderance of the evidence that a proposed specific use is reasonable, the court may additionally declare the use to be reasonable and enjoin the municipality from interfering with that use.

3. A zoning authority is free to rezone upon a declaration that an existing ordinance is unconstitutional. Where a proposed use additionally has been shown to be reasonable, rezoning must be consistent with the limiting conditions of the proposed use. If reasonableness has not been shown, the authority may rezone, unrestrained by such limitations.

Reversed and remanded.

Justice LEVIN, joined by Chief Justice WILLIAMS, would modify the *Zaagman* procedure and stated:

1. After a judicial determination that a zoning classification is unconstitutional as applied:

a. Enforcement of the ordinance should be enjoined. Not later

than sixty days before the date of trial, the city may present an alternative proposal for the specific use of the property. The court may require the landowner to submit an alternative proposal within the same time limitation.

b. Where timely presented, the court expeditiously should consider the city's proposal to determine whether it provides the landowner with a feasible alternative use as applied to the property. If the court determines that a feasible alternative has been provided, it would be obliged to enter a judgment declaring that to be the alternative use that may be made of the property.

c. Where the city fails timely to submit a specific use proposal, or it is determined that no feasible alternative has been provided or that the city's presentation was made in bad faith or for the purpose of delay, the court would conduct an evidentiary hearing to determine an appropriate remedy. Both parties could submit specific use proposals to the court, but the city's proposal would not be given priority over other feasible alternative uses.

d. Following the hearing, and after considering at least the objectives set forth in the applicable zoning enabling act, reasonable uses of the land, including economic considerations, compatibility with surrounding properties and developments, and the zoning plan contained in the zoning ordinance, the court would fashion a remedy that identifies a feasible specific land use or uses to be permitted, eliminates unreasonable or inappropriate zoning land use restrictions, and which might include conditions for use of the land, appropriate injunctions, and other provisions and orders as might be deemed necessary to effectuate the remedy. In addition, the court would be required to file findings of fact.

2. The procedure would reduce delay and the length of litigation because, although the city would be given a "second chance" to provide a feasible alternative use for the property, it also would be given an incentive to act reasonably and without delay. In following the procedure, a court would not exercise legislative power delegated to local zoning authorities because it would only be after the court finds that local authorities have failed timely to provide a feasible alternative to an unconstitutional application of a zoning ordinance that the court would be called upon to formulate a remedy for the unconstitutional deprivation of property rights. Nor would the procedure preclude a city from rezoning the property, but existing zoning and such a rezoning would not bar or impede use of the parcel as provided by the judgment and order of the court.

3. In this case, the city failed to submit an amendatory

ordinance or other proposal to the court within the requisite time. The court conducted an evidentiary hearing, receiving testimony and proposals from both parties concerning an appropriate use of the plaintiffs' property. In formulating a remedy after a determination that a zoning classification was unconstitutional as applied, and after the local zoning authorities failed timely to provide a feasible alternative use for the property, the court did not impermissibly exercise powers belonging to the legislative branch.

4. The judgment and order of the court did not amount to a deprivation of property without due process of law. The court considered several potential uses of the land as well as their anticipated effect on the surrounding properties and neighborhood. It did not clearly err in imposing separate restrictions on different portions of the property or in limiting the total number of residential units.

5. The limitation of access to the property, however, was clearly erroneous. The plaintiffs had no enforceable agreement to obtain the proposed right-of-way over the adjoining parcel. The court's decision in effect would completely landlock an otherwise developable parcel.

6. After more than fifteen years, it is time for this litigation to come to an end so that the plaintiffs may develop their property if they wish to do so. These portions of the judgment and order of the judge that prohibit access through the outlot and require that the plaintiffs obtain a right-of-way over an adjoining parcel should be vacated. Until such time as other means of access to and from the plaintiffs' parcel are in place, access should be provided through the outlot. In all other respects, the judgment and order of the circuit judge, as modified and affirmed by the Court of Appeals, should be affirmed.

Justice ARCHER took no part in the decision of this case.

120 Mich App 449; 329 NW2d 26 (1982) reversed.

Ed Zaagman, Inc v Kentwood, 406 Mich 137; 277 NW2d 475 (1979), overruled.

OPINION OF THE COURT

1. ZONING — CONSTITUTIONAL LAW — COURTS — REASONABLE USE OF LAND — REMEDIES.

A court, after declaring a zoning ordinance to be unconstitutional, additionally may declare a proposed land use reasonable and enjoin interference with the use, where the plaintiff has shown the use to be reasonable by a preponderance of the evidence.

2. ZONING — CONSTITUTIONAL LAW — REASONABLE USE OF LAND — REZONING.

A zoning authority is free to rezone upon a declaration that an existing ordinance is unconstitutional; where a proposed use additionally has been shown to be reasonable, rezoning must be consistent with the limiting conditions of the proposed use.

Levin, Levin, Garvett & Dill (by *Erwin B. Ellmann* and *Jay W. Tower*) for the plaintiffs.

S. Olof Karlstrom, Dennis M. Haley, and *Donald H. Robertson* for the defendant.

Amici Curiae:

Lawrence R. Ternan for Public Corporation Law Section, State Bar of Michigan.

Stephen A. Bromberg, Gerald A. Fisher, James A. Ginn, Norman Hyman, and *Edward Barry Stulberg* for Real Property Law Section, State Bar of Michigan.

BRICKLEY, J. We granted leave to appeal in this case to consider two questions. The first is whether *Ed Zaagman, Inc v City of Kentwood,* 406 Mich 137; 277 NW2d 475 (1979), should be overruled or modified. The second is whether the declaratory judgment and order entered by the circuit judge pursuant to the *Zaagman* procedure, as affirmed and modified by the Court of Appeals, unconstitutionally deprived the plaintiff of his property without compensation or without due process of law. Because we answer the first question by overruling *Zaagman,* we do not find it necessary to reach the specifics of the second question, other than to hold that the relief granted in this case was improper for the same reasons that the *Zaagman* procedure is now rejected.

I

This case traces its origins to 1967, when the plaintiff, Joseph Schwartz, requested that the City of Flint rezone his property. After nearly fifteen years of litigation, the plaintiff's land remains undeveloped.

Schwartz owns a twenty-eight acre parcel of undeveloped land in the City of Flint. Immediately west of the Schwartz parcel is Thread Lake, part of which passes through the Schwartz parcel. Approximately eleven acres of the parcel, including most of the western boundary and all the northern boundary, are located within the one-hundred-year flood plain of Thread Lake and Thread Creek.

The property immediately north of the Schwartz parcel is owned by the city. The property immediately east is an eleven-acre parcel that, like the Schwartz parcel, is privately owned and undeveloped. Immediately south are several subdivided residential lots containing single-family homes on the north side of Woodslea Drive, which runs roughly east and west. These homes are on the northern edge of a large residential neighborhood.

At the time Schwartz purchased the parcel in 1966, it was zoned A-2, which permitted single-family homes with minimum lot sizes of 5,000 square feet. An outlot owned by the plaintiff provides access to the property. In 1967, Schwartz requested that the parcel be rezoned from A-2 to C-1, to permit construction of multiple-family garden apartments and townhouses. In 1971, after the city denied the request to rezone, Schwartz commenced this action, seeking a declaration that the A-2 classification was unconstitutional and an order requiring the issuance of a building permit for the proposed garden apartments and townhouses.

The judge, after an apparent settlement between

Schwartz and the city, declared the A-2 classification unconstitutional as applied to the Schwartz parcel. On the city's motion, however, the judgment was set aside, and several neighboring landowners were permitted to intervene.[1]

The city subsequently rezoned the Schwartz parcel from A-2 to A-1, which permits single-family homes with minimum lot sizes of 10,000 square feet.[2] The judge sustained the A-1 classification. The Court of Appeals, one judge dissenting, reversed and held the A-1 classification unconstitutional as applied to the Schwartz parcel. Const 1963, art 10, § 2. Similarly, see US Const, Am V, applicable to the states under US Const, Am XIV, *Chicago, B & Q R Co v Chicago,* 166 US 226; 17 S Ct 581; 41 L Ed 979 (1897). It found that the ordinance was "taking from plaintiffs the use of their property without just compensation . . . ." *Schwartz v Flint,* 92 Mich App 495, 503; 285 NW2d 344 (1979).

Pursuant to the procedure set forth in *Zaagman,*[3] the Court of Appeals remanded the cause to the Flint City Council. The city, however, failed to

[1] The intervening landowners have not appeared in this Court.

[2] The city asserts that the more restrictive A-1 classification was adopted on the basis of a recommendation in an independent planning study commissioned by the city. The recommendation was based on projected traffic conditions and compatibility with the homes adjacent to the southern boundary of the Schwartz parcel. These homes, while located on property zoned A-2 (minimum lot size of 5,000 square feet), are, for the most part, constructed on double lots, thus giving the appearance of an A-1 classification (minimum lot size of 10,000 square feet).

[3] We . . . hold that, subsequent to a judicial finding of zoning classification invalidity, enforcement of the disputed ordinance should be enjoined and the matter remanded to defendant city council to present, for the chancellor's consideration within 60 days of this Court's or the appropriate reviewing court's order of unconstitutionality, an adopted amendatory ordinance comporting with the dictates of equity as well as the requirements of constitutional reasonableness as applied to an aggrieved landowner's parcel.

submit an amendatory ordinance or other proposal to the circuit court within the sixty-day period prescribed in *Zaagman*.[4]

Consistent with paragraph (v) of the *Zaagman* procedure,[5] the judge received proposals from both parties and conducted an evidentiary hearing for the purpose of determining "the most equitable or 'midsatisfactory use' to be made" of the Schwartz parcel.

Specifically, upon the expiration of or within this 60-day period, the chancellor shall enter one of the following orders:

(i) If, after remand to defendant city council, plaintiff and defendant find defendant's submitted amendatory ordinance mutually acceptable, the chancellor shall order the implementation of such "midsatisfactory" amendatory ordinance.

(ii) If, after remand to defendant city council, defendant submits an amendatory ordinance unacceptable to plaintiff but embodying Justice BLACK's "midsatisfactory use" as determined by the chancellor through a balancing of equitable considerations, the chancellor shall order the implementation of such "midsatisfactory" amendatory ordinance.

(iii) If, after remand to defendant city council, defendant submits an amendatory ordinance unacceptable to plaintiff and plaintiff submits a proposed use embodying Justice BLACK's "midsatisfactory use" as determined by the chancellor through a balancing of equitable considerations, the chancellor shall order the implementation of plaintiff's proposed "midsatisfactory use."

(iv) If, after remand to defendant city council, neither plaintiff nor defendant can agree upon the other's amendatory ordinance or proposed use and the chancellor determines that neither party's proposal embodies Justice BLACK's "midsatisfactory use," the chancellor shall order the implementation of a "midsatisfactory use" after both plaintiff and defendant as well as other affected parties have had the benefit of a hearing and the submission of proofs to determine the most equitable or "midsatisfactory use" to be made of plaintiff's parcel.

(v) If, after remand to defendant city council, defendant does not submit an adopted amendatory ordinance to the chancellor for consideration within 60 days of this Court's or the appropriate reviewing court's order of unconstitutionality, we direct the chancellor to conduct a hearing supplemented by the submission of proofs by all affected parties to determine and implement the most equitable or "midsatisfactory use" to be made of plaintiff's parcel. [*Ed Zaagman, supra,* pp 166-167.]

[4] The judge denied the city's motion to extend the sixty-day period.

[5] See n 3.

The city's proposal suggested development of the parcel as a "community development project."[6] Under this proposal, garden apartments or townhouses might be constructed even in an A-1 zoning district; density restrictions would, however, limit the total number of residential units in the development project to twenty-five percent more than the number of detached single-family homes that could be constructed in the same area on minimum lots of 10,000 square feet.[7]

Schwartz proposed the construction of 144 single-family townhouses, divided into several clusters of attached units. With regard to access to and from the development, it appears that Schwartz proposed directing traffic away from the large residential neighborhood to the south and westerly of the parcel. Schwartz indicated that it might be possible to obtain a right-of-way across an adjoining undeveloped parcel, leaving the outlot for emergency use only.

The order[8] entered by the judge did not adopt either the city's or Schwartz' proposal. The order

[6] By the time of the evidentiary hearing, the city had amended its zoning ordinance to provide for community development projects within A-1 and A-2 zoning districts. Under the community development option, a developer is permitted to construct multiple-family structures, such as apartments or townhouses, if—through the use of open spaces, buffer strips and other amenities, such as tennis courts or a swimming pool—the average density of the entire development project does not exceed the equivalent of 8,000 square feet per single-family unit in A-1 districts, or 4,000 square feet per single-family unit in A-2 districts.

[7] The planning study commissioned by the city indicated that fifty-seven single-family homes on 10,000 square foot lots could be developed on the Schwartz parcel. The density requirements of the community development option would thus permit the construction of seventy-one residential units.

[8] 1. The "emergency exit only" at the northwest corner of Greenhill and Woodslea Drive is prohibited;

2. Plaintiff Schwartz must obtain the right-of-way to Terrace Drive over land zoned A-1, known as the "Patsy parcel" and not owned by him;

prescribed different uses for various "tiers" of the Schwartz parcel. The first tier, consisting of approximately 3.7 acres immediately north of the single-family homes on Woodslea Drive, was restricted to single-family homes under the A-1 zoning classification (10,000 square-foot minimum lots). The second tier, consisting of approximately 1.15 acres immediately north of the first tier, was restricted to "duplexes." On the remaining property, Schwartz would be permitted to construct 120 or, depending on the flood plain level, 124 single-family attached townhouse units, provided that the total number of units on the entire parcel did not exceed 140.

The order also prohibited the use of the outlot as a means of access to and from the Schwartz parcel, and would require that Schwartz obtain a right-of-way over an adjoining privately owned parcel.

The Court of Appeals modified the judge's order to permit "detached single-family townhouses" as well as "duplexes" in the second tier of the parcel; the judge's order was affirmed in all other re-

3. The third, fourth and fifth clusters moving from east to west will be zoned A-2 plus community development projects in the nature of single-family attached townhouse units;

4. The land, or first cluster, (Tier 1) immediately north of the single-family houses on Woodslea will be A-1 single-family detached dwellings;

5. The second cluster will be zoned as "duplexes";

6. The balance of the land (referred to in paragraph 3) shall be developed for townhouses in fee simple, having a square footage in the basement of 25 x 36, making 1700 square feet in the townhouses, with not more than 120 units with a possibility of adding four more units depending on paragraph 7;

7. The flood plain level is established at 750 feet or whatever it is at the dam;

8. Plaintiffs have the right to move dirt or fill but only with the permission of this court, the court retaining jurisdiction and permitting the DNR coming in to object;

9. The maximum number of all units on the entire parcel is to be 140;

spects. *Schwartz v City of Flint (After Remand)*, 120 Mich App 449; 329 NW2d 26 (1982).[9]

II

After careful reconsideration of the procedure of *Zaagman, supra,* we conclude that that case should be overruled as an improper usurpation by the judiciary of a legislative function. In light of the extraordinary facts of this case and of the experience of the bench and bar, generally, under the *Zaagman* rule, we are replacing the *Zaagman* decision with a more judicially appropriate directive.

Zaagman was a well-intentioned effort to utilize the court's equity powers to minimize the side effects of resolving lawsuits having obvious ramifications beyond the parties to the suit. However, neither the parties nor the amici curiae[10] in this case are entirely satisfied with the *Zaagman* procedure as it has been implemented to date.

The separation of powers provision of the Michigan Constitution reads:

> The powers of the government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. [Const 1963, art 3, § 2.]

Our state system is modeled after the federal system. The United States Supreme Court described the separation of powers as follows:

[9] The city has not filed a cross-appeal from the Court of Appeals modification of the circuit judge's order.

[10] The Real Property Law Section and the Public Corporation Law Section of the State Bar of Michigan have filed briefs as amicus curiae, outlining proposed modifications to the *Zaagman* rule.

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. [*Massachusetts v Mellon,* 262 US 447, 488; 43 S Ct 597; 67 L Ed 1078 (1923).]

We, too, have emphasized:

> [I]n harmony with American political theory, the State government is divided into three historic departments, the legislative, the executive, and judicial . . . .
>
> * * *
>
> "This historical and constitutional division of the powers of government forbids the extension, otherwise than by explicit language or necessary implication, of the powers of one department to another." [*Civil Service Comm v Auditor General,* 302 Mich 673, 683; 5 NW2d 536 (1942).]

Option (v) of the *Zaagman* holding permits the court, under certain conditions,

> to conduct a hearing supplemented by the submission of proofs by all affected parties *to determine and implement* the most equitable or "midsatisfactory use" to be made of plaintiff's parcel. [*Zaagman, supra,* p 167. Emphasis added.]

In addition, options (i) and (ii) require the "chancellor" to "order the implementation of such 'midsatisfactory' amendatory ordinance." *Id.,* pp 166-167.

These directives, in the words of Justice T. G. KAVANAGH, amount to "judicial zoning." We agree

with some of his observations, made in dissent in *Daraban v Redford Twp,* 383 Mich 497, 501-506; 176 NW2d 598 (1970):

> The role of the Court is not to control the direction of zoning. It is not to determine what is the best use of the land. Our role is to prevent the abuse of the zoning power—as when the ordinance in question so restricts the use of land that it amounts to confiscation by the local government.
>
> * * *
>
> Zoning is a legislative function that cannot constitutionally be performed by a court, either directly or indirectly—in law or in equity. [*Id.,* pp 502-503.]

Justice KAVANAGH's comments were in keeping with pre-*Zaagman* precedent in this Court. In *Roll v City of Troy,* 370 Mich 94, 99; 120 NW2d 804 (1963), we "recogniz[ed] that zoning is a legislative function [and] we affirm[ed] the principle that courts cannot write zoning laws." Likewise, in *Christine Building Co v City of Troy,* 367 Mich 508, 515-516; 116 NW2d 816 (1962), we approved of the trial court's opinion that

> there devolved upon it no legal duty, right, or obligation to switch from the role of chancellor to that of municipal legislator for the purpose of rezoning the subject property . . . .

And in *Brae Burn, Inc v Bloomfield Hills,* 350 Mich 425, 430-431; 86 NW2d 166 (1957), we emphasized that "this Court does not sit as a superzoning commission. . . . The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life[,]" assuming, we would now add, that that governance is performed in a constitutional manner.

On the other hand, in contrast to Justice KAVANAGH'S view, we also recognize the judiciary's positive role in granting appropriate relief in zoning cases where unconstitutionality has been alleged and proven. We agree with the majority in *Zaagman,* pp 176-179, and with Justice BLACK's opinion in *Dequindre Development Co v Warren Charter Twp,* 359 Mich 634, 642-643; 103 NW2d 600 (1960), to the extent that they express the need for courts to exercise their equitable powers in order to fashion sufficient remedies for successful plaintiffs, while doing so expediently and within the constraints of the separation of powers.

Thus, while we reaffirm and endorse the judicial role in declaring the unconstitutionality of zoning ordinances generally, see *Delta Charter Twp v Dinolfo,* 419 Mich 253, 268-269; 351 NW2d 831 (1984), we believe that the *Zaagman* decision simply went too far in its effort to guarantee a replacement for an unconstitutional ordinance. There are less extreme remedies available that are within the judicial power and that would provide adequate relief in cases such as this one. We advocate adoption of the one articulated in Part III-B.

By overruling *Zaagman,* we bring Michigan in line with the holdings of a majority of state jurisdictions on this question. Although other states have adopted a variety of remedies in cases involving unconstitutional zoning ordinances, the majority are in agreement that courts should not attempt to perform the legislative functions of the zoning authority. See 4 Anderson, American Law of Zoning (2d ed), § 28.10, pp 378-379, n 36; 3 Rathkopf & Rathkopf, Law of Zoning & Planning (4th ed), § 36.01, p 36-1 ("Most courts hold that since zoning is a legislative function, it is beyond the judicial power to determine what the restric-

tions applicable to property should be"); § 36.04, p 36-11, n 13.

Such rezoning by the court, has been held to be contrary to the separation of powers. See, e.g., *Longboat Key v Kirstein,* 352 So 2d 924 (Fla App, 1977). In general, "[z]oning is primarily a legislative function, subject to judicial review only to determine 'whether the power, as exercised, involves an undue invasion of private constitutional rights without a reasonable justification in relation to the public welfare.' " *Norwood Builders v City of Des Plaines,* 128 Ill App 3d 908, 917; 471 NE2d 634 (1984). The Arkansas Supreme Court observed:

> [T]he Legislature gave the rezoning power to the City Council or legislative body of the City and it is not within the province of the court to rezone property. . . .
>
> "Courts are not super zoning commissions and have no authority to classify property according to zones."
>
> . . . Placing the property in a specific zone is beyond the Court's power. [*Little Rock v Breeding,* 619 SW2d 664, 672-673 (Ark, 1981).]

In New York, when ordinances have been found unconstitutional, but not discriminatory per se, "the new zoning [must] be determined not by the court, but by the [zoning authority]." *Stilbell Realty Corp v New York,* 54 AD2d 962, 963; 388 NYS2d 648 (1976).[11]

Even among states that grant to their courts fairly broad declaratory and injunctive power in these cases, there is great reluctance to allow courts to actually zone the property in question, as judges may do under options (i) and (ii) of the

[11] Like the New York Court and others, we would be inclined to distinguish situations involving discriminatory or exclusionary zoning. We do not consider here the proper role of the court in such cases.

Zaagman procedure, and as the trial judge and Court of Appeals in this case did by following option (v).

> The courts may not rezone property to specific categories upon a finding of the invalidity of a zoning ordinance. It is not the province of courts to zone or rezone, thereby substituting their judgment for that of the legislative body. [*Bd of Supervisors v Allman,* 215 Va 434, 445; 211 SE2d 48 (1975).]

Although the Ohio Supreme Court agreed with some of our reasoning in *Zaagman,* that court rejected a trial court's ordering of a change in a use classification applicable to the property in question. *Union Oil Co v City of Worthington,* 62 Ohio St 2d 263, 266; 405 NE2d 277 (1980). Although it appeared that the trial court in *Worthington* had "merely deferred to what it believed the city's wishes were[,]" the Ohio Supreme Court

> [n]evertheless . . . believe[d] the trial court exceeded its proper judicial role in zoning matters in ordering the property rezoned to a substitute zoning classification. [*Id.*]

Commentators have also questioned the *Zaagman* rule under the separation of powers doctrine.

> The court's role is to resolve disputes, applying statutes and making new common law where no statutes exist or where the statutes fail to provide for the situation in dispute. Since zoning laws typically establish a statutory procedure for amending zoning maps and allowing for development, it can be argued that the courts should play no role in providing for the orderly and equitable development of communities. The proper role for the courts is to assure that the legislature allows

> for development without violating the constitutional rights of property owners or other citizens. The *Zaagman* process would allow the court to usurp the legislative function by ordering legislation even though the court itself has deemed such action inappropriate under the constitution. In addition, the process appears to supercede, or render ineffectual, traditional statutory rezoning procedures. Presumably, the city must follow those procedures when it implements the court's order. If so, the city must notify surrounding property owners and hold the public hearing typically required by zoning enabling acts, even though the outcome has been judicially determined in advance. The court's order thus makes a farce out of the legislatively mandated rezoning hearing. If, however, the court's order exempts the city from the required procedures, the court has even more seriously invaded the legislative sphere by judicially waiving enforcement of a valid statutory requirement. [Prahl, *The rezoning dilemma: What may a court do with an invalid zoning classification?,* 25 SD L R 116, 123-124 (1980).]

See Rohan, Zoning & Land Use Controls, § 52.07(2)(a), pp 52-63, 52-64; Ellmann,[12] *The* Turkish *rhapsody—More dissonance in the zoning game,* 1983 Det C L R 1195, 1200.

Thus, relying on our former pronouncements on this issue, and in recognition of the reasoning of a majority of state jurisdictions as well as of the plain language of Const 1963, art 3, § 2, we hold that the *Zaagman* procedure impermissibly offends the separation of powers. Moreover, we find that the procedure outlined in *Zaagman* should be overruled for pragmatic reasons as well. There is simply no doubt that the procedure has resulted in excessive delay when applied.

This litigation has prevented Mr. Schwartz from

[12] The author is also counsel for plaintiffs-appellants in this case.

developing his property for over fifteen years. In the companion case to *Zaagman, Turkish v City of Warren,* it was eight years after rezoning proceedings had been initiated before the plaintiffs could effectively use their land. Ellmann, *supra,* p 1199, n 13.

The *Zaagman* procedure, even as modified by the separate opinion, perpetuates a litigation merry-go-round in zoning cases, providing no effective relief for successful plaintiffs, even while stepping outside the proper judicial role. As Justice Brennan pointed out in dissent in *San Diego Gas & Electric Co v San Diego,* 450 US 621, 655, n 22; 101 S Ct 1287; 67 L Ed 2d 551 (1981), there is always the possibility in these cases that a municipality will "merely amend the regulation and start over again." The *Zaagman* rule, by further lengthening the process of judicial review of a zoning ordinance challenge, does nothing to alleviate this problem, and in effect, adds to it.

Although the dissent's proposed rule of deference to the municipality's proposed alternative use, if reasonable, might enhance the predictability of zoning review, it does not adequately remove the judiciary from the "zoning business." Ultimately, if the municipality's alternative use proposal were untimely or unreasonable, the dissent would continue *Zaagman*'s endorsement of the courts as superzoning authorities.

Cutting, as it does, into private property ownership, zoning is an onerous legislative task for those who must withstand the political pressures attendant to its exercise. It is no wonder, then, that in our first post-*Zaagman* experience the defendant municipality and amici curiae are urging us on with even further policy and rulemaking suggestions, little of which could not be provided for in the zoning enabling statute or by individual zoning

authorities.[13] Therefore, our continued intrusion into this troublesome area would feed on itself, thrusting us further into this quagmire.

Even if the practice did not offend the separation of powers, the judiciary's zoning track record is not good. See, generally, Babcock, *The Zoning Game Revisited* (1985). Zoning, by its nature, is most uniquely suited to the exercise of the police power because of the value judgments that must be made regarding aesthetics, economics, transportation, health, safety, and a community's aspirations and values in general. By the same token, zoning, which requires linedrawing that oftentimes "by its nature [is] arbitrary," *Dinolfo, supra,* p 269, is uniquely unsuited to the judicial arena.

Thus, for doctrinal and practical reasons, the procedure that we established in *Zaagman* for providing relief in zoning cases once an ordinance has been found unconstitutional is hereby repudiated and replaced with a rule that better comports with the role of the judiciary and the separation of powers doctrine.

In the next portion of this opinion, we indicate our preference among the options presented in *Zaagman, supra,* pp 168-179, and those culled from other jurisdictions and the relevant literature. Relying somewhat on the experience and suggestions of other courts and commentators, as well as on our own post-*Zaagman* experience, we adopt an approach that does not move the judiciary into the realm of the municipal legislature, yet one that retains the courts' power to grant meaningful relief to successful plaintiffs.

III

It has been noted that "confusion over the

[13] Saving clauses in the event of partial constitutional invalidity are a common legislative tool.

proper relief to be awarded in zoning cases has continued at least since the United States Supreme Court's decision in *Nectow v City of Cambridge,* 277 US 183; 48 S Ct 447; 72 L Ed 842 (1928)." *Belkin v City of Birmingham,* 87 Mich App 690, 703; 276 NW2d 465 (1978), modified 406 Mich 949 (1979) (quoting Ellickson, *Suburban growth controls: An economic and legal analysis,* 86 Yale L J 385, 490 [1977]). Ellickson observed that *Nectow* has had several detrimental effects, among them the fact that the case

> has been construed to mean that a landowner's standard remedy against overly restrictive zoning should be some form of injunctive relief and not damages. [Also,] by failing to specify what type of injunctive relief the landowner was to receive, *Nectow* reinforced the judicial tendency toward sloppiness in the specification of remedies in zoning cases. [*Id.*]

Although the Court of Appeals in *Belkin,* p 704, observed that this Court had never "explained under which circumstances the court may depart from the general rule and invoke injunctive restraints against future municipal action[,]" it nevertheless found

> that such a foundation must exist . . . in the traditional power, inherent in courts of equity, to shape the relief granted according to the circumstances of the instant case. [*Id.*]

We agree with the Court of Appeals in *Belkin* that the power of the judiciary should extend far enough in zoning cases to allow courts to shape necessary relief without usurping legislative prerogative. We also feel constrained to select an alternative to the *Zaagman* procedure that is consistent with the *Nectow* approach to the problem.

Although the concept of awarding damages in this type of case is an intriguing one, see *San Diego Gas & Electric Co v San Diego,* 450 US 621; 101 S Ct 1287; 67 L Ed 2d 551 (1981) (Brennan, J., dissenting), we decline the opportunity at this time to fully consider or to endorse that alternative.[14]

[14] Under a compensation proposal, at least where plaintiff's property has been found to have been unconstitutionally "taken," the judge would award damages to the plaintiff for the "temporary taking." See *San Diego Gas & Electric Co v San Diego,* 450 US 621, 636-661; 101 S Ct 1287; 67 L Ed 2d 551 (1981) (dissenting opinion). In 1979, the Court of Appeals held that the ordinance challenged by this plaintiff "is taking from plaintiffs the use of their property without just compensation, contrary to the Federal and State Constitutions." *Schwartz v Flint,* 92 Mich App 495, 503; 285 NW2d 344 (1979). See *Schwartz v Flint (After Remand),* 120 Mich App 449, 451; 329 NW2d 26 (1982). This is not a regulatory case in which the value of plaintiff's land is merely lessened by the application of the regulation.

In *San Diego Gas & Electric, supra,* p 653, Justice Brennan, in dissent, stated:

> In my view, once a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the periods commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

Justice Brennan's further comments are conceivably applicable here:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production . . . . But "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." [*Id.,* pp 652-653.]

The Just Compensation Clause "was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole." *Id.,* p 656.

Plaintiffs have not asked for that type of relief;[15]

This reasoning may be analogized to the City of Flint's decision to zone plaintiff's property for large-lot single family residences when there is no demand for such housing. Justice Brennan's opinion seems to say that it is permissible for a municipality to make such a decision as a matter of policy and land-use planning, but that it must pay for the privilege to use private land for such public purposes.

Several states have recognized the temporary-takings remedy, although none are directly analogous to *Schwartz*. See *Rippley v City of Lincoln,* 330 NW2d 505 (ND, 1983); *Fifth Ave Corp v Washington Co,* 282 Or 591; 581 P2d 50 (1978); *Scheer v Evesham Twp,* 184 NJ Super 11; 445 A2d 46 (1982); *State v Zinn,* 112 Wis 2d 417; 334 NW2d 67 (1983). These cases are easily distinguished from *Schwartz* in that they involved zoning or regulations that *clearly* had a public purpose. Nonetheless, if the doctrine is accepted in theory, there must be no critical distinction between takings for obviously public purposes and those effected through normal zoning, assuming that a *taking* has been found.

A commonly cited advantage of compensation for temporary takings is the tempering effect it may have on the municipality's future zoning. "The existence of some damages liability may serve to encourage more conscientious application of land use controls." Rathkopf, *supra,* § 46.04, p 46-30. Moreover, unlike some of the other alternatives, it does provide plaintiff with a remedy. The zoning authority is left free to exercise its legislative duties without any kind of intrusion by the courts.

There are a number of disadvantages associated with temporary-takings compensation, the primary one being the financial stress placed on municipal budgets. See Badler, *Municipal zoning liability in damages—A new cause of action,* 5 Urban Lawyer 25, 54 (1973); Bricklemyer, *Regulatory takings—Call the question,* 60 Fla B J 77, 80 (1986) (citing similar arguments against compensation: "the potential strain on the public coffers and the chilling effect on innovative land use planning").

We do not attempt to balance the advantages and disadvantages of the "temporary takings" alternative here, as the approach is a novel one and not one even mentioned by the parties or amici curiae in this case. There have also been a number of "glosses" on the rule proposed in the literature. See, e.g., Rathkopf, *supra,* p 46-33. Consideration of the whole picture would thus require full briefing and argument in another case.

[15] The plaintiff-appellant in the instant case does not argue for temporary damages. Rather, he seems to allude only to inverse condemnation:

> If Defendants advise this Court that they are unwilling to abide by this result, the City of Flint should be directed immediately to perfect its condemnation of Plaintiffs' land and to pay Plaintiffs just and reasonable compensation for the deprivation of their property and its economic use from the date of the original complaint.

nor would it be an appropriate way to terminate this particular litigation, given its history.

Thus, in selecting an alternative to *Zaagman,* we seek to provide appropriate injunctive relief in an efficient, expedient manner without injecting courts into the legislative realm. After careful consideration of the many alternative avenues of relief proposed by the parties and amici curiae or employed by foreign jurisdictions, we conclude that the approach adopted by our sister state, Illinois, meets these criteria, and we therefore adopt it. Before describing that approach, however, we will briefly review the rejected options.

A

The State Bar amici curiae advocate overruling *Zaagman;* however, their joint proposal nevertheless would vest the trial court with overly broad powers, ignoring one of the major problems of *Zaagman.* The proposal, as enunciated by the Real Property Law Section, would allow the court to

> decree such relief as permits reasonable use of the land, does not have substantial adverse effect on the public health, safety or welfare, and otherwise comports with the dictates of equity.

The dispute between the two State Bar sections over an amendment to the proposal, offered by the Public Corporation Section, best highlights the weaknesses of the joint proposal. The Public Corporation Law Section adds a gloss to the proposal in an effort to recognize the "legislative prerogatives of local government." It recommends that

> [t]he final judgment shall provide that the munici-

"Temporary takings" damages are a much less extreme remedy than inverse condemnation.

> pality may exercise its zoning authority over the land described in the judgment, but any ordinance, amendment or regulation shall not preclude the use determined by the Court to be reasonable.

The Real Property Section maintains that this additional proposal is "unwise and unnecessary." Tellingly, this section's objection to the gloss observes that the additional proposal

> could . . . caus[e] delay and put[ ] the landowner and municipality back into the same problem area which has been created by *Zaagman, i.e., by giving the municipality an opportunity to re-legislate.* [Emphasis added.]

The Public Corporation Section responds that the joint proposal (without the amendment) is "close to legislating by the Court."

We find that both versions of the proposal are flawed. A court has no power either to give or to take away a municipality's authority to legislate or relegislate; nor may it legislate in lieu of the municipality. Such is the essence of the separation of powers.

The Real Property Section claims that the process of zoning legislatively is too long and burdensome, but the same reasoning may support the argument that a court has inadequate resources and is an inappropriate forum for performing the "several levels of consideration," noted by the amicus curiae, that are necessary to zoning determinations. Thus, we find the State Bar proposals to be inadequate substitutes for the *Zaagman* procedure. While we agree that *Zaagman* should be overruled, the joint proposal does little to correct the basic infirmities of that decision. The additional proposal neither corrects the separation of powers problem nor does it provide a procedure

that will ultimately be any less burdensome, from the successful plaintiff's perspective, than *Zaagman.*

We also reject the defendant's proposal for similar reasons. The city advocates revision of the *Zaagman* procedure so as to disallow a court's actual rezoning of a parcel of land, but it defends the court's power to "determin[e] which of the lesser restrictive zoning classifications that are already impliedly contained within the classification declared unconstitutional can be constitutionally applied to this property." The city, of course, retains its right to rezone the property later if the court's "rezoning" ends up permitting inappropriate uses of the property.

This alternative was not considered in the *Zaagman* decision. See *Zaagman,* p 165.[16] This alternative is like *Zaagman,* though, in that it allows the court to grant relief in the form of a whole *classification,* rather than a specific proposed use. By so doing, a court would be violating rules that require zoning regulations to be enacted according to zoning enabling acts.

A separation of powers problem is most apparent where the court is granting a classification, rather than a use, whether that classification is one proposed by the plaintiff or already "included" within the invalidated classification.[17] Moreover,

[16] The Florida courts apparently follow a variation of the "most restrictive lesser included" approach. Although Florida courts do not allow a court to rezone directly, they permit courts to direct the zoning authority to rezone to a less restrictive classification. See, e.g., *Clearwater v Curls,* 366 So 2d 1238 (Fla App, 1979).

[17] The defendant's proposal appears to assume a Euclidean, or pyramidal, approach to zoning. The State Bar Real Property Section noted:

> Not only is this approach not universally followed, but modern planning philosophy generally discredits the approach.

implementation of this proposal could result in the implicit approval of all types of uses of the property not even described or presented to the judge during the course of litigation. Thus, we reject the city's proposal as one that contains all of the problems of *Zaagman,* while presenting new ones of its own.

A sibling to the "most restrictive included" approach is the relief granted in *Long v Highland Park,* 329 Mich 146; 45 NW2d 10 (1950). In *Long,* this Court approved of the trial court's invalidation of an unconstitutional zoning ordinance and also of the trial court's conclusion

> that said property might be used for any of the purposes allowed by the ordinance under the classification B2, for business purposes. [*Id.,* p 154.][18]

Zaagman, itself, rejected the *Long* approach as "too expansive," noting that it allows the landowner to develop the land in any manner that falls within the approved zoning classification. *Id.,* p 172. Prahl, *supra,* p 119, notes that this alternative provides

> no predictability for surrounding property owners and no requirement that the community's plan be considered.

A majority of state courts also appear to reject this alternative as violative of the separation of

Our impression of current trends in land use planning supports this statement.

[18] It is unclear whether this B2 classification was one proposed or sought by the plaintiffs in *Long.* It has been so characterized, however. See *Daraban, supra,* p 506 (dissent). ("*Long* [and subsequent cases] have apparently come to stand as authority for the issuance of injunctions which can restrain municipalities from zoning the property involved in a manner different from that sought by the plaintiff.")

powers. See Anderson, *supra,* § 28.10, pp 270-277 (August, 1985, supp) and cases cited.

We object to adoption of this alternative for the same reason. By designating a classification, or requiring the municipality to adopt a particular classification, the court is clearly sitting as a superlegislature. This approach grants plaintiffs far more relief than they normally request and allows a successful plaintiff to change its proposed use to a potentially more disruptive use, although one that is within the approved classification.[19]

An alternative that falls at the other end of the spectrum from *Long* is that advocated by Justice KAVANAGH in dissent in *Daraban, supra.* Dubbed the "unzoned" approach, this proposal provides that once the court has declared an ordinance unconstitutional, the property is left unzoned, and the municipality must act to rezone if it wishes to prevent plaintiff's intended use. If plaintiff's use is precluded by a new ordinance, then, presumably, he must begin the process all over again.

Most courts and commentators find the unzoned approach undesirable; however, some states have adopted it. See *City of Cherokee v Tatro,* 636 P2d 337 (Okla, 1981); *Atlanta v McLennan,* 237 Ga 25; 226 SE2d 732 (1976).[20]

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[19] There is a factual scenario in which the court's implicit designation of a different zoning classification is more palatable. In *Harris Trust & Savings Bank v Duggan,* 105 Ill App 3d 839; 435 NE2d 130 (1982), the trial court had invalidated an amendatory ordinance. The court noted that the invalidation of the amendment did not cause the property to be unzoned, but rather, effected a "reversion" to the preamendment classification. It held that the

> declaration does not, therefore, constitute judicial rezoning but rather a statement of the necessary consequences of the court's having declared the zoning amendment invalid. [*Id.,* p 847.]

[20] Georgia has adopted a variation of the unzoned approach. When an ordinance is declared unconstitutional, the court must first remand the case to the zoning authority. If the board fails to act within

Plaintiffs in this case argue in favor of the unzoned approach in theory, but, of course, they insist upon their right to use the property as they have proposed. They note:

> Of course, invalidation of a zoning ordinance which offends the State or Federal Constitution means that the Plaintiff's property is "unzoned." . . . There is no presumption that land is to be burdened with restrictions even if they are invalid or not yet in being.

Courts that reject the unzoned approach do so for reasons similar to those articulated in *Zaagman.* We continue to endorse that view. While it is theoretically appealing, the unzoned approach ignores the court's power to grant relief tailored to the equities of the situation.

Zaagman noted in regard to the unzoned alternative:

> Although a technically logical position, we are of the opinion that restricting the Court's declaratory powers in such an absolute manner may operate to produce a result neither generally prayed nor argued for by an aggrieved landowner and potentially incompatible with the orderly development of the general community or abutting parcels of property. [*Id.,* p 168.]

The Ohio Supreme Court, in *Worthington, supra,* p 266, noted its agreement with *Zaagman* on this point. It opined that to leave the property in an unzoned condition would "afford the property

the time allotted, then the trial court may declare the property free of all zoning. *Atlanta v McLennan,* 237 Ga 25; 226 SE2d 732 (1976). In order to avoid a declaration of unzoned status, however, under which the neighboring residential property owners would suffer, the Georgia Supreme Court, in at least one case, allowed the county a second chance to rezone before going the unzoned route. See *DeKalb Co v Flynn,* 243 Ga 679; 256 SE2d 362 (1979).

owner complete freedom of choice as to the future use of his property."

The Illinois Supreme Court also found two problems with the unzoned approach. As to the defendant municipality, the court noted that it might

> rezone the property to another use classification that still excludes the one proposed, thus making further litigation necessary as to the validity of the new classification. [*Sinclair Pipe Line Co v Richton Park,* 19 Ill 2d 370, 378; 167 NE2d 406 (1960).]

Sinclair also noted the possibility that the property owner would not be constrained to implement the use proposed during the course of litigation and that "he might thereafter use the property for an entirely different purpose." *Id.,* pp 378-379.[21]

[21] The Supreme Court of Virginia also described a worst-case scenario under the unzoned alternative.

> [E]ntry of a simple adjudicatory decree granting no definitive relief would work a legal absurdity; the governing body might be left with an island of unzoned land, and the landowners might be left free to put their land to any use, short of a nuisance, they saw fit. Left in that posture, the governing body would be constrained to act hurriedly to zone the unzoned island to a new category. In the rush, and absent definitive guidelines from the court, it might select a category that would not allow the one use shown by the record to be reasonable. In such case, new litigation would ensue. If the new court decree declared the new category unreasonable but again granted no definitive relief, the process of re-zoning and re-litigation could continue *ad infinitum.* [*City of Richmond v Randall,* 215 Va 506, 512; 211 SE2d 56 (1975).]

We would note that while there may be no real danger of the average plaintiff constructing a slaughterhouse or incinerator on his property, the concern over municipal foot-dragging is real. As the city attorney quoted in footnote 22 of *San Diego Gas & Electric, supra,* p 655, advised:

> "If all else fails, merely amend the regulation and start over again. . . . One of the extra 'goodies' contained in [a recent California case] appears to allow the City to change the regula-

Thus, even courts that articulate separation of powers concerns are hesitant to adopt a pure unzoned approach. Commentators are equally unenthusiastic about leaving property unzoned after a declaration of unconstitutionality invalidates an existing zoning ordinance.[22]

In our view, the only way that an unzoned approach could be workable would be if it were combined either with a proscription against any future zoning of the property, like the Georgia rule,[23] or with a compensation scheme, whereby the successful plaintiff would be awarded damages for the "temporary taking" of his property. The Georgia rule embodies a major separation of powers problem; it also opens the door to totally unregulated land use. The compensation alternative, as noted above, is appealing, but its consideration must await future briefing and argument in a more appropriate case.

Having rejected variations on the two extreme forms of relief, we now turn to the middle ground. We have chosen to adopt an alternative that confines the trial court to its more traditional role, but that allows some latitude in granting appropriate relief to a plaintiff who has successfully challenged an unconstitutional zoning ordinance. Illinois has also adopted such an approach.

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tion in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

* * *

"See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck."

[22] Ellickson, *supra,* p 491, describes the judicial merry-go-round that is created when municipalities rezone in an equivalently stringent, though different, manner. Prahl, *supra,* p 119, agrees with our assessment that most courts find the unzoned alternative unacceptable.

[23] See n 20.

B

By borrowing the Illinois approach, we are essentially hearkening back to earlier pre-*Zaagman* precedent. The *Sinclair* rule is very similar to, but narrower than, that employed by this Court in *Daraban, supra.* See *Zaagman, supra,* pp 173-174, and n 10.

In *Daraban, supra,* p 500, we approved a trial court order that had enjoined the defendant municipality from interfering with the plaintiff's use of the land "in accordance with plaintiff's exhibit number 4, . . . and in accordance with the R-3 zoning classification . . . ." Thus *Daraban* allowed the court to declare the plaintiff's *use* permissible as well as to approve a specific use classification. This latter type of relief had already been approved in *Long, supra,* and we reject it for the reasons noted above.

We approve of the *Daraban* approach only insofar as it allows a court to enjoin the municipality from interfering with a plaintiff's proposed use. We would also add an important gloss to this limited version of the *Daraban* rule: The plaintiff's use must be shown to be a reasonable one, and the plaintiff must bear the burden of so proving by a preponderance of the evidence.

This "specific use" approach is endorsed by a number of jurisdictions and has the benefit of providing a successful plaintiff with some tangible relief. In addition, the task to be performed by the judge in awarding this type of relief is not unlike the findings that must be made initially in order to find a particular zoning ordinance unconstitutional as applied.[24]

Ohio is one of the states that has adopted a variation of this approach. In *Worthington, supra,*

[24] Again, the analysis is confined to situations in which the court

p 267, the court held that once an existing zoning ordinance is found unconstitutional

> the trial court should give notice to the zoning authority that, within a reasonable time certain, it may, at its option, rezone the property. Further notice should be given that, if the property is not rezoned within such period of time, *the court will authorize the property owner to proceed with the proposed use if, on the basis of the evidence before it, the court determines the proposed use to be reasonable.* [Emphasis added.]

The Ohio courts may enjoin the landowner from disturbing the status quo during the interim, and may later conduct further proceedings "to determine whether the new zoning restrictions may constitutionally proscribe the owner's proposed use." *Id.*

The Virginia rule is similar.

> [W]hen the evidence shows that the existing zoning ordinance is invalid and the requested use reasonable, and when, as here, the legislative body produces no evidence that an alternative reasonable use exists, then no legislative options exist and a court decree enjoining the legislative body from taking any action which would disallow the one use shown to be reasonable is not judicial usurpation of the legislative prerogative. [*City of Richmond v Randall,* 215 Va 506, 513; 211 SE2d 56 (1975).]

See *Bd of Supervisors v Allman, supra,* pp 445-446.

We prefer the Illinois approach because of its specificity and its elimination of delay. It combines the two types of action (declaration of unconstitutionality and relief) into one proceeding. By plac-

has found a particular ordinance to be unconstitutionally *applied.* Exclusionary zoning is an entirely different type of determination, necessitating potentially broader relief.

ing the burden of proof of reasonableness on the plaintiff, some degree of compromise and potential settlement is undoubtedly encouraged.

The rule originated in *Sinclair Pipe Line Co v Richton Park, supra.* The *Sinclair* court noted first:

> The problem thus presented as to the kind of relief to be awarded in a zoning case is a recurrent one, and one toward which this court has not manifested an unwavering attitude. [*Id.,* p 377.]

The same may be said of our own precedent on this point.

In developing the "specific reasonable use" relief rule, the Illinois court sought to avoid leaving property unzoned after a declaration of unconstitutionality. It observed that

> [i]n most of the cases that have come before us in recent years, a specific use was contemplated and the record was shaped in terms of that use. [*Id.,* p 379.][25]

The court opined that by granting the plaintiff's proposed use, further litigation can be avoided, but the plaintiff is also prevented from proceeding with a different, possibly more disruptive, use (as might be the case if the property is left unzoned or a whole classification is approved).

The Illinois courts have firmly limited the type of relief available to a court when an ordinance has been declared invalid. The court must not

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25 Plaintiff-appellant in this case makes a similar argument. He notes:

> Property owners do not attack zoning ordinances for the abstract satisfaction of proving a municipality to have exceeded its authority; they seek to develop their property in a particular way for a specific class of uses as specified in the ordinance.

> assume[ ] the legislative function of determining the ultimate zoning classification of the property in question. . . . The most that a court may do after declaring an existing zoning ordinance void as applied to certain property is to find that the specific use contemplated by the owner is reasonable and may be permitted. [*Fiore v Highland Park,* 76 Ill App 2d 62, 76; 221 NE2d 323 (1966).]

See *Exchange Nat'l Bank v Waukegan,* 85 Ill App 2d 461, 466-467; 229 NE2d 562 (1967) (reversed trial court's decree that divided the property for zoning purposes).

On the other hand, if the plaintiff does not show reasonableness by a preponderance of the evidence, the zoning authority is free to rezone the property, unrestrained by a use that has been declared reasonable. The court generally looks to the existing uses and zoning of nearby properties in determining reasonableness. Presumably, the defendant and any intervening parties will submit evidence on this point.

The reasonableness burden should, in our view, be appropriately high, so that a plaintiff who has successfully challenged an unconstitutional ordinance will not automatically be free to proceed with its proposed use. See, e.g., *Drogos v Bensenville,* 100 Ill App 3d 48, 56; 426 NE2d 1276 (1981), where the Illinois Court of Appeals affirmed the finding of invalidity, but found the plaintiff's proposed gas station to be an unreasonable use. See also *LaSalle Nat'l Bank v Chicago,* 130 Ill App 2d 457, 462; 264 NE2d 799 (1970) (remand for submission of further evidence regarding reasonableness of use). A plaintiff's proposed use must be specific, but it need not amount to a "plan." See *Norwood Builders v City of Des Plaines, supra.*

Under the Illinois rule, the zoning authority is always left free to rezone. When a plaintiff meets

the burden of proving the reasonableness of his proposed use, the zoning authority is simply prevented from prohibiting the approved use when it acts to rezone the property. Other Illinois cases decided under this rule are discussed in *Zaagman,* pp 174-176, n 10.

Zaagman rejected the Illinois approach along with *Daraban;* however, it found *Sinclair* and its progeny "persuasive." *Id. Zaagman* described *Sinclair* and *Daraban* as "too restrictive."

It goes without saying that we disagree on this point. In our view, *Sinclair* represents a unique accommodation of both the desire to provide relief and the necessity for keeping judicial action within constitutional bounds.

After a zoning ordinance has been declared unconstitutional, in addition to that declaration, a judge may provide relief in the form of a declaration that the plaintiff's proposed use is reasonable, assuming the plaintiff's burden has been met, and an injunction preventing the defendant from interfering with that use. The defendant is always free to rezone consistent with the limiting conditions of plaintiff's proposed use, or not so limited, where plaintiff's use has not been declared reasonable. In contrast to *Daraban,* the Illinois rule prevents the plaintiff from "shooting the moon" with its proposed use, because if the plaintiff does not demonstrate reasonableness, the municipality's further zoning will be limited only by the court's declaration of unconstitutionality.

It is a practical rule, because, as the *Sinclair* court observed:

> Normally the land owner is interested particularly in a specific use which he proposes, and so it is natural that he will try the case and the judge will reach his decision in terms of the reasonableness of excluding that specific use. [*Id.,* p 378.]

The finality aspect of the Illinois rule is also appealing. In contrast to a purely unzoned approach, it does not set the stage for future litigation.

We would prefer to terminate this litigation now, rather than extend it further. However, in the interests of rectifying a rule that has proved to be cumbersome and unworkable, and of providing a more manageable, efficient, and less theoretically problematic alternative approach, we find it necessary to remand this cause yet again in order to allow for a determination of reasonableness by the trial court. Since plaintiff still seeks to develop his property as he proposed in his original complaint, this would not prove to be a difficult task, although further evidence from all sides might be received on the question of reasonable use.

Thus, we overrule *Zaagman* and reverse and remand this case to the trial court for consideration of the question of relief in accordance with this opinion.

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

LEVIN, J. In this appeal we are called upon (1) to reexamine the procedure, applicable after a judicial determination that a zoning classification is invalid as applied to a particular parcel of land, prescribed by this Court in *Ed Zaagman, Inc v Kentwood,* 406 Mich 137, 166-167; 277 NW2d 475 (1979), and (2) to determine whether the declaratory judgment and order, entered pursuant to the *Zaagman* procedure by the circuit judge, as modified and affirmed by the Court of Appeals, constitutes an improper exercise by the judiciary of

power vested in the Legislature,[1] a deprivation of property without due process of law,[2] or a taking of private property without just compensation.[3]

I

Joseph Schwartz owns a twenty-eight acre parcel of undeveloped land in the City of Flint. Immediately south of the parcel are several subdivided residential lots containing single-family homes on the north side of Woodslea Drive, which runs roughly east and west. These homes are on the northern edge of a large residential neighborhood.

The judge ultimately declared the zoning classification to be constitutional as applied to the Schwartz parcel. The Court of Appeals, one judge dissenting, reversed and held the zoning classification unconstitutional as applied to the Schwartz parcel.[4]

Pursuant to the procedure set forth in *Zaagman*,[5] the Court of Appeals remanded the cause to the Flint City Council. The city, however, failed to submit an amendatory ordinance or other proposal to the circuit court within the sixty-day period prescribed in *Zaagman*.[6]

Consistent with paragraph (v) of the *Zaagman* procedure,[7] the judge received proposals from both parties and conducted an evidentiary hearing for the purpose of determining "the most equitable or

[1] Const 1963, art 3, § 2.

[2] Const 1963, art 1, § 17. Similarly, see US Const, Am XIV.

[3] Const 1963, art 10, § 2. Similarly, see US Const, Am V, applicable to the states under US Const, Am XIV; *Chicago, B & Q R Co v Chicago,* 166 US 226; 17 S Ct 581; 41 L Ed 979 (1897).

[4] *Schwartz v City of Flint,* 92 Mich App 495; 285 NW2d 344 (1979), lv den 408 Mich 905 (1980).

[5] See *ante,* pp 301-302, n 3.

[6] The judge denied the city's motion to extend the sixty-day period.

[7] See *ante,* pp 301-302, n 3.

'midsatisfactory use' to be made" of the Schwartz parcel.

The order[8] entered by the judge did not adopt either the city's or Schwartz' proposal. The order prescribed different uses for various "tiers" of the Schwartz parcel. The first tier, consisting of approximately 3.7 acres immediately north of the single-family homes on Woodslea Drive, was restricted to single-family homes under the A-1 zoning classification (10,000 square foot minimum lots). The second tier, consisting of approximately 1.15 acres immediately north of the first tier, was restricted to "duplexes." On the remaining property, Schwartz would be permitted to construct 120 or, depending on the flood plain level, 124 single-family attached townhouse units, provided that the total number of units on the entire parcel did not exceed 140.

The order also prohibited the use of the outlot[9] as a means of access to and from the Schwartz parcel, and would require that Schwartz obtain a right-of-way over an adjoining privately owned parcel.

The Court of Appeals[10] modified the judge's order to permit "detached single-family townhouses" as well as "duplexes" in the second tier of the parcel;[11] the judge's order was affirmed in all other respects.

II

Schwartz, the city, and two sections of the State

[8] See *ante*, pp 303-304, n 8.

[9] Schwartz owns an undeveloped outlot, sixty feet in width, on the north side of Woodslea Drive. This outlot has been, and still is, the only means of providing public access to the larger parcel.

[10] *Schwartz v City of Flint (After Remand)*, 120 Mich App 449; 329 NW2d 26 (1982).

[11] The city did not seek to file a cross-appeal from the Court of Appeals modification of the circuit judge's order.

Bar of Michigan, appearing as amici curiae, urge that the remand procedure set forth in *Zaagman*[12] should be repudiated or modified.

A

Schwartz asserts that the *Zaagman* procedure should be repudiated in its entirety and overruled. He argues that delay and prolonged litigation are invited by the procedure, which gives local zoning authorities at least a second chance after a classification has been determined invalid as applied. He also argues that the search for a "midsatisfactory use" in effect requires a landowner to "bargain against himself" after a successful challenge to a zoning restriction. He further asserts that the procedure improperly leads courts to "devise and impose restrictions on land use" that may threaten sound economic development and perhaps even constitute a "taking" by inverse condemnation.[13]

Schwartz argues that when a zoning restriction is declared unconstitutional as applied to a parcel of land, the parcel should be deemed "unzoned,"[14] and the landowner should be free to develop the property in a manner consistent with the classification originally sought in the complaint for relief, or the municipality should be ordered to pay just compensation for the "taking" of the property.

The city argues that the *Zaagman* procedure,

[12] See *ante,* pp 301-302, n 3.

[13] Schwartz states that the *Zaagman* procedure might give rise to liability, under 42 USC 1983, for deprivation "under color of law" of constitutional rights. Schwartz has not, however, asked for relief under § 1983.

[14] See, e.g., *First National Bank v Lake Co,* 7 Ill 2d 213; 130 NE2d 267 (1955); *Napierkowski v Gloucester Twp,* 29 NJ 481; 150 A2d 481 (1959); *Atlanta v McLennan,* 237 Ga 25; 226 SE2d 732 (1976).

which requires the judge to "determine and implement the most equitable or 'midsatisfactory use' to be made of plaintiffs' parcel," leads courts improperly to exercise legislative powers delegated to municipal zoning authorities. The solution, according to the city, is to require that the judge determine "the most restrictive, yet constitutional, lesser-included zoning classification within the classification determined unconstitutional." The city urges that the *Zaagman* procedure be replaced with a modified version of the proposal submitted by amici curiae,[15] limiting the judge's choice of remedies to a declaration and injunction based on existing zoning classifications.

Alternatively, the city urges that if the *Zaagman* procedure is retained, the sixty-day remand period should be lengthened, and the term "midsatisfactory use" should be redefined to avoid any implication that a compromise, or "middle use," must be implemented in every case.

The Real Property Law and Public Corporation Law Sections of the State Bar of Michigan, as amici curiae, have jointly submitted a proposal that would replace the *Zaagman* remand procedure. The Real Property Law Section argues that the *Zaagman* procedure invites costly delay and provides no incentive to the local zoning authorities to "zone reasonably in the first instance" or reach a settlement with the landowner. The Public Corporation Law Section argues that the *Zaagman* procedure forces both parties to prepare for further litigation, creating an atmosphere not conducive to productive land use planning.

The joint proposal of the State Bar Sections would eliminate the remand procedure and require that a judge fashion an appropriate remedy after it has been determined that a zoning ordi-

[15] See n 16.

nance is invalid as applied; the proposal identifies factors that the judge should consider when fashioning a remedy, and the forms of relief that might be granted.[16]

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[16] .1 After a Trial Court has determined a provision of a zoning ordinance is invalid, the Court shall fashion a remedy consistent with this Rule.

.2 Without delay, the Court shall then hold a conference with counsel for all parties to determine the procedure to be followed in fashioning the remedy which may include any of the following:

(1) The filing of Briefs and oral argument on the question of remedy, without any further testimony or evidence, based on the trial record.

(2) The taking of additional testimony and evidence on the question of remedy.

(3) Any other procedure the Court deems appropriate.

.3 In fashioning a remedy, the Court shall consider at least the following factors:

(1) The objectives of zoning as set forth in the applicable Zoning Enabling Act.

(2) A reasonable use or uses of the land, including economic considerations.

(3) The compatibility with, and the effect of any use allowed by the Court on surrounding properties, and the zoning plan as contained in the zoning ordinance.

.4 In determining the remedy, the Court shall make findings as required by [MCR 2.517(A)] in respect to the factors to be considered in .3 above.

.5 The remedy fashioned by the Court may include:

(1) A use or uses which shall be allowed on the land.

(2) Elimination of unreasonable or inappropriate zoning regulations or restrictions.

(3) Conditions on the use of the land.

(4) Appropriate injunctions and other orders as may be deemed necessary to effectuate the remedy.

.6 The remedy fashioned by the Court shall be included in the final Judgment.

The Public Corporation Law Section argues in its brief that the following should be added:

.7 The final judgment shall provide that the municipality may exercise its zoning authority over the land described in the judgment, but any ordinance, amendment or regulation shall not preclude the use determined by the Court to be reasonable.

B

We are not persuaded that the *Zaagman* procedure should be repudiated or overruled in its entirety. Legitimate concerns regarding that procedure, however, prompt us to modify and clarify certain aspects of the procedure.

All the parties have expressed concern that focusing on "midsatisfactory use" may imply that there is in all cases an appropriate compromise or "middle use" that must be reflected in the order of relief from an invalid zoning ordinance.

We see no need to attempt to assess whether the term "midsatisfactory use" is confusing or misleading. We disavow any implication that the term "midsatisfactory use" means that both the landowner's proposed use and a modified version of the original zoning classification must be rejected in all cases.[17] In some cases the landowner's proposed use will be the only constitutionally reasonable use of the property; in other cases the original zoning classification, with modifications, might present the landowner with a reasonable use of his property. The judge is not foreclosed from consideration of these uses in his determination of an appropriate remedy.

[17] Nor does it appear that the author of the opinion that introduced the term "midsatisfactory use" intended that it would be so construed. In his separate opinion in *Dequindre Development Co v Warren Charter Twp,* 359 Mich 634, 642; 103 NW2d 600 (1960), Justice BLACK observed that "there need be no inexorable choice, now at least, between plaintiff's prayer for specific relief and defendants' too-restrictive ordinance" and suggested that the plaintiff and the city might jointly consider "some possibly midsatisfactory use." There was no suggestion that such a "midsatisfactory use" is present in all factual circumstances or that the judge must in every case stay his order of relief until such a use has been considered. See *Daraban v Redford Twp,* 383 Mich 497; 176 NW2d 598 (1970), written by Justice BLACK, affirming an order enjoining interference with the plaintiff's proposed specific use.

C

We adhere to the view that, when a zoning restriction is declared unconstitutional as applied to a parcel of land, the parcel should not be considered "unzoned." The effect of leaving a parcel temporarily unrestricted, and preventing the judge from entering appropriate declaratory or injunctive relief, might be development of the parcel in a manner incompatible with the general development of the surrounding area.[18]

The city should be provided an opportunity to demonstrate the feasibility of uses other than those proposed in the landowner's complaint. A determination that an existing zoning restriction is unconstitutional as applied does not mean that the landowner must be permitted to use the land in the manner he has proposed.

Nor should the judge's choice of remedies be limited to issuance of a general injunction based on a determination of the most restrictive, yet constitutional, "lesser-included" zoning classification within the classification previously invalidated. Adoption of the city's proposal would introduce another area of controversy concerning what constitutes the "most restrictive" zoning classification and unnecessarily constrict the city's and the judge's alternatives.[19]

If there is more than one constitutionally reasonable use of the property, the city's choice should, we continue to believe, generally prevail.

[18] See *Ed Zaagman, Inc v City of Kentwood, supra,* pp 168-169, and n 6; *Sinclair Pipe Line v Village of Richton Park,* 19 Ill 2d 370, 378-379; 167 NE2d 406 (1960). See also 4 Anderson, American Law of Zoning (2d ed), § 28.10, p 378; 3 Rathkopf & Rathkopf, Law of Zoning and Planning (4th ed), § 36.04, p 36-6.

[19] Nor, given the movement away from the pyramidal, *Euclidean* approach to zoning, would it even be possible in many cases to identify a constitutionally reasonable "lesser-included" classification.

If, however, the city fails to identify its choice—through a specific use proposal for the property—within a reasonable period of time, then the judge properly is called upon to determine and implement an appropriate remedy without being limited to, although he should consider, existing zoning classifications and untimely proposals submitted by the city.

D

Specifically, we would hold that, as before, after a judicial determination that a zoning classification is unconstitutional as applied, enforcement of the ordinance should be enjoined and an alternative specific use proposal submitted by the city would be considered by the judge.

In lieu of the remand procedure, not later than sixty days *before* the trial date, the city might present an alternative specific use proposal for the property. The judge could require the landowner to submit an alternative use proposal within the same time limitation.

If the city's presentation is timely, the judge would, upon a determination of unconstitutionality, expeditiously determine whether the city's proposal provides the landowner with a feasible alternative use that is not unreasonable as applied to his property.[20] If the judge determines that a feasible alternative use has been provided by the city, he would be obliged to enter a judgment declaring that to be the use that may be made of the property.

If the judge determines that no feasible alternative use has been provided, or that the city's

[20] The substantive standard to be applied in judging the validity of the specific use proposal is the same standard applied in deciding the validity of the original zoning classification.

presentation was made in bad faith or for the purpose of delay, or if the city fails timely to submit a specific use proposal, the judge would conduct an evidentiary hearing to determine an appropriate remedy. Both parties could submit specific use proposals to the judge, but a feasible use proposed by the city would not then be given priority over other feasible alternative uses.

After conducting the evidentiary hearing, the judge, considering at least (1) the objectives set forth in the applicable zoning enabling act, (2) reasonable uses of the land, including economic considerations, (3) compatibility with surrounding properties and developments, and (4) the zoning plan contained in the zoning ordinance, would fashion a remedy that identifies a feasible specific use or uses to be permitted on the land, eliminates unreasonable or inappropriate zoning land use restrictions, and which might include conditions on the use of the land and appropriate injunctions and other provisions and orders as might be deemed necessary to effectuate the remedy.[21] Findings of fact would be required to be filed.

E

The foregoing modification of the *Zaagman* procedure would reduce delay and the length of litigation. While, as before, the city would be given a "second chance" to provide a feasible alternative use for the property, the modified procedure would provide the city with an incentive to act reasonably and without delay. Under the modified procedure the city need not formally adopt an amendatory ordinance, and might instead submit a specific use proposal. The city's choice among feasible

[21] This language substantially tracks the joint proposal submitted by amici curiae. See n 16.

alternatives would lose its preferred status if the city acts in bad faith or for the purpose of delay, or if it fails timely to submit a feasible alternative use proposal.

The city would be required to submit a specific use proposal, if at all, sufficiently in advance of the trial date so that if the judge determines that the challenged zoning is unconstitutional, he might, and the parties could reasonably be expected to, proceed, without rescheduling the case and the attendant further delay, immediately to consider the feasibility of the city's alternate specific use proposal. The city should be authorized to file the alternative specific use proposal with opposing counsel rather than the judge so that the judge need not know before he determines the constitutionality of the challenged zoning whether the city has made an alternative specific use proposal and, if so, the nature of the proposal.

Adoption of the modified procedure would eliminate "bargaining against himself" by the landowner or the city. Any implication that a remedy must include a compromise "midsatisfactory" use has been disavowed; the landowner might argue that his originally proposed use is the most, or perhaps the only, reasonable use of the property.

A judgment entered by a trial court is not final until it contains a remedial order. As in all cases, however, a party may file an application for leave to appeal in the Court of Appeals from a judgment or order of the court "which is not a final judgment appealable of right."[22]

The foregoing procedure would not permit a court to exercise legislative power delegated to local zoning authorities. It is only *after* a court finds that local authorities have failed timely to provide a feasible alternative to an unconstitu-

[22] MCR 7.203(B)(1).

tional application of a zoning ordinance that the court would be called upon to formulate a remedy for the unconstitutional deprivation of property rights. Nor would this procedure preclude the city from rezoning the property; existing zoning and such a rezoning would not, however, bar or impede construction and use of the parcel pursuant to the judgment and order of the court.

III

We turn to consideration of the declaratory judgment and order entered by the circuit judge.[23]

A

We review the judgment and order of the judge, as modified and affirmed by the Court of Appeals, pursuant to the clearly erroneous standard.[24] Under that standard, the findings of the judge may be set aside when " 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' "[25]

B

Schwartz asserts that the judgment and order constitute an impermissible exercise of legislative power, a deprivation of property without due process of law, and a taking of private property without just compensation.

1

We have indicated that the *Zaagman* procedure,

[23] See *ante*, pp 303-304, n 8.

[24] See MCR 2.613(C); *In re Cornet*, 422 Mich 274; 373 NW2d 536 (1985).

[25] *Tuttle v Dep't of State Highways*, 397 Mich 44, 46; 243 NW2d 244 (1976).

as we would modify that procedure in this opinion, does not permit a court to exercise legislative power delegated to local zoning authorities.[26]

In the instant case, the city failed to submit an amendatory ordinance or other proposal to the judge within the time provided. The judge conducted an evidentiary hearing, receiving testimony and proposals from both parties concerning an appropriate use of the Schwartz property.

In formulating a remedy after a determination that a zoning classification was unconstitutional as applied, and after the local zoning authorities failed timely to provide a feasible alternative use for Schwartz' property, the judge did not impermissibly exercise powers belonging to the legislative branch.

2

Schwartz presents several arguments in support of his claim that the judgment and order deprive him of property without due process of law.

First, Schwartz argues that the decision to permit an A-1 restriction (single family home with a minimum lot size of 10,000 square feet) on part of the property repudiated the "law of the case," insofar as the Court of Appeals originally held that the A-1 classification precludes the use of the property "for any purpose to which it is reasonably adapted."[27] We do not read the first decision of the Court of Appeals as barring the judge on remand from designating a *portion* of the parcel as subject to the A-1 classification.

Second, Schwartz argues that the focus on a "midsatisfactory use" led the judge to "dismiss out of hand" his originally proposed use of the prop-

[26] See text following n 22.

[27] *Schwartz v City of Flint*, n 4 *supra*, p 539.

erty. While the number of multiple-family units permitted by the judge's order was less than the number that Schwartz originally wished to construct, it does not appear that the judge failed to consider the use proposed by Schwartz.

Third, Schwartz argues that he had no advance notice of the plan adopted by the judge, and thus had no realistic opportunity to oppose the remedy proposed and adopted by the judge. Schwartz participated in the remand procedure and submitted a proposal for consideration by the judge. The judge was not required to provide the parties with a proposal for decision or advance notice of the precise contours of the remedy he was formulating.

Finally, Schwartz asserts that the restriction of the first tier to single-family homes and the second tier to duplexes, combined with the overall maximum of 140 units on the entire parcel, bears no relation to public health, morals, safety, or welfare. The judge considered several potential uses of the land as well as their anticipated effect on the surrounding properties and neighborhood. He did not clearly err in imposing separate restrictions on different portions of the property or in limiting the total number of residential units.

3

Schwartz asserts that the judgment entered by the judge constitutes an unconstitutional taking of his property without just compensation. He argues that, because the judge prohibited the use of the outlot as a means of access to and from the property, the judgment prohibits any and all use of the property. The city argues that the decision to prohibit access through the outlot was "invited" by Schwartz' own proposal to obtain a right-of-way over an adjoining privately owned parcel.

We are persuaded that the decision to prohibit access through the outlot was clearly erroneous. Schwartz had no enforceable agreement to obtain the proposed right-of-way over the adjoining parcel. While some streets[28] in the residential area south of the Schwartz parcel were narrow or without sidewalks, that does not justify a decision that, in effect, completely landlocks an otherwise developable parcel.

If local authorities perceive a potential safety problem due to an increase in traffic,[29] they might post reasonable restrictions or condemn private property to widen streets or add sidewalks or to provide a different means of ingress or egress to Schwartz' parcel.

The city urges that, if this Court decides that access to the Schwartz parcel must be provided over the outlot, the matter should be remanded once again to the circuit court for reconsideration of the appropriate use of the parcel in light of that decision. We decline to do so. After more than fifteen years, it is time for this litigation to come to an end so that Schwartz may develop his property if he wishes to do so.

C

We would vacate those portions of the judgment and order of the judge that prohibit access through the outlot and require that Schwartz obtain a right-of-way over an adjoining parcel. We would hold that until such time as other means of access

[28] Many of the streets in the residential area south of the Schwartz parcel are twenty feet wide.

[29] The Court of Appeals originally found that "the street and road system [is] adequate to accommodate the development of the plaintiffs' land under A-1, A-2, B or C classification." *Schwartz v City of Flint*, n 4 *supra*, p 539.

to and from the Schwartz parcel are in place, access may be provided through the outlot.

In all other respects, we would affirm the judgment and order of the circuit judge, as modified and affirmed by the Court of Appeals.

WILLIAMS, C.J., concurred with LEVIN, J.

ARCHER, J., took no part in the decision of this case.

MICHIGAN MUTUAL INSURANCE COMPANY v ALLSTATE INSURANCE COMPANY

Docket No. 77470. Argued May 7, 1986 (Calendar No. 5). Decided October 28, 1986.

Michigan Mutual Insurance Company brought an action in the Wayne Circuit Court against Allstate Insurance Company for recoupment of one-half of no-fault benefits paid on behalf of an injured pedestrian struck by an uninsured motorist. At the time of the accident, the injured pedestrian was not named in a policy of insurance, but was living with her mother, the named insured on a policy issued by Allstate. The injured person was married, but separated from her husband, the named insured on a policy issued by Michigan Mutual. The court, William J. Giovan, J., granted summary judgment for the defendant, holding that Michigan Mutual was in a higher order of priority than Allstate under the no-fault act to pay benefits to the injured party and thus was not entitled to recoupment from Allstate. The Court of Appeals, M. J. KELLY, P.J., and MACKENZIE and KAUFMAN, JJ., reversed (Docket No. 77689). The defendant appeals. The Court of Appeals certified that its decision conflicted with *Martin v DAIIE,* 135 Mich App 588 (1983).

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

An insurer of the spouse of an injured person and the insurer of a relative in whose household the injured person, who is not named in either policy, is domiciled are in the same order of priority to pay personal protection insurance benefits. An insurer that pays benefits under such circumstances is entitled to partial recoupment from the other.

Affirmed.

146 Mich App 475; 382 NW2d 169 (1985) affirmed.

Rutledge, Manion, Rabaut, Terry & Thomas, P.C. (by *Christopher L. Terry*), for the plaintiff.

Garan, Lucow, Miller, Seward, Cooper & Becker, P.C. (by *James L. Borin*); (*Gromek, Bendure & Thomas,* by *Nancy L. Bosh,* of counsel) for the defendant.

LEVIN, J. The no-fault automobile liability act[1] provides that an insurer shall pay personal protection insurance (no-fault) benefits to "the person named in the policy, the person's spouse, and a relative of either domiciled in the same household . . . ." It is further provided that when benefits are payable by the injured person's insurer and would also be payable under the policy of the person's spouse or a relative, the injured person's insurer shall pay all the benefits and "shall not be entitled to recoupment[2] from the other insurer."[3]

The act does not, however, expressly provide

[1] MCL 500.3114(1); MSA 24.13114(1).

[2] The act provides that when two or more insurers "are in the same order of priority" an insurer paying benefits is entitled to "partial recoupment from the other insurers in the same order of priority" "to accomplish equitable distribution of the loss among" such insurers:

> When 2 or more insurers are in the same order of priority to provide personal protection insurance benefits an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among such insurers. [MCL 500.3115; MSA 24.13115.]

[3] (1) 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, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. A personal injury insurance policy described in section 3103(2) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motorcycle accident. When personal protection insurance benefits or personal injury benefits described in section 3103(2) are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and shall not be entitled to recoupment from the other insurer. [MCL 500.3114; MSA 24.13114.]

whether, when an injured person is not "named" in a policy of no-fault insurance, but is covered pursuant to the no-fault act under both a spouse's policy and a policy of a relative, both insurers are in the same order of priority.

Allstate Insurance Company contends that the insurer of a spouse is in a higher order of priority than the insurer of a relative because in the phrase, "the person named in the policy, the person's spouse, and a relative of either domiciled in the same household," "spouse" appears before "relative," and because such a construction of the act would eliminate the sometimes difficult factual question whether a person is "domiciled in the same household" of a relative and facilitate thereby the administration of the act.

The Court of Appeals, in *Martin v DAIIE,* 135 Mich App 588; 354 NW2d 267 (1983), where, as here, the injured person did not have a no-fault policy, was separated from her husband and was living with her mother at the time of the accident, held that the insurer of the spouse was in a higher order of priority and was required to pay the full no-fault benefits without recoupment from the insurer of the mother.[4]

In the instant case, the Court of Appeals considered, but rejected, the reasoning of *Martin* and held that there should be recoupment. The Court certified the question for conflicts resolution pursuant to Administrative Order No. 1984-2, 418 Mich lxxxii (1984). We agree with the Court of Appeals in the instant case and affirm.

The no-fault act provides with considerable precision for priorities between insurers. A person

[4] The trial judge in this case relied on the opinion of the Court of Appeals in *Martin v DAIIE,* 135 Mich App 588; 354 NW2d 267 (1983).

injured[5] in a motor vehicle "operated in the business of transporting passengers," except as delineated in the act, shall receive benefits from the insurer of that vehicle. A person injured in his employer's motor vehicle shall receive benefits from the insurer of the employer's vehicle.[6] Both such insurers are in a higher order of priority than an insurer of the injured person's vehicle, his spouse's vehicle, or a relative's vehicle.[7] If no such coverage applies, a person suffering injury shall recover no-fault benefits from the "insurer of the owner or registrant of the vehicle occupied" by the injured person or, where not an occupant, the "insurers of owners or registrants of motor vehicles involved in the accident." Last in the "order of priority" stated in the act is the insurer of the

[5](2) A person suffering accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers shall receive the personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle. This subsection shall not apply to a passenger in the following, unless that passenger is not entitled to personal protection insurance benefits under any other policy:

(a) A school bus, as defined by the department of education, providing transportation not prohibited by law.

(b) A bus operated by a common carrier of passengers certified by the public service commission.

(c) A bus operating under a government sponsored transportation program.

(d) A bus operated by or providing service to a nonprofit organization.

(e) A taxicab insured as prescribed in section 3101 or 3102. [MCL 500.3114; MSA 24.13114.]

[6](3) An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle. [MCL 500.3114; MSA 24.13114.]

[7] See n 3 for text of § 3114(1) of the act.

operator of "the vehicle occupied," or, as the case may be, "involved in the accident."[8]

As previously noted, the Legislature carefully spelled out the order of priority between the insurer of the injured person's vehicle, on the one hand, and an insurer of a spouse's or relative's vehicle, on the other. There is nothing that would indicate that, in providing for coverage by insurers of a spouse's or relative's vehicle, the Legislature intended also to provide an order of priority between them.

The Court of Appeals in *Martin* ignored the provision of the act establishing that the insurer of the person named in the policy is in a higher order of priority than an insurer of a spouse or relative and the implication from that provision that no order of priority was established between an insurer of a spouse or relative. Treating the order in which the insurers are identified for coverage as also establishing an order of priority would render superfluous that provision establishing the insurer of the person named in the policy as primary.

While the issue of domicile may in some cases

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[8](4) Except as provided in subsections (1) to (3), a person suffering accidental bodily injury 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. [MCL 500.3114; MSA 24.13114.]

(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. [MCL 500.3115; MSA 24.13115.]

be, as Allstate argues, troublesome,[9] in other cases it will be as clear or almost as clear as who is a spouse or relative.

Some might agree with the Court of Appeals in *Martin* that "a spouse is a more natural and logical source of benefits under the no-fault insurance statute than any other relative of the injured party with whom the injured party is living at the time of the accident."[10] The Legislature did not, however, so provide and we find no basis for concluding that it so intended. In this connection, we observe that some might believe that when spouses are separated the goal of prompt compensation of injured persons is better served by subjecting to liability both the spouse's insurer and the insurer of a relative in whose household the spouse is domiciled with a right of recoupment, by a no-fault insurer who paid more than its share, to accomplish equitable distribution of the loss.

In sum, the Legislature carefully spelled out the order of priority of insurers. There is nothing in the structure or purpose of the act that would be defeated by a literal construction of the act. We conclude that we would not be justified in reading the phrase "the person's spouse, and a relative of either domiciled in the same household" as providing that a spouse's insurer is in a higher order of priority than a relative's insurer to eliminate the factual issue of domicile or the cost to insurers of maintaining and defending actions for recoupment where they are unable to agree on their responsibilities in a particular case.

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[9] See *Workman v DAIIE,* 404 Mich 477, 495; 274 NW2d 373 (1979).

[10] *Martin v DAIIE, supra,* p 594.

We have also considered Allstate's other arguments including that from an underwriting standpoint the insurer of a spouse can more readily estimate its exposure than the insurer of a relative. The record does not support that claim, and in all events it is an argument that would be better addressed to the Legislature.

We hold that an insurer of an injured person's spouse and the insurer of a relative domiciled in the same household are in the same order of priority.

Affirmed.

WILLIAMS, C.J., and BRICKLEY, CAVANAGH, BOYLE, RILEY, and ARCHER, JJ., concurred with LEVIN, J.

FERRARIO v ESCANABA BOARD OF EDUCATION

Docket No. 75602. Argued April 9, 1986 (Calendar No. 2). Decided October 31, 1986.

Richard Ferrario appealed his dismissal as a teacher by the Escanaba Board of Education to the Teacher Tenure Commission. The commission granted Ferrario summary judgment on the ground that the board had shown bias or a probability of bias by placing itself in the role of accuser as well as judge, and ordered reinstatement with back pay. The Delta Circuit Court, Edward A. Quinnell, J., remanded the matter to the Tenure Commission for a hearing on the merits. The Court of Appeals, R. M. MAHER, P.J., and WAHLS and HATHAWAY, JJ., affirmed, and awarded Ferrario unconditional back pay in an unpublished opinion per curiam (Docket No. 71195). The board appeals.

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

The Tenure Commission failed to properly review the record of Ferrario's dismissal to determine whether actual bias or a high probability of actual bias existed. The record as a whole fails to substantiate the commission's finding of lack of due process. Remand for review de novo on the merits is required.

1. A discharge of a tenured teacher may be made only for reasonable and just cause, and only after following procedures established under the teacher tenure act. Where a charge of misconduct is brought against a teacher, the board of education must determine whether to proceed. If it decides to conduct a hearing, the school district administration must appear on behalf of the person bringing the charge, while the role of the board of education is to represent the public. The burden of proof is on the district to show reasonable and just cause for discharge.

2. The Teacher Tenure Commission acts as a board of review

REFERENCES

Am Jur 2d, Schools §§ 185 *et seq.*, 202, 208 *et seq.*

Who is "teacher" for purposes of tenure statute. 94 ALR3d 141.

Construction and effect of tenure provisions of contract or statute governing employment of faculty member by college or university. 66 ALR3d 1018.

for appeals of tenure decisions of controlling boards of education. The commission must review all questions of fact and law de novo, and should review and consider the record made before the controlling board. Review of a commission decision involves a determination from the record whether there is competent, material, and substantial evidence on the whole to support the commission's findings.

3. In this case, only the board minutes raised an inference of bias and required further investigation by the commission. However, by themselves they do not provide substantial evidence of actual bias or a high probability of bias. Viewed in a light most favorable to the board, they are not sufficient to establish lack of a genuine issue of material fact, and thus summary judgment should have been denied. The hearing transcript provides a valid defense to the claim of bias. Moreover, Ferrario raised no objection regarding bias prior to or during his hearing.

4. Review of the record reveals no due process violation. The board performed its statutory duty in determining whether there was probable cause to proceed with the charges against Ferrario. Its determination whether the charges in fact were substantiated by the evidence presented at the hearing was not a reevaluation of its initial decision. Although actual bias need not be shown to establish violation of due process rights, it must be shown that the risk of unfairness was intolerably high or that the probability of unfairness is too high to be constitutionally tolerable. An examination of the full procedures used at the hearing fails to substantiate Ferrario's claims.

5. An award of back pay by the Tenure Commission on the basis of procedural error prior to a determination on the merits, where a teacher's discharge was for cause, does not further the purpose of the teacher tenure act. A final determination of an award and an amount of back pay should occur after all appeals are completed. In addition, where a school board discharges a tenured teacher following a hearing on the merits, the Tenure Commission, upon finding procedural or due process error on appeal that cannot be corrected on remand to the board, should not order reinstatement before conducting review de novo on the merits. If no hearing on the merits was conducted by the board and the commission concludes that the teacher cannot receive a hearing by the board that comports with due process, the commission likewise should conduct a hearing on the merits before determining if reinstatement is proper.

Reversed and remanded for review de novo on the merits.

1. SCHOOLS — ADMINISTRATIVE LAW — TEACHER TENURE COMMISSION.
   Review of all questions of fact and law regarding the discharge of a tenured teacher must be made de novo by the Teacher Tenure Commission (MCL 38.139; MSA 15.2039).

2. SCHOOLS — ADMINISTRATIVE LAW — TEACHER TENURE COMMISSION — REINSTATEMENT — AWARD OF BACK PAY — APPEAL.
   The Teacher Tenure Commission should neither order the reinstatement of nor award back pay to a discharged tenured teacher until it reaches a decision on the merits; should either party appeal the decision of the commission, an award of back pay or an order of reinstatement will be held in abeyance pending the completion of all appeals.

Foster, Swift, Collins & Coey, P.C. (by *Lynwood E. Beekman* and *Timothy P. Greeley*), for the plaintiff.

Butch, Quinn, Rosemurgy, Jardis & Valkanoff, P.C. (by *Robert S. Rosemurgy* and *Terry F. Burkhart*), for the defendant.

CAVANAGH, J. The State Tenure Commission granted summary judgment to plaintiff Ferrario because it found that Ferrario's right to due process at his discharge hearing before the local board was violated. In this appeal, the Escanaba Area Public Schools Board of Education contends that the Court of Appeals erred as a matter of fact and law in finding substantial evidence to support the Tenure Commission's finding. The board further contends that the Court of Appeals erred in granting Ferrario back pay from the date of the board's decision discharging him until the Teacher Tenure Commission completes a de novo review of the case on the merits.

We find that the Teacher Tenure Commission failed to properly review the record involving Ferrario's dismissal to determine whether actual bias or a high probability of actual bias existed. The

record as a whole fails to substantiate the commission's findings of lack of due process.

Moreover, if such bias had been found, the commission should have performed a de novo review on the merits before ordering reinstatement or back pay for the plaintiff. While the lower courts properly remanded the case to the Tenure Commission for consideration of the merits, they erred in affirming the commission's finding of a due process violation and in awarding back pay to Ferrario.

I. FACTS

Plaintiff Ferrario[1] was a teacher in the Escanaba Area High School. On April 27, 1981, the assistant superintendent of the Escanaba Schools received a written statement from a student of alleged improper conduct by Ferrario. This statement was forwarded, with a memorandum, to the secretary of the Board of Education.[2] In response to the charge, the secretary called a board meeting by

[1] Plaintiff Ferrario died on October 14, 1985. This case is being continued on behalf of his estate. Ferrario's counsel concedes that any award of back pay would cease as of the date of Mr. Ferrario's death. Ferrario's death has made the question of reinstatement to his teaching position moot.

[2] To: Gerald C. Anderson Date: April 27, 1981—6:00 P.M.
From: J. Mongue, Supt.
Regarding: Personnel Issue

Attached, you will find a copy of a statement of a student [name omitted] which implicates Mr. Richard Ferrario, a Senior High School Social Studies teacher, in actions alleged to be perverted.

I met with the student and his mother on Sunday afternoon, April 26th, and with Mr. Ferrario on Monday, April 27th. *In my judgment, there appears to be possible basis for the allegations by the student.*

I have, therefore, suspended Mr. Ferrario, with pay, and recommend that the Board of Education take appropriate action in accordance with the tenure laws in the State of Michigan. [Emphasis added.]

written notice dated April 27, 1981.[3] The board met on April 28, 1981, and decided to proceed with a discharge hearing.[4] Mr. Ferrario was informed of

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[3] To: Board of Education Date: April 27, 1981
From: Gerald C. Anderson, Secretary
Regarding: Personnel Issue

The Superintendent of Schools has provided me with information regarding a teacher whose behavior with a student appears to be questionable.

I am satisfied that there are sufficient grounds to call a full board meeting to consider possible action against the teacher.

I am, therefore, requesting a full board meeting to be held Tuesday, April 28, 1981 at 7:30 P.M. at the Wylie Administration Center.

/s/ Gerald C. Anderson

[Emphasis added.]

[4] Escanaba Area Public Schools
Executive Session Meeting Minutes
April 28, 1981
7:30 P.M.

* * *

The purpose of the Executive Session was restated:

1. Negotiation Strategy

2. Personnel Problem—Charges Brought Against Richard Ferrario

* * *

2-A *Dr. Mongue reviewed the charges of improper conduct that were brought against Richard Ferrario by an 11th grade student at the high school. After reviewing all the charges and Mr. Ferrario's personnel file,* a motion was made by Dr. Bradley and supported by Pat Sundstrom, that additional information and testimony be gathered from two students who recently volunteered similar information.

This motion was then amended by Dr. Bradley and supported by Mr. Paulin, *to bring formal charges against Mr. Ferrario under the Michigan Tenure Act* and to continue Mr. Ferrario's suspension with pay until a hearing can be held. This hearing cannot be held in less than thirty days or more than forty-five days according to Michigan Tenure Law. Motion passed 6-0.

Mr. Ferrario was contacted in person by Dr. Mongue immediately following the meeting to discuss with him the board's decision. He was also advised of his rights. A letter was to be sent to Mr. Ferrario as a follow up.

Motion by Mr. Anderson, supported by Mr. Carne, that the meeting be adjourned.

the school board's decision, the nature of the charges, the time of the scheduled hearing, and of his rights under the teacher tenure act in a letter from the assistant superintendent dated May 11, 1981.[5]

Respectfully submitted,

/s/ Thomas C. Vitito
[Emphasis added.]

[5] May 11, 1981

Mr. Richard Ferrario
1401 North 23rd Street, Lot #25
Escanaba, Michigan 49829

Dear Mr. Ferrario:

As we previously advised, *the Escanaba Board of Education at an executive session held on April 28, 1981, brought and filed the following charges against you:*

1. Improper conduct consisting of sexual advances and misconduct on Wednesday, April 8, 1981, involving a student at the Escanaba Area Public High School. The exact nature of the conduct and the identity of the student has been described to you in detail by Dr. Mongue at a meeting held on April 27, 1981. Any additional information relative to this charge may be obtained at the administration office from Assistant Superintendent, Thomas C. Vitito.

2. Consistent with number one, improper conduct with other students at the Escanaba Area High School on many occasions during the past three school years. Information concerning this conduct and the students may be obtained from the Assistant Superintendent at the administration office. These instances of misconduct will be considered by the Board of Education in connection with charge number one above.

This will confirm that Dr. Mongue has discussed the charges and your rights on both April 27, 1981 and the evening of April 28, 1981. For your benefit, I have attached a copy of the rights provided you by tenure law, which statements are incorporated by reference.

A hearing has been scheduled for you with the Board of Education on June 10, 1981 at 7:30 P.M. in the Wylie Administration Center. In connection with that hearing, you have the following rights and privileges:

A. The teacher may not be discharged or demoted except for reasonable and just cause and only after such charges, notice, hearing and determination thereof are made as provided by the Act.

A hearing was held on June 10, 1981. At Ferrario's request, the hearing was private and the witnesses were sequestered. Mr. Ferrario, the administration, and the board were each represented by

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B. The teacher has a right to a hearing, if he so requests, and the hearing shall be scheduled not less than thirty (30) nor more than forty-five (45) days from the date of the filing of such charges. (The charges were filed in this instance on April 28, 1981).

C. No action concerning demotion nor [sic] dismissal will be taken except by majority vote of the members of the Board of Education.

D. Both the teacher and the person filing the charges may be represented by counsel.

E. The hearing shall be public or private at the option of the teacher.

F. Testimony will be on oath or affirmation.

G. The Board of Education will employ a stenographer to make a full record of the proceedings, and the teacher will be provided with a complete transcript thereof within ten (10) days after the conclusion of the hearing.

H. The hearing will be concluded by a decision in writing within fifteen (15) days after the termination of the hearing, and a copy of the decision will be furnished the teacher within five (5) days after the decision is rendered.

I. The Board of Education will subpoena witnesses and documentary evidence on behalf of the teacher, at his request, and if any person shall refuse to appear on his behalf the Board of Education will petition the Circuit Court of Delta County and request a subpoena commanding that person to appear before the Board of Education at the time of the hearing.

J. The teacher has a right of appeal as provided by the Act, being Article VI of the Michigan Tenure of Teachers' Act.

If you or your counsel have any questions in advance of the hearing, please advise.

Respectfully yours,

/s/ Thomas C. Vitito
Assistant Superintendent
Escanaba Area Public Schools

TCV/ms

pc: Mr. Gil Truax, President, Board of Education
Dr. Joseph Mongue, Superintendent of Schools
Mr. Gerald Anderson, Secretary, Board of Education

[Emphasis added.]

counsel. All exhibits were introduced by stipulation of counsel. In his opening statement, Ferrario's counsel stipulated on the record that Ferrario had been given adequate notice of the charge against him and had been properly advised of his rights under the teacher tenure act. Prior to the taking of testimony, counsel for the board advised the board members that their function was to decide impartially whether there was reasonable and just cause to support the charges brought on the basis of the evidence produced at the hearing.[6]

A board member asked:

> Can we assume the person is innocent until proven guilty?
>
> Mr. DeGrand (Board Attorney): Very much so, yes, you may.

The administration and Mr. Ferrario each presented witnesses. Ferrario's testimony substantially corroborated that of the complainant's.

At the close of testimony, the attorney for the administration stated that "the charges were issued by this Board" and that they had been filed by the administration, which had established Fer-

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[6] Members of the Board of Education, by document dated May 11, 1981, *charges were issued by this Board of Education* concerning Richard Ferrario. The charge, a charge was issued concerning Mr. Ferrario. The charge is, improper conduct consisting of sexual advances and misconduct on Wednesday, April 8, 1981, involving a student at the Escanaba Public High School. That is the charge.

* * *

We submit, and *I am representing the Administration who filed the charges, that the Administration has established without any doubt that Mr. Ferrario engaged in improper conduct* consisting of sexual advances and misconduct on Wednesday, April 8, 1981, involving a student at the Escanaba Area Public High School. [Emphasis added.]

rario's improper conduct beyond a doubt.[7] In his closing statement, Ferrario's counsel discussed the role of the board.

> Charges are not brought by this Board, the Board merely determined that they should be heard and determined by this Board. If they had been brought by this Board, I would have to raise a question about the Board's impartiality to hear and determine them. They were brought by the Administration on the complaint of a student, which complaint you have seen, tendered to you in writing, and which has been—complaint has been amplified by the testimony that has been presented to you.

At the close of the hearing, the board president

[7] At this point I would like to advise the Board members concerning this hearing. Your function in this case is to impartially decide the matter which is being brought before you. The test which you are to apply in this matter is whether or not there is reasonable and just cause to support the charges which have been brought. Not having advised you earlier, I do not know specifically what each of you or all of you might be aware of as to the charges which have been brought against the teacher. However, I do caution you and strongly advise you to disregard any knowledge at this point that you have of those charges and to start this hearing much as a jury would in a lawsuit or a criminal case. What I am saying to you is that you must keep an open mind. You are to keep an open mind throughout the proceedings and you are to decide the case on all of the evidence as you hear it and all of the evidence in toto.

As your counsel in this case, I will not be specifically involved in presenting evidence. However, I will advise you if there are questions of admissibility of evidence and if there are questions as to what evidence you might legally base your decision upon.

Generally, the rules of evidence in this case are somewhat more liberal than if we were in court to a degree hearsay would be admissible. However, I should caution you that you cannot decide this matter strictly on hearsay. There must be other supportive direct evidence and not hearsay evidence.

If any of the board members have any specific questions about your function in this matter before we begin and before we get into subsequent testimony, I would entertain them for you at this time if you would like.

advised the members that Mr. Ferrario was to be presumed innocent until there was a finding of fact to the contrary within the guidelines of the tenure law. Until a decision was reached by the board, there was to be no discussion of the case with anyone, including other board members.[8] The board's attorney reminded the members that he was present merely to advise the board of legal standards and not to give his opinion of the case.

In a decision dated June 17, 1981, the Board of Education unanimously found reasonable and just cause to terminate Mr. Ferrario's employment with the school district. The board stated that its decision was based solely on the official charge of improper conduct consisting of sexual advances and misconduct and on the evidence presented at the hearing. The board noted that Ferrario's coun-

[8] Thank you, gentlemen. I wish at this time, as President of the Board, to make a very brief statement.

And that is that at the completion of these hearings, Mr. Ferrario has requested an executive session of the Board. That session is now coming to a close, I would assume.

In our society and in all circumstances where we have an accused in any set of circumstances, be it the criminal justice system or be it a school, the presumption of innocence may remain with the accused until such time as a finding of the fact. And in this case, a finding of the fact by the School Board members. Therefore, because Mr. Ferrario has requested an executive session and because there has not, at this point in time, been a finding of fact, I am suggesting and even going beyond that, and saying that this will not be discussed outside this room.

At this point, there has been, as I said, no finding of fact and I caution everyone in this room, who is not a Board member, to not discuss this case outside the room.

I caution Board members not to discuss it among themselves or among persons outside this room, except as a full Board to make a finding of fact.

The finding of facts will come within the guidelines of the tenure laws that will be researched to make sure that we stay within the confines of the tenure laws, and at that time, that finding of fact and decision by this Board will be submitted to all parties involved.

sel had raised no objection to the board's procedure at any time.[9]

The letter dated May 11, 1981, advising Ferrario of the board's initial decision to proceed to formal hearing, had not been entered into evidence and thus was not considered by the board in reaching its decision. The parties had stipulated to the letter's admission into evidence should Ferrario appeal from the board's decision.[10]

Plaintiff Ferrario filed a claim of appeal with the Michigan Teacher Tenure Commission. The commission granted Ferrario's motion for summary judgment on the basis that the school board had shown bias or a probability of bias by placing itself in the role of accuser as well as judge. This decision was based on a review of the board minutes, the notice of April 27, and the May 11 letter. The minutes stated that the board had moved "to bring formal charges against Mr. Ferrario" under

[9] The attorney for the teacher, to this time, has raised no objections to the procedure followed thus far. [Opinion and Decision of Board of Education, June 17, 1981.]

[10] In deciding this matter, the Board is considering only the "Official Charge" which is attached hereto, dated June 10, 1981, under the letterhead of the Escanaba Area Public Schools. To complete the record if the matter is appealed, counsel for the administration and the teacher have stipulated to the admission of a letter dated May 11, 1981, from the Administration to Mr. Ferrario. The Board has not considered any information in such correspondence, except the "official charge." A copy of Attorney Rosemurgy's [administration attorney] letter of June 15, 1981, addressed to Attorney DeGrand [board attorney], is made a part of the record in explanation of the official charge and the previous letter of May 11, 1981. Specifically, the Board has disregarded, and has not considered, the "second charge" made in the letter of May 11, 1981.

The Board's decision in the matter is based solely upon the evidence elicited at the hearing on June 10, 1981, and the exhibits introduced at said hearing. [Opinion and Decision of Board of Education, June 17, 1981.]

the teacher tenure act. The commission refused to consider any further review of the official record of proceedings on the basis that board minutes cannot be altered or supplemented by parol testimony. *Tavener v Elk Rapids Rural Agricultural School Dist,* 341 Mich 244; 67 NW2d 136 (1954). Without further review of the case on its merits, the commission ordered the reinstatement of Ferrario with back pay.[11]

On appeal, the circuit court ordered that the matter be remanded to the Tenure Commission for a hearing on the merits. The circuit judge stated that he would not have found that the local board was prejudiced if he had been sitting on the Tenure Commission. However, since there was evidence on the record which could support the Tenure Commission's finding that the local board's actions gave the appearance of partiality, the court affirmed. While the circuit court did not find the hearing "so defective that it could be considered a nullity" as the Tenure Commission had, it allowed Ferrario back pay from the date of its decision until a final decision on the merits by the commission. The court held that the school board need not reinstate Ferrario prior to a final decision on the merits.[12]

Plaintiff Ferrario appealed the circuit court's order. The Court of Appeals affirmed that there was sufficient evidence to support the Tenure Commission's finding that the Board of Education had acted to bring charges against the plaintiff. The Court of Appeals found "an impermissibly great risk of bias" where "a controlling board becomes involved in the decision whether to bring charges

[11] Decision and Order of the State Tenure Commission, July 30, 1982.

[12] Order of the Delta Circuit Court, Edward A. Quinnell, J., April 18, 1983.

against a teacher, acts to bring those charges, and later sits as decisionmaker." The Court affirmed the remand to the Tenure Commission and awarded Ferrario unconditional back pay.

> Here, because bias undermined the initial decision to proceed with charges against the teacher, the defect in plaintiff's discharge is the school board's involvement in the filing of charges against plaintiff. Therefore, the defect preceded the decision to proceed on the charges, rendering the entire procedure tainted. Where the decision to proceed with charges is improperly made, conditional back pay is a sufficient remedy. However, this is not true where plaintiff claims that, absent improper bias, the school board may never have decided to proceed with charges. Thus, plaintiff is entitled to unconditional back pay from the date of discharge until the Tenure Commission reaches a decision on the merits, subject to a mitigation determination pursuant to *Shiffer v Gibraltar Schools,* 393 Mich 190; 224 NW2d 255 (1974).[13]

This Court granted leave to appeal.

II. THE TEACHER TENURE ACT

The teacher tenure act, MCL 38.71 *et seq.;* MSA 15.1971 *et seq.,* was enacted to protect teachers from arbitrary and unreasonable practices. A discharge may be made only for reasonable and just cause, and only after following the procedures established by the act. MCL 38.101; MSA 15.2001. *Rehberg v Melvindale, Ecorse Twp Bd of Ed,* 330 Mich 541, 547; 48 NW2d 142 (1951) *(Rehberg I).*

Under the act, a board must determine whether or not to proceed on a given charge. MCL 38.102; MSA 15.2002 provides:

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[13] Unpublished opinion per curiam of the Court of Appeals, decided November 30, 1984 (Docket No. 71195).

> All charges against a teacher shall be made in writing, signed by the person making the same, and filed with the secretary, clerk or other designated officer of the controlling board. Charges concerning the character of professional services shall be filed at least 60 days before the close of the school year. The controlling board, if it decides to proceed upon such charges, shall furnish the teacher with a written statement of the charges including a statement of the teacher's rights under this article, and shall, at the option of the teacher, provide for a hearing to take place not less than 30 nor more than 45 days after the filing of such charges.

If the board decides to proceed with a hearing, the administration appears on behalf of the student who has filed the charges. The burden of proof is on the school district to show reasonable and just cause for discharging the tenured teacher.[14] The role of the board of education is to represent the public.[15]

The proper rules and regulations of the hearing before the board are established in the teacher tenure act.[16] The act permits the board the right to suspend a teacher with pay until the board reaches a final decision.[17]

A teacher who has tenure may appeal any decision of the controlling board to the State Tenure Commission.[18] The Tenure Commission was established to act as a board of review for all appeals from the decision of a controlling board.[19] The

[14] *Sutherby v Gobles Bd of Ed,* 73 Mich App 506, 508; 252 NW2d 503 (1977), remanded 401 Mich 833 (1977).

[15] *Rogers v Trenton Bd of Ed,* 61 Mich App 682, 692; 233 NW2d 141 (1975).

[16] MCL 38.104; MSA 15.2004.

[17] MCL 38.103; MSA 15.2003.

[18] MCL 38.121; MSA 15.2021.

[19] MCL 38.139; MSA 15.2039.

commission must make a de novo decision on all questions of fact and law. *Long v Royal Oak Bd of Ed,* 350 Mich 324; 86 NW2d 275 (1957). The Tenure Commission should review and consider the record made before the controlling board. *Rehberg I, supra,* pp 546, 548; *Rehberg v Melvindale, Ecorse Twp Bd of Ed,* 345 Mich 731; 77 NW2d 131 (1956) *(Rehberg II).*

Either party may appeal a decision of the Tenure Commission. The function of the reviewing courts is to determine from the record whether there is competent, material, and substantial evidence on the whole to support the Tenure Commission's findings.[20] This review entails a degree of qualitative and quantitative evaluation of the evidence considered by the agency. *Beebee v Haslett Public Schools (After Remand),* 406 Mich 224, 231; 278 NW2d 37 (1979).

Plaintiff Ferrario alleges that the following items relate to the issue of bias or prejudgment:

(1) The memorandum to the board secretary from the superintendent stating that the superintendent had met with the student and his mother and believed that there "appears to be a possible basis for the allegations by the student." (See footnote 2.)

(2) The notice from the board secretary to the board members stating that he was "satisfied that there are sufficient grounds to call a full board meeting to consider possible action against the teacher." (See footnote 3.)

(3) The minutes of the board meeting which state that "Dr. Mongue reviewed the charges of improper conduct that were brought against Richard Ferrario by an 11th grade student at the high school" and the "motion was then amended . . . to bring formal charges against Mr. Ferrario." (See footnote 4.)

(4) The May 11, 1981, letter from the assistant super-

[20] Const 1963, art 6, § 28; MCL 24.306(1)(d); MSA 3.560(206)(1)(d).

intendent to Ferrario which stated that "the Escanaba Board of Education . . . brought and filed the following charges against you." (See footnote 5.)

In the present case, a formal complaint which complied with the statute was received by the administration and forwarded to the board's secretary. At this time, the board was required to determine the necessity of proceeding with the charges under MCL 38.102; MSA 15.2002. The memorandum and the notice suggest that the superintendent and the board secretary were acting with proper caution before bringing the matter before the board.

The board minutes contain conflicting statements about who is bringing the charges. The minutes state that an eleventh grade student brought the charge against Ferrario and that the board moved to bring formal charges against Ferrario. The board now contends that it misstated itself by using the word "bring" rather than the statutory term "proceed" in the final paragraph. Moreover, the board contends that the commission's reliance upon the grammar or choice of verbs in the minutes as substantial and material evidence of impropriety is misplaced.

A school board is not composed of lawyers but of lay persons from the community. The choice of the verb "bring" as opposed to "proceed" may have been an error or may have reflected a lack of understanding on the part of the board of its role. We believe that the conflicting statements in the board minutes including the statement that the board was "bringing" charges raised a question of fact concerning possible bias that should have

been resolved by the Tenure Commission by further examining the record of the hearing.[21]

The letter of May 11, 1981, paraphrases the board's minutes. It served to give Ferrario written notice of the charges against him and to explain his rights under the tenure act as mandated by MCL 38.102; MSA 15.2002. Copies of the letter were sent only to the superintendent, the board president, and the board secretary. Therefore, only two of seven board members who voted unanimously to dismiss Ferrario had received copies of the May 11 letter.

This letter was not admitted into evidence at the discharge hearing. The board expressly stated that its decision rested solely on the official charge of misconduct and the evidence presented at the hearing. (See footnote 9.) In our opinion, only the board minutes raised an inference of bias and required further investigation by the Tenure Commission.

III. SUMMARY JUDGMENT

The State Tenure Commission has a motion practice similar to that of Michigan courts.[22] A motion for summary judgment may be granted when the moving party has failed to state a claim

[21] We agree with the board that the distinction between the meaning of the word "bring" (to convey, lead, carry, or cause to come along . . .) and the word "proceed" (to begin and carry on an action, process, or movement) is quite subtle. *Webster's New Collegiate Dictionary* (1980), pp 137, 910. The distinction in the common meaning of each word as it relates to the field of law is almost nil. The definition for "bring" is "[t]o advance or set forth (charges or evidence, for example) in a court." The definition for "proceed" is "[t]o institute and conduct legal action." *The American Heritage Dictionary of the English Language* (1981), pp 166, 1043.

[22] Michigan Administrative Code, 1979 AC, R 38.151-38.159. The three motions involving peremptory disposition of a case are motion for accelerated judgment (R 38.154), motion for summary judgment (R 38.155), and motion for default judgment (R 38.157).

upon which relief can be granted, when the controlling board has failed to state a valid defense to the claim against it, or there is no genuine issue as to material fact, except as to the relief to be granted.[23] When a party moves for summary judgment on the basis of no genuine issue of material fact, the commission must consider the parties' affidavits, pleadings, admissions, and other documentary evidence then filed in the action or submitted by the parties.[24]

The courts are liberal in finding that a "genuine issue" does indeed exist. *Rizzo v Kretschmer,* 389 Mich 363; 207 NW2d 316 (1973). The evidence presented should be interpreted to give the benefit of any reasonable doubt to the opposing party, i.e., any evidence should be viewed in a light most favorable to the nonmoving party.

The Tenure Commission granted summary judgment to plaintiff Ferrario solely on the basis of its review of the memorandum, the board minutes, and the May 11, 1981, letter. The commission refused further review of the procedures at the hearing on the basis that the board minutes cannot be altered or supplemented by parol evidence.

> First, we must note that the official minutes of a school board cannot be impugned by any member's mental reservations, nor can board minutes be altered or supplemented by parol testimony. *Tavener v Elk Rapids Rural Agriculture [sic] School District,* 341 Mich 244 (1954). The board minutes here clearly indicate that the board, itself, acted to bring the charges against appellant. As of that moment, the controlling board became the accuser as a matter of law. Beyond this point, appellee board's continued participation as the finder of fact must be viewed as inherently improper. [Decision and Order of the State Tenure Commission.]

[23] 1979 AC, R 38.155(1)(a)-(c).

[24] 1979 AC, R 38.155(2).

The commission erred in its reliance on *Tavener, supra. Tavener* involved an action in assumpsit (a contract dispute) by an architect against a school district over an amount agreed upon by the parties for the architect's services. At trial, the plaintiff architect introduced the testimony of three former board members, and the defendant school district offered the testimony of two board members. This Court did not find the testimony of all the board members inadmissible. It held that the record established a dispute and that the existence of a dispute did not disprove plaintiff's claims of a contract.

The Court allowed the testimony of the board members, whether for the plaintiff or the defendant, with the exception of a Mr. Barnes. Mr. Barnes' testimony was found inadmissible because he claimed that the board had approved the architect's plan "with reservations" not in the official record. The Court disallowed this "deviation or modification" of the recorded instrument.

> When the law requires municipal bodies to keep records of their official action in the legislative business conducted at their meetings, the whole policy of the law would be defeated if they could rest partly in writing and partly in parol, and the true official history of their acts would perish with the living witnesses, or fluctuate with their conflicting memories. No authority was found, and we think none ought to be, which would permit official records to be received as either partial or uncertain memorials. That which is not established by the written records, fairly construed, cannot be shown to vary them. They are intended to serve as perpetual evidence, and no unwritten proofs can have this permanence. [*Tavener, supra,* pp 251-252.]

In the present case, the school board was not

offering the "mental reservations" or the testimony of board members to substantiate its claims of misstatement or error. The board presented the transcript of the hearing as evidence of the procedural safeguards offered at the discharge hearing to prove its claim of due process. The transcript of the hearing will hardly "perish with the living witnesses, or fluctuate with their conflicting memories." It is not "a partial or uncertain memorial[ ]" or an "unwritten proof" with no permanence. The transcript itself is an official record specifically required by the teacher tenure act[25] and should have been examined by the Tenure Commission.[26]

In reviewing the board minutes, this Court agrees with the Tenure Commission that the minutes might serve as evidence of bias. These minutes are material to the issue of bias and competent to a degree. By themselves, however, they do not provide substantial evidence of actual bias or the high probability of bias. The inconsistent statements within the minutes as to who was bringing the charges against Ferrario raise a question of fact. When the minutes are viewed in a light most favorable to the nonmoving party, they are not sufficient to establish no genuine issue of material fact.[27] Thus, summary judgment should have been denied.

The hearing transcript provides a valid defense to the claim of bias asserted by Ferrario.[28] The comments of the attorneys and board members at the opening and close of the hearing and the procedural safeguards of the hearing including the sequestration of witnesses, separate attorneys for

[25] MCL 38.104(e); MSA 15.2004(e).

[26] 1979 AC, R 38.155. See *Arnold v Crestwood Bd of Ed*, 87 Mich App 625; 277 NW2d 158 (1978).

[27] 1979 AC, R 38.155(1)(c).

[28] 1979 AC, R 38.155(1)(b).

the board of education, the charged teacher, and the charging party; sequestration of all persons from the board of education during deliberation; adherence to the rules of evidence; complete cooperation with respect to all documents and charges; and a written opinion by the board of education based upon the testimony, stipulations, and evidence elicited at the hearing, establish the board's attempt to provide Ferrario with a fair hearing. Moreover, no objection was raised by plaintiff prior to or during his hearing regarding bias on the part of the school board or any improper procedure.

IV. DUE PROCESS

Plaintiff Ferrario claims that the commission and the courts have reviewed and considered every piece of evidence which might bear on the question of bias. He further contends that the board minutes, notice of the meeting, and the May 11 letter clearly establish that the board had placed itself in an accusatory role and had prejudged the case prior to the hearing. Ferrario argues that the board's actions require its disqualification under *Crampton v Dep't of State,* 395 Mich 347, 351; 235 NW2d 352 (1975), where the decisionmaker "might have prejudged the case because of prior participation as an accuser, investigator, factfinder or initial decisionmaker."

The *Crampton* case involved a determination by this Court that the plaintiff has been denied due process of law in appealing the loss of his driver's license before the Licensing Appeal Board because the board was staffed by a full-time law enforcement official. The two-member board was composed of a representative of the Secretary of State and a police officer from the Lansing Police Department whose employment involved the arrest and prosecution of drunk drivers.

In an opinion authored by Justice LEVIN, this Court held:

> Crampton was denied due process of law. Appeal board panels which are membered by full-time law enforcement officials are not fair and impartial tribunals to adjudge a law enforcement dispute between a citizen and a police officer. [*Crampton, supra,* p 350.]

The Court identified four situations as presenting constitutionally unacceptable risks of bias. Those situations are where a judge or decisionmaker:

> (1) has a pecuniary interest in the outcome;
> (2) has been the target of personal abuse or criticism from the party before him;
> (3) is "enmeshed in [other] matters involving petitioner . . ."; or
> (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker. [*Id.,* 351.]

In *Crampton,* Justice LEVIN reviewed United States Supreme Court decisions in which individual adjudicators were disqualified because they had personally conducted the initial investigation, amassed evidence, and filed and prosecuted the charges.

> The Court held in *In re Murchison,* 349 US 133; 75 S Ct 623; 99 L Ed 942 (1955), that a Michigan one-man grand juror could not try for contempt witnesses who had appeared before him and whom he had charged with perjury and refusal to answer questions.
> In *Goldberg v Kelly,* 397 US 254, 271; 90 S Ct 1011; 25 L Ed 2d 287 (1970), the Court held that procedural due process required that welfare recip-

ients be afforded an evidentiary hearing before termination of benefits and declared that "of course, an impartial decision maker is essential." "[P]rior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review."

In *Morrissey v Brewer,* 408 US 471, 485, 489; 92 S Ct 2593; 33 L Ed 2d 484, 497 (1972), the Supreme Court held that a parolee is entitled to a hearing before a "neutral and detached" board before his parole is revoked and to a preliminary determination that there is probable cause to hold him pending that hearing. The preliminary determination "that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case." [*Id.,* 353.]

Justice LEVIN then distinguished these cases from those instances where a board must make a preliminary decision on the issue of probable cause and then conduct a full evidentiary hearing. *Withrow v Larkin,* 421 US 35; 95 S Ct 1456; 43 L Ed 2d 712 (1975). *Withrow* "eschewed a flat rule that prior involvement of a tribunal as accuser, investigator or prosecutor necessarily precludes participation as adjudicator."

In *Withrow,* a state examining board, composed of practicing physicians, first investigates and issues findings and conclusions regarding probable cause to believe a physician has violated the statutes regulating the practice of medicine and then determines whether in fact the statutes have been violated. The Court concluded that "the combination of investigative and adjudicative functions does not, *without more,* constitute a due process violation . . . ." [*Id.,* p 354.]

Withrow, supra, p 58, does preclude such partici-

pation where the special facts and circumstances present in a case show that "the risk of unfairness is intolerably high."

In the present case, the plaintiff has made no allegation that the makeup of the school board itself created any inherent bias such as existed in *Crampton.* Plaintiff claims that in performing its statutory duty to determine whether it should proceed with charges, the board had become biased or that an impermissible appearance of bias existed.

In *Hortonville Joint School Dist No 1 v Hortonville Ed Ass'n,* 426 US 482; 96 S Ct 2308; 49 L Ed 2d 1 (1976), a similar claim of bias was made against a local board because of an alleged prosecutorial role and, in addition, its role as a party to collective bargaining negotiations. The United States Supreme Court stated:

> Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker. *Withrow v Larkin* [*supra*]; *FTC v Cement Institute,* 333 US 683, 700-703 [68 S Ct 793; 92 L Ed 1010] (1948). Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances." *United States v Morgan,* 313 US 409, 421 [61 S Ct 999; 85 L Ed 1429] (1941); see also *FTC v Cement Institute, supra,* at 701.
>
> Respondents' claim and the Wisconsin Supreme Court's holding reduce to the argument that the Board was biased because it negotiated with the teachers on behalf of the school district without reaching agreement and learned about the reasons for the strike in the course of negotiating. From those premises the Wisconsin court concluded that the Board lost its statutory power to determine

that the strike and persistent refusal to terminate it amounted to conduct serious enough to warrant discharge of the strikers. Wisconsin statutes vest in the Board the power to discharge its employees, a power of every employer, whether it is negotiated with the employees or not. The Fourteenth Amendment permits a court to strip the Board of the otherwise unremarkable power the Wisconsin Legislature has given it only if the Board's prior involvement in negotiating with the teachers means that it cannot act consistently with due process.

Due process, as this Court has repeatedly held, is a term that "negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v McElvoy,* 367 US 886, 895 [81 S Ct 1743; 6 L Ed 2d 1230] (1961). Determining what process is due in a given setting requires the Court to take into account the individual's stake in the decision at issue as well as the State's interest in a particular procedure for making it. See *Mathews v Eldridge,* 424 US 319 [96 S Ct 893; 47 L Ed 2d 18] (1976); *Arnett v Kennedy,* 416 US 134, 168 [94 S Ct 1633; 40 L Ed 2d 15] (1974) (Powell, J., concurring); *id.,* at 188 (White, J., concurring and dissenting); *Goldberg v Kelly,* 397 US 254, 263-266 [90 S Ct 1011; 25 L Ed 2d 287] (1970). Our assessment of the interests of the parties in this case leads to the conclusion that this is a very different case from *Morrissey v Brewer* [408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972)], and that the Board's prior role as negotiator does not disqualify it to decide that the public interest in maintaining uninterrupted classroom work required that teachers striking in violation of the state law be discharged. [426 US 493-494.]

Respondents have failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decisionmakers as a matter of federal due process. A showing that the Board was "involved" in the events preceding this decision, in light of the important interest in leaving with the

> Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power. Cf. *Withrow v Larkin,* 421 US at 47. *Accordingly, we hold that the Due Process of the Fourteenth Amendment did not guarantee respondents that the decision to terminate their employment would be made or reviewed by a body other than the School Board.* [426 US 496-497. Emphasis added.]

Recently, this Court upheld the constitutionality of the decision by the Director of the Department of Social Services. *City of Livonia v DSS,* 423 Mich 466; 378 NW2d 402 (1985). In *Livonia,* the city argued that they had been denied due process of law because the Director of the DSS participated in a decision which granted a license for a group home for the mentally handicapped over the city's objections. The director had reviewed the city's initial complaints and issued a final decision after reviewing the hearing officer's findings. *Id.,* 509-510.

This Court cited *Hortonville, supra,* noting that mere familiarity with the facts of a case obtained during performance of a statutory duty does not disqualify a decisionmaker. Nor is disqualification required because the decisionmaker has taken a public position on the issue, without a specific showing of incapability of judging a particular case fairly. *Id.,* 510.

In *Withrow, supra,* 56, 58, the United States Supreme Court discussed situations where a decisionmaker is involved in both the initial and final adjudicative proceedings:

> Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person

> named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the trial is without a jury, against making the necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary restraining order or a preliminary injunction.
>
> * * *
>
> *The initial . . . determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation.* Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised. But in our view, that is not this case. [Emphasis added.]

The school board in the present case, like the DSS director in *Livonia,* was not reevaluating its initial decision. The board was fulfilling a statutory duty similar to that in *Withrow* to determine if there was probable cause to proceed with the charges before determining if the charges were in fact substantiated by the evidence presented at the hearing. It was the duty of the Tenure Commission to review the board's findings de novo.

Ferrario alleged before the Tenure Commission that the board had "become partial," given "the appearance of partiality" or "raised the spectre of bias." We agree with Ferrario that he does not

have to show actual bias to show a violation of his due process rights. Indeed, Ferrario has failed to establish actual bias on the part of any individual board member or the board as a whole. However, an appearance of bias or partiality does not meet the standard of *Withrow* and *Crampton.*

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. [*Withrow, supra,* p 47.]

Ferrario must show that the risk of unfairness was intolerably high or that the probability of unfairness is too high to be constitutionally tolerable. *Crampton, supra,* p 358. As noted earlier, the board minutes may have raised a question of bias on the part of the board. However, an examination of the full procedures used at the hearing fails to substantiate Ferrario's claims.[29] Moreover, had the commission conducted a de novo review on the merits, it would have discovered that Ferrario admitted almost every one of the complainant's serious allegations. If the board's decision had gone against the great weight of the evidence, Ferrario's claims of bias would have been substantiated. Such was not the case.

[29] Virtually every case cited by plaintiff to support his claim of lack of due process involved no hearing prior to dismissal.

V. REMEDIES

A. BACK PAY

The teacher tenure act provides that a teacher may be suspended with pay until the board reaches a decision. If the Tenure Commission reverses the board's decision, the teacher shall be entitled to all salary lost.[30]

In *Shiffer v Gibraltar Schools, supra,* 208-209, this Court held that a determination of back pay should be deferred during the pendency of teacher tenure controversies.

> The objective of an expeditious administrative resolution of tenure controversies can be accomplished by having the Tenure Commission similarly defer determination of back pay until after completion of the liability phase. There is no need to jettison the sound principles of mitigation of loss generally applied by courts and administrative tribunals throughout the land.
>
> Deferring determination of the amount of a back-pay award will facilitate resolution of the liability phase by freeing the commission from consideration of interlocutory evidence on the back-pay issue. An effort by the Tenure Commission to determine back-pay before a definitive ruling on liability will often be premature. If the school district appeals from the Tenure Commission's decision and does not reinstate the discharged teacher during the pendency of the appeal, the teacher's employment status and oppor-

[30] On the filing of charges in accordance with this section, the controlling board may suspend the accused teacher from active performance of duty until a decision is rendered by the controlling board, but the teacher's salary shall continue during such suspension: Provided, That if the decision of the controlling board is appealed and the tenure commission reverses the decision of the controlling board, the teacher shall be entitled to all salary lost as a result of such suspension. [MCL 38.103; MSA 15.2003.]

tunities will often change during the lengthy appeal process.

Deferral of the back-pay question will, avoiding piecemeal litigation, allow that question to be expeditiously resolved at one time with all the necessary evidence, hopefully informally and without further adjudication but, in all events, with the least expenditure of the Commission's resources.

In *Pounder v Harper Woods Bd of Ed,* 402 Mich 91; 260 NW2d 287 (1977), this Court interpreted MCL 38.103; MSA 15.2003:

> A teacher is entitled to salary during the period of suspension, but the suspension ends when the school board renders a decision. The statute does not address the question whether salary must be paid during the pendency of appeals from board or commission rulings.
>
> We do not impute to the Legislature an intent to award salary to a teacher who has not yet prevailed on the merits and whose discharge was vacated on procedural grounds, subject to correction on remand without a rehearing. Under such a construction of the statute, interlocutory rulings on procedural errors would result in windfalls to teachers who later lose on the merits. Teachers who prevail on the merits are entitled to no more than the actual economic loss suffered. *Shiffer v Board of Education of Gibraltar School District,* 393 Mich 190; 224 NW2d 255 (1974). The awarding of salary to a teacher who has not yet prevailed on the merits and whose discharge was reversed on procedural grounds is at odds with the rule of compensation for actual loss suffered. Moreover, the practice of awarding salary at this stage conflicts with the policy of deferring determination of the amount of back pay until after there has been a definitive ruling on liability. See *Shiffer v Gibraltar Schools, supra,* 207-209. [*Id.,* 93-94.]

Ferrario alleges that the board's error in the

present case is not correctable on remand to the board as in *Pounder* and, therefore, he is entitled to back pay. Ferrario looks to this Court's decision in *Wilson v Flint Bd of Ed,* 361 Mich 691; 106 NW2d 136 (1960). In *Wilson,* the Flint School District required three years of tenure as opposed to the two-year period required by statute. Plaintiff Wilson was given no evaluations of her teaching performance for three years. The board failed to follow any of the procedures established by the teacher tenure act, including presentation of definite written charges, an opportunity for a full hearing with a stenographer, and an opportunity to cross-examine witnesses against her.

The commission concluded that the teacher was entitled to back pay for the period between the improper hearing and the conclusion of the proper hearing before the board. This Court approved the remand to the school board to conduct a proper hearing on the merits, but did not discuss the issue of back pay. *Wilson, supra,* p 697.

The present case can be distinguished from *Wilson.* Here there was ample evidence of the board's attempt to protect Ferrario's due process rights and to comply with the teacher tenure act. Moreover, Ferrario, unlike Wilson, had a complete hearing on the merits before the board which has never been reviewed by the Tenure Commission or any court. In fact, the Tenure Commission foreclosed its review of the school board's findings on the merits by granting summary judgment to Ferrario. Without any determination on the merits, the commission ordered both reinstatement and back pay.

This Court recognizes that the Tenure Commission may reverse a board decision on the basis of procedural error alone. However, the truth or falsity of the allegations against the teacher is

relevant in the fashioning of a remedy.[31] Both the circuit court and the Court of Appeals recognized this in denying plaintiff reinstatement until such time as the commission completed a de novo hearing on the merits. If the board were biased, a remand to the board for a new hearing would not protect Ferrario's due process rights. On the other hand, if Ferrario were guilty of the misconduct charged, summary judgment for Ferrario with reinstatement and back pay would fail to protect the school district's legitimate concerns.

The Court of Appeals held that Ferrario was entitled to unconditional back pay where he alleged that, absent improper bias, the school board may never have decided to proceed with the charges. The serious nature of the allegations in the present case make it highly improbable that the school board would not have proceeded with a hearing upon an initial determination that there was a basis in fact for the student's allegations. However, according to the Court of Appeals, plaintiff does not have to show that the school district would not have proceeded with the charges, i.e., he does not have to establish that there was no basis in fact for the charges or no merit in the administration's case, he only needs to *allege* that charges would not have been brought. With this conclusion, we disagree.

A plaintiff need only claim that charges would never have been brought absent bias and, no matter how spurious that claim, the plaintiff would be entitled to compensation from the school district. We disagree with plaintiff's contention that back pay in such situations is an equitable remedy.[32]

[31] *McGhee v Draper,* 639 F2d 639 (CA 10, 1981).

[32] *Thomas v Ward,* 529 F2d 916, 920 (CA 4, 1975).

Back pay in Michigan is a statutory remedy provided by the teacher tenure act.

In *City of Ann Arbor v United States Dep't of Labor,* 733 F2d 429 (CA 6, 1984), an award of back pay to an employee, fired without a prior informal hearing, was reversed. The hearing referee who initially heard the case specifically refused to consider whether the employee would have been properly discharged for cause even if all of the procedures and regulations had been followed.[33]

The Sixth Circuit Court of Appeals concluded that an award of back pay based on procedural error where a plaintiff's discharge was for cause did not further the statutory purposes of the federal program involved nor serve as a proper remedy.

> In *Kentucky v Donovan,* 704 F2d 288 (CA 6, 1983), the court noted:
>
> "[B]ack pay, in many circumstances, will further the purposes of the Act. An award of back pay is the traditional 'make whole' remedy for wrongful discharge. Where it has not furthered the purposes of CETA, as when the discharge is proper but the procedure is technically deficient, courts have been reluctant to allow such a remedy. The rationale for disallowing back pay in these cases is that it does not further the purposes of the CETA program.
>
> "Yet, in cases not involving technical defects . . . no court has found that back pay

[33] At the time of the employee's firing, there were mandatory procedures for resolving disputes between prime sponsors in the Comprehensive Employment and Training Act (29 USC 801 *et seq.*) program and employees hired under it. 29 CFR 98.26 (1975), removed June 28, 1985. *City of Ann Arbor v United States Dep't of Labor, supra,* 430, n 2.

awards are inconsistent with the purpose of the Act."

* * *

It is unclear to us how a complainant who was properly discharged in a procedurally imperfect way is made whole by the payment of a year's wages for which he did not work. There is little logical correlation between the award and the loss. The payment of back pay here would be a windfall, not a make-whole compensation. [*Ann Arbor, supra,* 432.]

So too here, an award of back pay based on procedural error where a plaintiff's discharge was for cause does not further the statutory purpose of the teacher tenure act. Until the Tenure Commission determines the merits of Ferrario's case, it cannot be argued that he will be made whole by an award of back wages for which he has not worked. If Ferrario was discharged for just and reasonable cause, he has not suffered any unjust economic loss. By ordering reinstatement of Ferrario with full back pay, the commission is penalizing the school district for its own failure to conduct a de novo review on the merits. The school district should not be forced to pay Ferrario before its liability for his back pay is finally established. *Shiffer, supra.*

We believe that *Shiffer* and *Pounder, supra,* properly state the opinion of this Court. A final determination of the award and amount of back pay should take place after all appeals have been completed. Until a teacher has prevailed on the merits, the teacher has not established actual economic loss.

B. REINSTATEMENT

Although Ferrario's death has made the issue of reinstatement moot, we believe it is necessary to consider the commission's order of reinstatement. In *Davis v River Rouge Bd of Ed,* 406 Mich 486, 490; 280 NW2d 453 (1979), this Court reviewed an order of reinstatement made without consideration of the merits by the Tenure Commission. The procedural defect involved was the late delivery of the hearing transcript by the school board.

> In this situation the State Tenure Commission has consistently ordered reinstatement of the teacher, without regard to the merits of the appeal. We acknowledge that the construction placed upon a statute by the agency legislatively chosen to administer it is entitled to great weight. *Magreta v Ambassador Steel Co (On Rehearing),* 380 Mich 513, 519; 158 NW2d 473 (1968). However, we disagree with the commission's construction in this instance. We do not believe the Legislature intended to provide for automatic reinstatement of a teacher who may be unfit and who has not been prejudiced by the delay in furnishing a transcript.

The Court in *Davis* found that tolling the period of the appeal would better protect the teacher's rights. Ferrario, unlike the plaintiff in *Davis,* has alleged prejudice as a result of the board's bias. However, we do not believe that the Legislature intended to provide for reinstatement of a teacher who may be unfit without a de novo review of the record on the merits by the Tenure Commission even when the teacher claims prejudice by the board's actions.

The Tenure Commission has a statutory duty to conduct a de novo review on the merits in order to determine if reasonable and just cause existed for the teacher's dismissal. This review protects the teacher from the dangers inherent in an "often subjective determination of a teacher's competency" made by a local school board. *Detroit Bd of Ed v Parks,* 417 Mich 268, 282; 335 NW2d 641 (1983).

Where there has been a hearing on the merits by the school board and the Tenure Commission has found a procedural or due process error that cannot be corrected on remand to the board, the commission should not order reinstatement before fulfilling its statutory duty of de novo review on the merits. If there has been no hearing on the merits by the board and the Tenure Commission has concluded that the teacher cannot receive a hearing that comports with due process by the board, the Tenure Commission shall conduct a hearing on the merits before determining if reinstatement is a proper remedy. Until a decision on the merits is reached by the commission, the commission shall not order reinstatement of the teacher.

VI. CONCLUSION

We reverse the decision of the Court of Appeals and remand this case to the State Tenure Commission for a de novo review on the merits consistent with this opinion. Should plaintiff Ferrario prevail on the merits, the commission shall award him back pay in accordance with *Shiffer v Gibraltar, supra.*

WILLIAMS, C.J., and LEVIN, BRICKLEY, BOYLE, RILEY, and ARCHER, JJ., concurred with CAVANAGH, J.

DIXON ROAD GROUP v CITY OF NOVI

Docket No. 75767. Argued March 5, 1986 (Calendar No. 13). Decided November 6, 1986. Rehearing denied 428 Mich 1201.

Dixon Road Group and Novi-Twelve Associates, owners of certain real property within the City of Novi, challenged the creation of special assessment districts and the levy of special assessments by the city against the properties for construction of a road system and water main and storm drainage improvements. The Tax Tribunal rejected a hearing officer's findings for the petitioners and upheld the special assessments. The Court of Appeals, V. J. BRENNAN, P.J., and T. M. BURNS and FORSTER, JJ., affirmed in an unpublished opinion per curiam (Docket No. 71807). The Supreme Court remanded the case to the Tax Tribunal for specific findings with regard to whether any benefits would be conferred upon the petitioners' properties, including any increase in valuation after the proposed improvements if the zoning was not changed and if the zoning was changed to planned development or some other use. 422 Mich 858 (1985). On remand, the tribunal adopted findings consistent with the findings of a hearing officer that the cost of improvements would exceed the increase of the true cash value of the properties resulting from the improvements. After remand, the petitioners appeal.

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

The factual findings of the Tax Tribunal, while supported by competent, material, and substantial evidence, cannot be upheld because of the large disproportionality between the amount of the special assessment and the benefits to the properties.

1. A special assessment must be supported by a showing of an increase in the market value of the assessed property reasonably proportional to the cost incurred. It is insufficient to show

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REFERENCES

Am Jur 2d, Special or Local Assessments §§ 9 *et seq.*, 18 *et seq.*, 87 *et seq.*

See the annotations in the ALR3d/4th Quick Index under Special Assessments.

only that the property was relieved of a burden or was made specially adaptable to a purpose which would enhance its value.

2. Although decisions by municipalities with respect to special assessments generally will be upheld, the Supreme Court will intervene where there is a substantial or unreasonable disproportionality between the amount assessed and the value accruing to the land as a result of the improvement. In this case, the cost of improvement was 2.6 times greater than the increase in the value of the properties.

Reversed.

Justice BOYLE, joined by Justices BRICKLEY and RILEY, dissenting, stated that the decision of the Tax Tribunal affirming the levy of the special assessment by the city was supported by competent, material, and substantial evidence on the whole record and should be affirmed.

1. The creation of a special assessment district by a municipality enjoys a presumption of validity. Whether any benefit will accrue, or the amount of benefit, is best decided by the body imposing the assessment. Where a municipality acts in good faith and has good reason to believe that benefits will accrue as a result of an assessment, and there is no showing of fraud, mistake, discrimination, or a clear absence of benefits, courts are reluctant to interfere. In this case, the Tax Tribunal found a reasonable basis for the city's conclusion that the petitioners' properties would be specially benefited by the challenged improvements.

2. Special assessments for improvements such as those challenged in this case must be based on special benefits to the land assessed. A municipality's determination of the existence and extent of special benefits is presumed valid and may be based upon an increase in value, relief of burdens to the land, or creation of special adaptabilities in the land which enhance the value of the land. While an increase in value established by an appraisal reflecting market value is appropriate evidence of a special benefit, it is not a prerequisite to a finding of a special benefit. In determining whether property will be benefited by a particular improvement, inquiry is not limited to present use, but extends to potential use, including use rendered more feasible by the improvement. In this case, in addition to an increase in value, the Tax Tribunal found that the proposed improvements would result in relief of existing burdens upon and would create a special adaptability in the land for development. These findings sustain the city's initial determination that special benefits to the properties would accrue as a result of the assessments.

3. The record supports the findings of the Tax Tribunal that

the city complied with the applicable city ordinance in considering and prescribing what proportion of the improvements would be paid by special assessment, what benefits would be received by the affected properties, and whether any part of the cost of the improvements should be borne by the city at large. It also supports the finding that the petitioners' properties will be benefited in a manner unique from the community as a whole.

4. Because this is not a case which turned upon credibility, the petitioners' contention that the decision of the hearing officer should be adopted on the ground that the officer was in the best position to determine credibility and make findings of fact cannot be accepted.

OPINION OF THE COURT

1. TAXATION — SPECIAL ASSESSMENTS — VALUE ACCRUING TO LAND — INVALIDATION.

Decisions by municipalities with respect to special assessment of property generally will be upheld; however, assessments will be invalidated where a substantial or unreasonable disproportionality exists between the amount assessed and the value which accrues to the land as a result of improvement.

2. TAXATION — SPECIAL ASSESSMENTS — VALUE ACCRUING TO LAND.

A special assessment must be supported by a showing of an increase in the market value of the assessed property reasonably proportional to the cost incurred; it is insufficient to show only that the property was relieved of a burden or was made specially adaptable to a purpose which would enhance its value.

DISSENTING OPINION BY BOYLE, J.

3. TAXATION — SPECIAL ASSESSMENTS — MUNICIPAL CORPORATIONS.

The creation of a special assessment district by a municipality enjoys a presumption of validity; whether any benefit will accrue, or the amount of benefit, is best decided by the body imposing the assessment, and where a municipality acts in good faith, has good reason to believe that benefits will accrue as a result of an assessment, and there is no showing of fraud, mistake, discrimination, or a clear absence of benefits, courts will be reluctant to interfere.

4. TAXATION — SPECIAL ASSESSMENTS — SPECIAL BENEFITS.

Special assessments for improvements of property should be based on special benefits to the land assessed; a municipality's determination of the existence and extent of special benefits is

presumed valid and may be based upon an increase in value, relief of burdens to the land, or creation of special adaptabilities in the land which enhance the value of the land.

5. TAXATION — SPECIAL ASSESSMENTS — SPECIAL BENEFITS.

Inquiry whether certain property will be benefited by a particular improvement resulting from a special assessment should not be limited to present use of the property, but should extend to potential use, including use rendered more feasible by the improvement.

Schlussel, Lifton, Simon, Rands, Kaufman, Galvin & Jackier (by *Joseph F. Galvin* and *Robert J. Sandler*) for the petitioners.

Lampert, Fried & Levitt, P.C. (by *David M. Fried* and *Dennis Watson*), for the respondent.

WILLIAMS, C.J. The issue in this case is whether the Tax Tribunal was correct in upholding a special assessment which allocated a cost of $13,236.81 per acre to the Novi land and $38,769.11 per acre to the Dixon Road land. The Tax Tribunal found that, if there were no zoning change, there would be no increase in the value of either property as a result of the assessment and that, even if there were a zoning change, the value of the land would increase by only $5,000 per acre for the Novi land and $15,000 per acre for the Dixon land. We hold that, while the factual findings of the tribunal are supported by competent, material, and substantial evidence, because of the large disproportionality between the cost and the benefit, as a matter of law, we cannot uphold the special assessment.

FACTS

The Dixon Road Group and Novi-Twelve Associates are limited partnerships which own land in the City of Novi. The parcels are located on

Twelve Mile Road, one-half mile west of the intersection of Twelve Mile and Novi Roads.

The properties are currently zoned R-1-F, Small Farm Agricultural Residential District. An area development plan adopted by Novi in 1978 designated the northerly portion of the Dixon Road parcel and the Novi parcel for PD-2 development and the southerly portion of the Dixon Road parcel for PD-3 development.[1] The PD-2 option is

[1] According to the Tax Tribunal:

> [W]hen application for development under either option requires rezoning the land, an application to rezone shall be made to the planning board for review and recommendation to the city council. The application must be accompanied by a mapped property area survey of the area for which the rezoning request is being made, proof of ownership of the land or an option to purchase, a written report assessing the impact the proposed rezoning and development will have on the site and a preliminary site plan of sufficient detail to comply with the site plan review requirements set out in Respondent's Site Plan Review Procedures Manual.
>
> The planning board may recommend approval of the request to rezone only when it finds that the parcel for which rezoning is requested lies substantially within an area of Respondent's Regional Center Plan designated for development under a PD option, the option requested corresponds closely with the area of the Regional Center Plan intended for development under the PD option, the request is made with intent to develop under the PD option permitted, the area for which rezoning is requested is immediately adjacent to like or similar zoning and does not create unrelated penetrations of nonresidential districts in a residentially zoned area and that the area for which rezoning is requested is either fully served by public utilities, including water and sanitary sewers, or will be fully served through the extension of such public utilities to the site at the time of development.
>
> If the request for rezoning is granted by the council, the preliminary site plan must then be submitted to the planning board for review. The planning board reviews the preliminary site plan and makes a recommendation to the city council relative to the site plan's meeting the intent and requirements of the Center Area Development Plan.
>
> The final site plan must also be submitted to the planning board, which reviews it and makes recommendations to the city council. The council must find, before it gives its approval, that among other things, dedication of public rights-of-way shall have been made, marginal access road easements have been provided and any direct access points to major thorofares [sic]

intended to permit limited mid- and high-rise development. The PD-3 option is intended to encourage intensive major nonresidential use of the land.

In 1981, the city determined that road improvements, water mains, and storm sewers were necessary for the area and created a special assessment district for each improvement. The total cost of these special assessments is $264,736.16 or $13,236.81 per acre for the Novi land and $765,302.33 or $38,769.11 per acre for the Dixon Road land.

Petitioners argue: 1) that the assessments are invalid because the cost of the improvements exceed the increase in value of the property and 2) that there is no special benefit conferred upon the property beyond that to the community as a whole.

The hearing officer at the Tax Tribunal found that the benefit conferred upon the properties was disproportionate to the costs allocated and therefore vacated the special assessments. The Tax Tribunal adopted most of the findings of the hearing officer, but deleted the findings on increased value. The tribunal did not adopt any specific finding of its own, but found that the land was specially benefited as a result of the improvements. The Court of Appeals affirmed the opinion of the Tax Tribunal in an opinion released on December 26, 1984. This Court then remanded the case to the Tax Tribunal with directions to

> make specific findings on *any* benefits conferred on the petitioners' properties, including any increase in valuation after the proposed improvements, if

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will be temporary access points. Money or other forms of credit satisfactory to the council must be submitted for the ultimate removal of direct access points to major thorofares [sic], guaranteeing the construction of the marginal access road.

any, 1) if the zoning is not changed, and 2) if the zoning is changed to planned development or some other use. [422 Mich 858 (1985). Emphasis added.]

In a response dated May 28, 1985, the tribunal found:

1. If the subject properties are not rezoned, the special assessment improvements will not increase the true cash value of the subject properties. This finding is consistent with the proposed judgment of the hearing officer, and based upon the reasons stated therein.

2. If the subject properties are ultimately rezoned and can then be developed for use as permitted by the PD options, then the increase in value to the subject properties owing to the improvements would be $5,000/acre for the Novi Twelve parcels (010 and 011); and $15,000/acre for the 001 parcel. This finding is also consistent with the proposed judgment of the hearing officer, and for the reasons expressed therein.

I. FACTUAL FINDINGS MADE BY THE TAX TRIBUNAL ON REMAND ARE SUPPORTED BY COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE ON THE RECORD

On remand, the Tax Tribunal stated that the benefits which accrued to the property, assuming rezoning, were $5,000 per acre for the Novi land and $15,000 per acre for the Dixon land. These factual findings were said to be "consistent with the proposed judgment of the hearing officer, and based upon the reasons expressed therein." The figures adopted were taken from the testimony of appraiser McDonnell.

The primary approach used by McDonnell in evaluating the properties both before and after the

improvements involved a "comparison of properties recently sold in the area to the subject property, and adjust[ment] for location, physical differences and lot size . . . ." As a result of this market data approach, McDonnell arrived at a price of $55,000 per acre for the improved Dixon Road property.

As a further justification for this figure, he stated that on the basis of projections for future office space in the area and considering other more desirable properties available, the Dixon Road property would not be in demand for office space for about four years. He stated that "it just seems to me that office use is really, very, very, speculative for this area . . . ." He therefore took the price at which nearby small parcels of land were currently being sold for *immediate* office construction and discounted that price to reflect his belief that it would be a number of years before there would be a buyer willing to pay the going rate for either the Dixon Road or the Novi-Twelve land. The result of these calculations is a price very close to his original market data estimate as indicated in the last paragraph.[2] Because the estimate

[2] This discounting is reproduced below from the Appraisal Report for the Novi-Twelve land:

> It is this appraiser's opinion that a minimum of 5 to 8 years is required to develop this property as the present proposed zoning indicates. Assuming an average of 5 years at an interest rate of 13%, the factor is 0.542760. This factor obtained from the present worth of one table.
>
> A review of the smaller land sales in this immediate area it is this appraiser's opinion that a new selling price of $85,000.00 per acre for small parcels is justified. This is the price after marketing expenses, overhead, and engineering costs are eliminated.
>
> Therefore:
>
> $85,000.00 × 0.54134 = $ 46,135.00
> rounded = $ 46,000.00 per acre
> 20.0 × $46,000.00 = $920,000.00

of value adopted by the Tax Tribunal on remand is supported by competent, material, and substantial evidence on the record, Const 1963, art 6, § 2, we uphold these factual findings.[3]

II. SPECIAL BENEFITS MUST BE REFLECTED BY AN INCREASE IN MARKET VALUE

The hearing officer, the Tax Tribunal in its original opinion, and the Court of Appeals all assumed that a special assessment could be supported by a showing which did not necessarily include an increase in the market value of the assessed property. We disagree. As Cooley stated:

> It has been said that, in assessing benefits, the only safe and practicable course, and the one which will do equal justice to all parties, is to consider what will be the influence of the proposed improvement on the market value of the property; what the property is now fairly worth in the market, and what will be its value when the improvement is made. [2 Cooley, Taxation (3d ed), ch XX, p 1254.]

Other authorities support this position.

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[3] We disagree with the contention of the dissent that the appraiser considered only *current use* in evaluating the properties. He testified as follows:

> Well, in our terminology, we *call highest and best use the highest use to which the property can be put within a reasonable time* and maybe I better read that. "*Highest and best use has been defined as that use which will produce the greatest net return to the land and/or the property over a reasonable period of time.*"
>
> * * *
>
> *It was my opinion at the date of the appraisal that the highest and best use would be, under the PD-2 Option, which calls for mid-rise high-rise office uses;* [however], I say that because of the distance from aid to developments, the economic climate, that development would probably be, at least 4 to 8 years from the date of the appraisal. [Emphasis added.]

> Undoubtedly, the simplest, fairest and most just rule, and one that best conforms to the underlying theory of the local assessment, is that the existence and amount of special benefits is to be determined by the effect of the improvement upon the market value of the property which it is claimed is benefited by such improvement. If the construction of such improvement increases the market value of such property, such property receives a benefit and the amount of such benefit is measured by the amount of such increase. [Page & Jones, Taxation by Local and Special Assessment, vol II, § 653, p 1114.]
>
> The benefit by reason of which a special assessment is authorized to be imposed must be understood to be a pecuniary benefit resulting from the increased market value of the land, and if the use of the land imposed by law is such that it can have no market value, an assessment cannot be levied. [70 Am Jur 2d, Special or Local Assessments, § 18, p 859.]
>
> Subject to some exceptions, the general rule is well settled that the benefits which property will derive from a local improvement and for which it may be assessed should be determined by the difference in the market value of the property before and after the making of the improvement. [63 CJS, Municipal Corporations, § 1372, p 1130.]

In holding that special benefits did not need to be reflected by an increase in market value, the tribunal and the Court of Appeals relied on a Court of Appeals decision which stated that

> [a] special benefit may be found from an increase in value, relief from a burden or in the creation of a special adaptability in the land. [*Soncoff v Inkster,* 22 Mich App 358, 361; 177 NW2d 343 (1970).]

The language of this case derives from 63 CJS, Municipal Corporations, § 1371, p 1128 and the complete sentence reads:

> Property is specially benefited within the meaning of the law governing special assessments where the *improvement would increase the value of the land, relieve it from a burden, or make it specially adaptable to a purpose which enhances its value,* and where the assessment is fair, having regard to the value of realty benefited, and is proportioned to the property assessed, the assessment will be deemed proper. [Emphasis added.]

We do not agree with the Court of Appeals that the emphasized portions suggest that there are three *alternative* methods of calculating benefits.

The first phrase, "would increase the value of the land" clearly reflects the increase in market value which we believe to be the appropriate basis for determining special benefits. The third phrase, when read in its entirety, also refers to the increase in value resulting from the special adaptability of the land. It clearly does not anticipate that a finding of a special adaptability *without a corresponding increase in value* would support a finding of a special benefit. The four cases cited in support of the second phrase, "relieve it from a burden" do not support the proposition that the relief of a burden without an increase in value can be used to support a finding of a special benefit. Two of these cases explicitly require a finding that the *value* of the property be increased by the improvement.[4] A third states that in order "to sustain a special assessment it must appear that a benefit has been occasioned to the premises as-

[4] *In re Public Service Electric & Gas Co,* 18 NJ Super 357, 364; 87 A2d 344 (1952) ("In determining whether property has been benefited, the question is whether the *market value* of the property has been increased by the improvement and it is not confined to benefits conferred for the particular use it is being devoted to at the time"); *Gabriel v Borough of Paramus,* 45 NJ 381, 384; 212 A2d 550 (1965) ("The foundation of the power to levy a special assessment is the *benefit or enhancement of value* which the improvement confers"). (Emphasis added.)

sessed at least equal to the burden imposed." *Satter v Littleton,* 185 Colo 90, 97; 522 P2d 95 (1974). Only the oldest case even arguably supports the proposition that the relief of a burden on the land which is not reflected in an increase in its value is a special benefit. However, in that case the court was only considering whether a cemetery derived any benefit from the installation of sewers. *Mullins v Mt St Mary's Cemetery Ass'n,* 268 Mo 691; 187 SW 1169 (1916). The idea that either the relief of a burden on the land or a special adaptability without an increase in the market value can justify a special assessment is at odds with the entire concept of market value which necessarily includes such improvements.

We believe that a determination of the increased market value of a piece of property after the improvement is necessary in order to determine whether or not the benefits derived from the special assessment are proportional to the cost incurred.

III. PROPORTIONALITY BETWEEN THE AMOUNT OF THE SPECIAL ASSESSMENT AND THE BENEFITS RECEIVED

There is general agreement that there must be some proportionality between the amount of the special assessment and the benefits derived therefrom. Although various formulations of this relationship have been stated,[5] the concept of propor-

[5] See, e.g., *Page & Jones, supra,* § 665, p 1139 ("It is well settled that, in theory, at least, local assessments based on the theory of benefit must be limited to the amount of the special benefit conferred by the improvement for which the assessment is levied, and must be apportioned upon the property assessed *in substantial proportion* to the amount of the benefit thus conferred"). (Emphasis added.) See also Cooley, *supra,* pp 1255-1260 ("There can be no justification for any proceeding which charges the land with an assessment greater than the benefits; it is a plain case of appropriating private property to public uses without compensation); 70 Am Jur 2d, § 22 ("It has been

tionality is not new in Michigan. In *Fluckey v Plymouth,* 358 Mich 447; 100 NW2d 486 (1960), this Court found that no benefits accrued to the property as a result of the special assessment, but the Court also stated that the amount of the property increased in value as a result of the expenditure had to be at least equal to the amount of the assessment. 358 Mich 453. See also *German Lutheran Church Society v Mt Clemens,* 179 Mich 35, 40; 146 NW 287 (1914). ("There can be no justification for any proceeding which charges the land with an assessment greater than the benefits.") In another case we stated that there must be reasonable proportionality between the amount of the assessment and the value of the benefits. See *St Joseph Twp v Municipal Finance Comm,* 351 Mich 524, 533; 88 NW2d 543 (1958). ("It is an essential of a special assessment that the improvement concerned should be of value to the property assessed in *reasonable relationship* to the assessment . . . .") (Emphasis added.) See also *Crampton v Royal Oak,* 362 Mich 503, 520; 108 NW2d 16 (1961). ("This court . . . accepted the view that an assessment must be levied in proportion to benefits.") We have also suggested that we would not invalidate a special assessment unless there was a "substantial excess" between the cost of an improvement and the benefits accruing to the land as a result. *Blades v Genesee Co Drain Dist No 2,* 375 Mich 683, 695; 135 NW2d 420 (1965).

While we certainly do not believe that we should require a rigid dollar-for-dollar balance between the amount of the special assessment and the

variously stated that in order to sustain the validity of a special or local assessment, the benefit to the property assessed must be substantial, equivalent to the amount of the assessment, not exceeded—or at least not substantially exceeded—by the assessment").

amount of the benefit, a failure by this Court to require a reasonable relationship between the two would be akin to the taking of property without due process of law. Such a result would defy reason and justice. Therefore, we conclude that while decisions made by municipalities with respect to special assessments generally should be upheld, this Court will intervene where there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements. In this case, the cost of the improvements is approximately 2.6 times the increase in value of the properties and for that reason we hold the special assessment invalid.

LEVIN, CAVANAGH, and ARCHER, JJ., concurred with WILLIAMS, C.J.

BOYLE, J. Petitioners began the present action on March 24, 1981, seeking to invalidate the creation of certain special assessment districts in the City of Novi. Petitioners are landowners in the assessment districts which cover an area across from Twelve Oaks Mall, one-half mile west of Novi Road and in between Twelve Mile Road and the I-96 expressway.

The land is currently zoned for large lot, low density, single family dwellings. In anticipation of further development after the construction of Twelve Oaks Mall, the Novi City Council amended its zoning ordinance to create planned development options for multiple, commercial, and office development in the area at issue.[1] The city later

[1] According to the findings of the Tax Tribunal, the northerly portion of the Dixon Road Group parcel was designated for use under the PD-2 option while the southerly portion was designated for use under the PD-3 option. The Novi-Twelve Associates parcels were designated for use under the PD-2 option. Section 1906 of the zoning

determined that a new road system, water main, and storm drainage improvements were necessary and created special assessment districts to defray the costs of the improvements. The properties were then assessed according to the special benefits to be derived.

The parcel owned by petitioner Dixon Road Group was assessed a total cost of $765,302.33, or $38,769.11 per acre. The parcels owned by petitioner Novi-Twelve Associates were assessed a total cost of $264,736.16, or $13,236.81 per acre. Petitioners sought to vacate the assessments, contending that they were invalid because 1) the improvements did not confer a special benefit on

ordinance provides that the PD-2 planned development option would permit the limited application of mid- and high-rise, higher intensity office uses in a district otherwise restricted to low-rise, lower intensity office uses. Section 1907 states that the PD-3 planned development option would allow the development of intensive major nonresidential land use types not otherwise permitted in the district, including convention and commercial centers, freestanding retail outlets, banquet halls, restaurants of the non-fast-food type, and the office commercial uses permitted in the PD-2 areas.

When application for development under either option requires rezoning, an application to rezone must be made to the city's planning board for review and recommendation to the city council. The application must comply with the requirements of the city's Site Plan Review Procedures Manual.

The planning board may recommend approval of the request for rezoning when it finds that the rezoning is consistent with the city's master regional center plan, the rezoning will not cause unrelated penetrations of nonresidential districts in a residentially zoned area, and the area requested to be rezoned is eitner fully served by public utilities, including water and sanitary sewers, or will be fully served through the extension of such public utilities to the site at the time of development.

If the request for rezoning is granted by the council, both the preliminary and final site plans must then be submitted to the planning board which reviews them and makes recommendations to the city council. Before the council gives its approval, it must find, among other things, that dedication of public rights-of-way and marginal access road easements have been provided and that any direct access points to major thoroughfares will be temporary access points. Money or other terms of credit satisfactory to the council must be submitted for the ultimate removal of the direct access points thereby guaranteeing the construction of the marginal access road.

the properties beyond that conferred upon the community as a whole, 2) the allocations of cost were unreasonable and out of proportion to any benefits derived from the improvements, and 3) the special assessment districts were not created pursuant to the local ordinance and statutes.

The hearing officer at the Michigan Tax Tribunal agreed with petitioners and in her proposed opinion and judgment declared the special assessments invalid. While adopting the bulk of the facts found by the hearing officer, the Tax Tribunal refused to accept the hearing officer's ultimate conclusion and corresponding factual support and affirmed the special assessments. The Court of Appeals upheld the decision of the Tax Tribunal.

Pursuant to petitioners' application for leave to appeal, this Court remanded this cause to the Tax Tribunal to make specific findings on the benefits conferred on petitioners' properties, including increase in valuation after the proposed improvements, if any, under the following alternative hypotheses: a) if the zoning were not changed, and b) if the zoning were changed to planned development or some other use. On remand, the Tax Tribunal simply adopted findings consistent with the findings of the hearing officer as to these questions.[2] This Court then granted petitioners leave to appeal.

I

"A special assessment is in the nature of a tax upon property levied according to benefits conferred on the property." *Cooper, Wells & Co v City of St Joseph,* 232 Mich 255, 260; 205 NW 86 (1925)

[2] See n 7.

(quoting 1 Cooley, Taxation [4th ed], p 105).[3] The theory sustaining special assessments is that the

[3] Taxes are distinguished from special assessments in that "[t]axes are the enforced proportional contributions from persons and property, levied by the State by virtue of its sovereignty for the support of government and for all public needs." *Cooper, Wells & Co, supra,* quoting 1 Cooley, Taxation (4th ed), p 260. This Court, in *Cooper,* also quoted with approval the following language from *Town of Macon v Patty,* 57 Miss 378; 34 Am Rep 451 (1879), which further explained the differences between a tax and special assessment:

> A local assessment can only be levied on land; it cannot, as a tax can, be made a personal liability of the taxpayer; it is an assessment on the thing supposed to be benefited. A tax is levied on the whole State, or a known political subdivision, as a county or town. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other function, or even existence, than to be the thing on which the levy is made. A tax is a continuing burden, and must be collected at stated short intervals for all time, and without it government cannot exist; a local assessment is exceptional both as to time and locality,—it is brought into being for a particular occasion, and to accomplish a particular purpose, and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected, and administered by a public agency, elected by and responsible to the community upon which it is imposed; a local assessment is made by an authority *ab extra.* Yet it is like a tax, in that it is imposed under an authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is like a tax, in that it must be levied for a public purpose, and must be apportioned by some reasonable rule, among those upon whose property it is levied. It is unlike a tax, in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must enure to the property upon which it is imposed, or else the courts will interfere to prevent its enforcement. [232 Mich 261.]

Because of these distinctions, a special assessment is not considered a "tax" within the constitutional provision providing for limitations on property tax, Const 1963, art 9, § 6, see *Graham v Saginaw,* 317 Mich 427; 27 NW2d 42 (1947); nor is it subject to the constitutional requirement of uniformity of taxation, Const 1963, art 9, § 3. See *Detroit v Weil,* 180 Mich 593; 147 NW 550 (1914); *Loomis v Rogers,* 197 Mich 265; 163 NW 1018 (1917). However, in Michigan, "when a public burden by way of special assessment is laid, it must be laid under some uniform plan" because of the requirements of equal protection and due process of the laws. *Auditor General v Konwinski,* 244 Mich 384, 386; 221 NW 125 (1928).

party assessed is locally and peculiarly benefited, to the extent of the assessment, over and above the ordinary benefit which one of the community receives from the public improvement.[4] *Kuick v Grand Rapids,* 200 Mich 582, 588; 166 NW 979 (1918). A special benefit may be found from an increase in value, relief from a burden, or in the creation of a special adaptability in the land.[5] *Soncoff v Inkster,* 22 Mich App 358, 361; 177 NW2d 243 (1970), citing 63 CJS, Municipal Corporations, § 1371, p 1128. In determining whether a special benefit exists, the inquiry is not limited to

[4] The assessment cannot exceed the benefit to be derived from the improvement, for the reason that the only principle upon which the special assessment can be made at all is that the value of the property is enhanced by the expenditure . . . . [*White v Saginaw,* 67 Mich 33, 40; 34 NW 255 (1887); *Fluckey v Plymouth,* 358 Mich 447, 453-454; 100 NW2d 486 (1960), quoting, 2 Cooley, Taxation (3d ed), pp 1153-1154.]

[5] McQuillin offers examples of improvements to the land which have been found to confer special benefits:

> Access is a special benefit. Property may derive a special benefit from the construction of a sewer forming part of a general sewer system. So, the benefit accruing to property by reason of the greater facility with which fire protection can be afforded it, is proper for considering benefits derived from the paving of a street. The improved sanitary condition of surrounding property, made more healthful by the construction of a sewer, may be considered in determining the benefits to a lot from such sewer. If a sewer takes surface water from a lot more speedily than it was removed before, that fact may be considered as a benefit. In opening or extending a street it is proper to consider the benefit accruing to property from fronting on a street that is a thoroughfare. Under a statute creating a corporation to build a railroad passenger station and requiring the extension of streets and widening of one to accommodate the public in the use of the station, benefits accruing to land by reason of the construction of the station by the corporation may be considered, as well as those derived from widening and extending the streets, and such do not invalidate the statute. [14 McQuillin, Municipal Corporations (3d ed), § 38.33, p 126.]

the present use of the property, but also includes the uses rendered more feasible by the completion of the improvements. *Crampton v Royal Oak,* 362 Mich 503, 514-516; 108 NW2d 16 (1961). See also 14 McQuillin, Municipal Corporations (3d ed), § 38.33, p 125.

The creation of a special assessment district through the legislative powers of a municipality enjoys a presumption of validity. *Auditor General v Maier,* 95 Mich 127, 131; 54 NW 640 (1893); *Crampton, supra.* Whether there is any benefit at all, or the amount of the benefit, is a decision best made by the legislative body imposing the assessment. Courts are reluctant to interfere in this legislative determination where a municipality acts in good faith and has a good reason to believe that benefits will accrue and there is no showing of fraud, mistake, discrimination, or a clear absence of the benefits claimed. *Frischkorn Investment Co v Detroit,* 257 Mich 546, 552-553; 241 NW 903 (1932).

In the case at bar, the Tax Tribunal found that a reasonable basis[6] existed for the city's conclusion that petitioners' properties would be specially benefited by the improvements at issue. In reviewing a decision of the Tax Tribunal, this Court must determine whether the decision is authorized by law and whether the decision is supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28.

The hearing officer in this case found that the allocated costs to the petitioners for the improve-

[6] If a reasonable basis can be shown for the levying of the special assessment, then the presumption that the special assessment is valid has not been overcome. See *Powers v Grand Rapids,* 98 Mich 393; 57 NW 250 (1894); *Graham v Grand Rapids,* 179 Mich 378; 146 NW 248 (1914); *Fluckey v Plymouth,* n 4 *supra.* See, generally, Comment, *Special assessments for road improvement projects in Michigan—What standard of trial court review?,* 20 Wayne L R 1073 (1974).

ments were approximately 2.6 times the increase in value that the improvements would confer upon the parcels assessed.[7] The hearing officer then vacated the assessments, concluding that the assessments were both unreasonable and out of proportion to the benefits conferred. *Axtell v City of Portage,* 32 Mich App 491, 497; 189 NW2d 99 (1971). The Tax Tribunal refused to adopt the hearing officer's conclusion. The petitioners claim this was error. We disagree because the hearing officer's finding on increase in value was based on considerations which are contrary to law.

A

Special assessments for improvements like the ones at issue must be based on the special benefits to the land assessed. Contrary to petitioners' contention and the assertion of the majority, however, a finding of special benefit is not limited to a measurable increase in value equal to or more than the sum they are required to pay.[8] This Court

[7] The hearing officer, apparently accepting the appraisal submitted by petitioners' expert, found that the true cash value of the Novi-Twelve parcels was $35,000 per acre before the improvements and $40,000 per acre after the improvements. For the Dixon Road Group parcel, the hearing officer found the true cash value to be $40,000 per acre before the improvements and $55,000 after the improvements. As stated earlier in this opinion, the cost of the improvements was $13,236.81 per acre for the Novi-Twelve parcels and $38,769.11 per acre for the Dixon Road Group parcel, or roughly 2.6 times the increase in value found by the hearing officer to be conferred on the parcels by the improvements.

[8] Petitioners cite *Fluckey v Plymouth,* n 4 *supra,* in support of their proposition. *Fluckey* does not support petitioners' contention.

In *Fluckey,* this Court struck down a special assessment for the widening of a two-lane road to a four-lane road. In doing so, the lack of enhancement in value of the residential property was only one factor considered by the *Fluckey* Court. The *Fluckey* Court also considered whether there were unquantified benefits conferred upon the property assessed which were different from those conferred upon the community as a whole. Because the alleged special benefits to be conferred by the improvements were de minimis in light of the

has never held that the measure of a special benefit is limited to the enhanced value of the property after it is improved. Actual and exact monetary benefit is incapable of precise quantification.[9] Indeed, such a rule is totally unworkable where there has been a general depression in the market value of real estate. See 63 CJS, Municipal Corporations, § 1372, p 1130.

The existence and extent of a special benefit may be determined, therefore, by considering also whether the improvements result in the relief of existing burdens or the creation of a special adaptability in the land.[10] These are considerations

detriment that would be suffered in the depreciated value of the property, the *Fluckey* Court was constrained to find that no special benefit would accrue to the property as a result of the improvements. *Fluckey* does not hold, as petitioners contend, that a quantified increase in value is a prerequisite to the validity of a special assessment.

We also find the case at bar distinguishable from the facts in *Fluckey*. In this case, the existence and nature of the special benefits as well as an increase in value because of the improvements has been established. While the amount of the increase is disputed, what has not been established, as was in *Fluckey*, is a detriment other than that to the pocketbooks of the assessed property owner. It has not been established in this case that the property itself will be detrimentally affected by the improvements.

[9] It is true that special assessments for a public improvement, such as a drain, must be based on the special benefits to the land assessed therefor. Cross-appellants claim that such benefits must be measured by the enhanced value of the land due to the drain as determined many years after the drain was constructed. This is not correct. Drains are not only for the purpose of improving the land, but are also for improving the sanitation and health of the residents and municipalities of the entire district. The exact and actual monetary benefit to any individual parcel of land would be difficult to measure and at most can only be estimated with a fair degree of exactness. [*Oakland Co Drain Comm'r v Royal Oak*, 325 Mich 298, 313; 38 NW2d 413 (1949), cert den 338 US 890 (1949). See also *Foren v Royal Oak*, 342 Mich 451, 456; 70 NW2d 692 (1955).]

[10] [T]he word "benefit" does not mean simply an increase in market value, but embraces both actual increase in money

which embrace the actual and potential uses of the land as a result of the improvements and normally go hand in hand with an enhancement of value. So long as the value of the land is not diminished by the improvements and the relief of a burden or creation of a special adaptability in the land is clearly ascertainable, it cannot be said that the finding of a benefit to those specially assessed is without a reasonable basis. See *Fluckey v Plymouth,* 358 Mich 447, 453; 100 NW2d 486 (1960); *Oakland Co Drain Comm'r v Royal Oak,* 325 Mich 298; 38 NW2d 413 (1949).

The majority holds that "a determination of the increased market value of a piece of property after the improvement is necessary in order to determine whether or not the benefits derived from the special assessment are proportional to the cost incurred." (*Ante,* p 401.) It appears from this holding that the essential thrust of the majority opinion is that an increase in value established by an appraisal is a prerequisite to the validity of a special assessment. Such a holding is clearly wrong.

A municipality's determination of the existence and extent of special benefits is presumed valid. It is well-established that this determination may be based upon an increase in value, relief of burdens to the land, or the creation of special adaptabilities in the land which enhance the land's value. While we agree that an increase in value established by an appraisal is appropriate evidence, we note that a paper valuation of each property to be assessed has never been a prerequisite to the proper initial apportionment of a special assessment. Our disagreement with the majority concerns its apparent

value and actual or added use and enjoyment of the property. [63 CJS, Municipal Corporations, § 1372, p 1131.]

holding that a finding of special benefits must be supported by an appraisal reflecting market value. In our view, such evidence is appropriate, but not a necessity to justify a special assessment, unless the presumption of validity has been legitimately overcome.

Indeed, as early as 1892, this Court rejected increase in value as the only method of apportioning the costs of improvements because such valuations do not approach uniformity. *Grand Rapids School Furniture Co v Grand Rapids,* 92 Mich 564, 569; 52 NW 1028 (1892).[11] Further, this Court has long accepted the front-footage method for measuring the costs of assessments. *Auditor General v Konwinski,* 244 Mich 384; 221 NW 125 (1928); *Foren v Royal Oak,* 342 Mich 451; 70 NW2d 692 (1955).[12] McQuillin also recognizes that "[t]he prohibition is that special taxes or local assessments shall not be levied in excess of the benefits conferred, *whether by the valuation, front foot, area, or any other method.*" 14 McQuillin, Municipal Corporations (3d ed), § 38.02, p 20. (Emphasis added.)

The majority also believes that "[t]he idea that either the relief of a burden on the land or a special adaptability without an increase in the market value can justify a special assessment is at odds with the entire concept of market value which necessarily includes such improvements."

[11] A simple illustration bears this point out. Assume that two properties front upon a dirt road which is later determined to be in need of paving. One property is already improved with a building while the other is not. If the assessments for the paving are apportioned according to valuation, it may well be that the improved property will be assessed a greater proportion than the unimproved property because the paving increases its value more than the unimproved property. Yet the advantages to both properties are clearly the same. See also *Grand Rapids School Furniture Co, supra,* pp 569-570.

[12] The theory sustaining this method is that it treats all abutting owners alike and results in an equitable distribution of the burden. *Auditor General, supra.*

We have never intimated a contrary position. Indeed, we agree with this statement. We further submit that an increase in value without correlative concrete advantages in the land resulting from the improvements smacks of pure sophistry and is fundamentally suspect.

There is no guarantee that assessments based on valuation will be uniformly upheld. See *St Joseph Twp v Municipal Finance Comm,* 351 Mich 524, 533; 88 NW2d 543 (1958). As pointed out by this Court in *Grand Rapids School Furniture Co, supra,* pp 570-571:

> Is there any practical difference between a finding that the several owners of property within a given district have been benefited in a given amount, and a finding that the same property has been increased in value to that amount? The only difference is that in the one case the finding is the basis of the assessment, and in the other it is itself the assessment. In the one case the finding concludes the assessment, and in the other a percentage is to be calculated based upon the finding. Each finding is a valuation of benefits. But are they not both equally open to the same objections? Is not the valuation in each case equally arbitrary? The adjustment of percentages is purely a question of mathematics, and courts are rarely troubled with mistakes in figures. It is the valuation that the tax-payer objects to. Does it make any difference whether the amount assessed is denominated "increased value" or "benefits?" Is not this Court as well informed as to this assessment as though the amount assessed were a percentage of a larger amount? The question does not involve the taking of private property for public uses, but is simply the exercise of the inherent right of taxation. The power of taxation implies apportionment, and, when that power has been exercised, courts will not assume to declare it void unless the invasion of private rights is flagrant and its demonstration clear. [Emphasis added.]

The holding of the majority increases the risk that the method of apportionment will not achieve uniformity and will not ensure that assessments will be validly laid in the future.

We believe the majority has confused the theory of special benefits with the applicable standard of review. The theory of special benefits is that the land to be assessed must be specially benefited by the improvements above those benefits enjoyed by the public at large and that the exactions for the improvements must not exceed the benefits. *Kuick v Grand Rapids, supra.* Review of a special assessment, on the other hand, begins with a presumption of validity in the determination of benefits by the municipality. As explained in McQuillin, *supra,* pp 19-20 and quoted by this Court in *St Joseph Twp, supra,* pp 533-534:

> It would seem that the legislature is competent to judge of benefits. This is assumed by the current of authority. A public improvement having been made, the question of determining the area benefited by such improvement is generally held to be a legislative function, and such legislative determination, unless palpably unjust, is usually conclusive, and not subject to judicial interference unless arbitrariness, abuse or unreasonableness be shown.

The holding of the majority seems to be that the presumption of validity does not attach where the determination of benefits is challenged by an appraisal indicating an increase in value which differs from the municipality's determination. It therefore appears to require that the reviewing tribunal make a de novo determination as to the existence and extent of special benefits and substitute its judgment for that of the municipality. The majority would therefore replace the established standard of review with a new standard of review

that destroys the presumption of validity. Compare *Foren v Royal Oak, supra; Frischkorn, supra,* 553; *Fluckey, supra,* 454.

We adhere to the standard of review firmly established by more than a century of jurisprudence in Michigan. Under this standard, we do not believe that the petitioners in this case have rebutted the presumption of validity. In the case at bar, the Tax Tribunal found that the assessed parcels would increase in value. The amount of the increase was widely disputed. The figures adopted by the Tax Tribunal on remand as barometers of the increase in value are the same figures originally proposed by the hearing officer. The findings of the Tax Tribunal on remand are inconsistent with its original opinion.

In its original opinion the Tax Tribunal held in pertinent part:

> According to *Crampton, supra,* the court must consider potential uses of the property made more feasible by the improvements as well as actual uses to determine if a special benefit exists. From the proofs submitted, there exists a strong possibility that the area could be rezoned in accordance with the master plan, to allow commercial development in the future. Thus, the proposed improvements would greatly aid Petitioners in developing the land. But even if the property is not rezoned, Petitioners would not be able to develop the property for residential use without these improvements. Further, both parties' appraisers found that the improvements would result in an increase in value, although they substantially disagreed as to how much of an increase.
>
> As set forth in *Soncoff, supra,* the three criteria for establishing the existence of a special benefit to the property are an increase in value, a relief from an existing burden, or the creation of a special adaptability in the land. In this cause the proper-

> ties are increased in value by the improvements and existing burdens on the property are relieved so as to create a special adaptability in the land for profit, i.e., development either under the existing zoning or under rezoning if obtained in the future.

This passage seems to state that an increase in value will inure to the land because of the improvements even if the land is not rezoned. On remand, however, the Tax Tribunal stated that no increase in value would occur in the absence of rezoning.

While this inconsistency is inexplicable and therefore troubling, it is not fatal to the decision of the Tax Tribunal upholding the special assessments. It is the future and best use of the land which is to be considered in evaluating benefits. In this case, it is not disputed that the highest and best use of the land at issue includes those uses made possible by rezoning. Therefore, the finding on increase in value after rezoning may be considered in reviewing whether the assessment was laid by arbitrary, capricious or unreasonable means if it properly takes into consideration the highest and best use of the property. In this case the finding did not. In fact, it appears that the appraisal upon which the Tax Tribunal based its finding was limited to an estimation of market value based on the land's current use.

Increase in market value based on current use is a standard too inflexible to determine whether a special benefit accrues to an affected property.[13] Indeed, the settled law in Michigan is:

> [I]n determining whether property is benefited by a particular improvement the inquiry is not

[13] See *Hawley v Hot Springs*, 276 NW2d 704, 706 (SD, 1979).

limited to the present use of the property but, rather, to uses to which it may be put, including such as may be rendered more feasible by the carrying out of the project in connection with which the assessment is levied. [*Crampton v Royal Oak, supra,* 517.][14]

The appraisal which was the basis of the Tax Tribunal's findings on increase in value was made pursuant to the market data approach to estimating market value. According to the appraisal, this approach involves "the comparison of properties recently sold in the area to the subject property, and adjusting for location, physical differences and lot size between the properties to indicate value."

The appraisal was calculated twice using two different sets of comparables. The first set of comparables consisted of similar-type land sales in-

[14] In *Hawley v Hot Springs,* n 13 *supra,* 706, the South Dakota Supreme Court noted that market value increase based on current use has been rejected by the Michigan courts:

> The method by which the amount of a special benefit to a piece of property is determined varies among the several states. Minnesota has apparently adopted the rule that the value of special benefits is found by determining what increase, if any, there has been in the market value of the benefited land. *In re Village of New Brighton Resolution 862,* 293 Minn 356, 199 NW2d 435 [1972]. The difficulty with rigidly applying this rule is that a search for increased market value resulting from the special benefit tends to examine the property's increased value in terms of the current use of the property. The better rule looks to the benefits accruing to the property in light of highest and best future use of the property that can reasonably be expected. *Goodell v City of Clinton,* Iowa, 193 NW2d 91 [1971]. See also 63 CJS Municipal Corporations § 1372b. Accordingly, the strict market value increase rule has been rejected in a number of jurisdictions. See, e.g., *Chicago, RI & P Ry Co v City of Centerville,* 172 Iowa 444, 153 NW 106 [1915]; *Foren v City of Royal Oak,* 342 Mich 451, 70 NW2d 692 [1955]; *Beh v City of West Des Moines,* 257 Iowa 211, 131 NW2d 488 [1965]; *Soo Line Railroad Co v City of Wilton, ND,* 172 NW2d 74 [1969]; *Davis v City of Westland,* 45 Mich App 497, 206 NW2d 750 [1973]; *Buehler v City of Mandan, ND,* 239 NW2d 522 [1976]; *NEBCO, Inc v Speedlin,* 198 Neb 34, 251 NW2d 710 [1977].

volving similar acreage and land use similar to its current use. The second set of comparables consisted of smaller parcels sold for mid- to high-rise office use. This second comparison resulted in an increase in value substantially greater than that derived under the first comparison. However, this potential price of the land was discounted to current market value to reflect the appraiser's belief that the land could not be developed as the present proposed zoning indicates for five to eight years. It is clear that if this latter value had not been discounted, the increase in value of the land would exceed the cost of the improvements.

The majority disagrees that the appraiser considered only current use in evaluating the properties, notwithstanding that the highest and best future use of the property as improved was discounted to doublecheck a determination of market value *on the basis of current land use* and was thereby *totally* negated in the final determination. Petitioners' appraiser admitted that the reason for the discounting was his opinion that this future use is "really, very, very speculative for this area."

According to McQuillin:

> Chances and probabilities of future use, as sufficiently near in time and definite in kind to be of practicable importance, enter into present market value, and so far as they enhance or diminish it, *are to be given full weight. But where they are so remote as to rest chiefly in the imagination, and do not in fact influence the price which customers would be willing to pay in a present sale, they cannot be the basis of a determination of benefit or value.* [14 McQuillin, Municipal Corporations (3d ed), § 38.33.]

I would submit that if such use is so speculative that in all fairness it should be discounted for its

effect on market value, then, in keeping with the teaching of McQuillin, *supra,* it cannot be the basis of a determination of benefit based on enhanced value. Yet neither the petitioners nor the majority argues that this future use for the properties is so remote as to rest chiefly in the imagination. Indeed, it seems that the majority finds the future use an appropriate consideration. I note that the hearing officer who originally formulated the findings on increase in value gave no explanation for rejecting the city's appraisal in favor of petitioners'. She found no fraud or abuse of discretion. Nor is fraud or an abuse of discretion on the city's part manifest to this Court on appeal. Because I am not prepared to state that the city acted unreasonably in considering this future use as a basis for a determination of benefit to the land, it should be given full weight in a determination of market value.

Given that the appraisal relied upon by the Tax Tribunal limited the evaluation of the properties to their current use, we consider the amount of increase in value derived from that appraisal an inappropriate basis for invalidating the special assessments and confine our review to the remaining findings of the Tax Tribunal.[15]

[15] Given the fact that we do not consider the finding on the amount of increase in value a competent basis for our review in this case, we do not address the issue of proportionality framed by the parties, that is, whether a special assessment must fail where an increase in fair market value is not equal to or more than the cost of the improvement. We would note, however, that increase in value is a factor which is often subject to conflicting expert testimony. Due to the fluctuating economic climate, an estimated increase in value may either never come to pass or may come to pass many times its current expectation. Therefore, while depreciated value is a clear sign of no special benefit, see *Fluckey v Plymouth, supra,* the same cannot always be said of an increase in value which is less than the cost of the improvements. In the latter case, it seems necessary for a court, in reviewing the validity of a special assessment, to examine the nature of the benefits conferred in terms of relieving existing burdens and creating special uses for the land.

B

In addition to an increase in value, the Tax Tribunal, in its first opinion, found that the proposed improvements would result in relief from existing burdens because the improvements would create internal access to the petitioners' parcels and drainage and water service where none existed before. The tribunal further found a strong possibility that the parcels could be rezoned in accordance with the city's master plan to allow for commercial development. The tribunal thus concluded that the proposed improvements would create a special adaptability in the land for development. It noted that even if the property were not rezoned, the petitioners would not be able to develop the property for residential use without the improvements. The record established that due to the long, narrow shape of the parcels, the southern portions have no direct access to any public right of way. These portions are unreachable and cannot be separately developed. Petitioners' own witness agreed that the improved road system would provide a special benefit to these parcels to the extent that it made separate development of the lower portions possible.

We would hold that these latter findings sustain the city's initial determination that special benefits would accrue to the properties assessed. We cannot ignore the obvious benefits conferred upon petitioners' properties when the finding of benefits is supported by material, competent, and substan-

Moreover, because exact equality of taxation is not always attainable, the excess of cost over increase in value would have to be substantial and of material character before a court should restrain the enforcement of the special assessment. *Norwood v Baker*, 172 US 269; 19 S Ct 187; 43 L Ed 443 (1898); see also *Fluckey v Plymouth*, *supra*.

tial evidence in the record as a whole.[16] See *Foren v Royal Oak, supra.*

II

Petitioners also contend that the city did not act properly in creating the special assessment districts. They submit that the city failed to consider and prescribe "what part or proportion of the cost shall be paid by special assessment upon the property especially benefited, [the] determination of benefits received by affected properties, and what part, if any, shall be paid by the City at large." Novi City Ordinance No. 79-1.04, § 7.

The Tax Tribunal found that the city council did give due consideration to this issue and complied with the city ordinance. The record supports the Tax Tribunal's findings.

The record also refutes petitioners' claim that they will not receive benefits from the improvements which are unique from the community as a whole. The instant case is distinguishable from *Stybel Plumbing, Inc v Oak Park,* 40 Mich App 108, 113; 198 NW2d 782 (1972), cited by petitioners in support of their position. In *Stybel,* the Court of Appeals found that while the landowners directly benefited from construction of a service drive and parking lot, the public at large also received the benefit of less traffic on a major thoroughfare. The fact that this benefit was not incidental, but the purpose of the project, caused the Court of Appeals to hold that the public must bear its fair share of the assessment.

In the case at bar, the proposed road system is consistent with the city's regional plan. The record

[16] Our review is not limited to the finding of the Tax Tribunal presented to us on remand. Our review of this case must include the Tax Tribunal's original opinion as well.

indicates, however, that it is designed solely as an access road for development west of Novi Road and any effect on current traffic on Novi and Twelve Mile Roads would be nonexistent or incidental. Moreover, the parcels assessed will peculiarly benefit from the water and drainage systems not only because such systems are not existing there now, but also because the risk of failing to secure easements from neighboring lands for the development of alternative privately placed systems is removed.[17] Therefore, petitioners' claim is without merit.

III

Petitioners' final contention is that the hearing officer's decision should be adopted in toto by this Court because the hearing officer had a firsthand opportunity to view the witnesses and was in the best position to determine credibility and make findings of fact. We cannot accept petitioners' contention. This is not a case which turned upon credibility. Cf. *MERC v Detroit Symphony Orchestra, Inc,* 393 Mich 116; 223 NW2d 283 (1974). Nor did the hearing officer extend credibility as one of the reasons for accepting petitioners' appraisal of the property over the city's.

It is sufficient that the Tax Tribunal's decision affirming the city's levy of the special assessment is supported by material, competent, and substantial evidence on the whole record. Const 1963, art 6, § 28. For the foregoing reasons, the Court of Appeals decision affirming the decision of the Tax Tribunal should be affirmed.

[17] Petitioners offered evidence establishing that their alternative plan to the special assessment for the water system was to seek easements from neighboring lands for the purpose of connecting to existing systems. Petitioners admitted, however, that there was no guarantee that the easements could be secured.

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

KOSKI v VOHS

Docket No. 75140. Argued January 15, 1986 (Calendar No. 17). Decided November 10, 1986. Rehearing denied 428 Mich 1201.

Aldred E. Koski brought an action in the Oakland Circuit Court against Danny R. Daniel, an investigator for the Oakland County Prosecutor, several officers of the Madison Heights Police Officers Association, and the Oakland County Prosecutor, alleging malicious prosecution for larceny by conversion involving advertising revenues paid to him as agent for Monitor Publications, Ltd., publisher of an MHPOA magazine. The court, Robert C. Anderson, J., directed a verdict for the defendants, finding that as a matter of law they had probable cause to initiate the prosecution. The Court of Appeals, HOOD, P.J., and BEASLEY, J. (CAPRATHE, J., concurring in part and dissenting in part), affirmed except as to Daniel, ruling that the question whether Daniel had probable cause to instigate the prosecution was for the jury, and remanded for a new trial (Docket No. 69982). The defendant appeals.

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

The trial court correctly determined as to all defendants that the plaintiff failed to prove the element of lack of probable cause.

1. In an action for malicious prosecution, absent a dispute of fact, the question of probable cause is a question of law to be determined by the court. In this case, although the Court of Appeals found that there was a disputed question of fact as to whether the plaintiff had a claim of right to the advertising revenues, it was undisputed that Mr. Daniel had knowledge of the plaintiff's claim. Thus, the issue of probable cause was a question of law to be determined by the court on the basis of

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REFERENCES

Am Jur 2d, Malicious Prosecution §§ 50-55, 184-186.

Accused's release of liability, or stipulation that there was probable cause for criminal charge, in consideration of termination of prosecution as precluding malicious prosecution action. 26 ALR4th 245.

what Mr. Daniel ascertained during his investigation. The trial court correctly found that the evidence presented by the plaintiff was not adequate to prove the element of lack of probable cause.

2. The standard for determining whether probable cause existed involved only consideration of the conduct of a reasonable man under the circumstances, not a finding that there was a specific intent to commit the crime beyond a reasonable doubt. Where, as in this case, there are sufficient facts to warrant a prudent person under the circumstances to believe that a crime had been committed and that the accused committed it, failure to conduct further investigation does not negate probable cause.

Chief Justice WILLIAMS, concurring with Justice BOYLE, wrote separately to question whether the trial court correctly exercised its discretion in granting a directed verdict for the defendant.

Reversed.

Justice LEVIN, joined by Justices CAVANAGH and ARCHER, dissenting, stated that the Supreme Court should not decide, viewing the question of probable cause as one of law, whether there was probable cause until after the trial court and the Court of Appeals have reviewed the record for that purpose. In this case, neither the trial court nor the Court of Appeals so reviewed the record, and the Supreme Court should not bypass decision by the trial court and the Court of Appeals on the issue. Rather, it should remand the case to either court for a determination whether, on the record, there was probable cause. Only after such an assessment should the Supreme Court consider whether further review is warranted.

It is of considerable importance for purposes of a civil action for malicious prosecution whether a person has probable cause to initiate a criminal prosecution if a prudent person would believe that the person to be prosecuted probably or has committed a crime, or whether the person must additionally correctly or reasonably believe that he is sufficiently informed as to the law and facts to justify initiating prosecution. It is not correct to say or suggest that where, as in this case, there is evidence sufficient to show that the requisite acts constituting a criminal offense have probably been committed by the accused and there is contradictory evidence concerning the accused's defense further investigation is not required.

Defendant Daniel was not sufficiently informed of the law to justify him initiating prosecution of the plaintiff unless advised to do so by counsel after full disclosure of the facts within his

knowledge and information. Without such advice, he could not have acted as a prudent person and did not have probable cause to initiate the prosecution. Whether he made full disclosure of all the facts was a question for the jury.

137 Mich App 491; 358 NW2d 620 (1984) reversed.

OPINION OF THE COURT

MALICIOUS PROSECUTION — PROBABLE CAUSE — QUESTIONS OF LAW.

In an action for malicious prosecution, absent a dispute of fact, the question of probable cause is a question of law to be determined by the court.

James Paterson for the plaintiff.

Kohl, Secrest, Wardle, Lynch, Clark & Hampton (by *Michael L. Updike*) for the defendant.

BOYLE, J. In this case we are asked to decide whether the trial court correctly determined that the plaintiff had not proven the element of lack of probable cause in this malicious prosecution suit. As the Court of Appeals noted, "[t]he basis for the trial court's ruling was a finding that as a matter of law defendants had probable cause to initiate criminal prosecution against plaintiff." We find that this determination was correctly made by the trial court as to all defendants, and we reverse that portion of the opinion of the Court of Appeals which had remanded the case for a jury determination of this question.

Basically, the record in this case reveals the following facts. Aldred Koski, as agent for Monitor Publications, Ltd., entered into a contract with the Madison Heights Police Officers Association to publish a police magazine. The contract provided that advertisements would be sold to local businesses and that all advertising revenues would be deposited in the MHPOA account. Mr. Koski would then be paid a certain amount for expenses and a share of the profits (see n 6).

Approximately two years later, several Madison

Heights police officers met with the Oakland County Prosecutor's Office to discuss allegations that Mr. Koski was converting checks made out to the MHPOA. An investigation was undertaken by Mr. Danny Daniel of the prosecutor's office and charges were later authorized. At the preliminary examination, Mr. Koski was discharged when the Secretary-Treasurer of the MHPOA failed to appear to testify.

Mr. Koski began the instant suit for malicious prosecution against seven defendants: five Madison Heights police officers, the Oakland County Prosecutor, and Mr. Daniel. At trial, after the plaintiff had completed his proofs, the court granted defendants' motion for a directed verdict, finding as a matter of law that defendants had probable cause to initiate criminal prosecution against Mr. Koski.[1]

Mr. Koski appealed to the Court of Appeals which affirmed as to all defendants except Mr. Daniel. It then remanded to the trial court for a new trial as to the remaining defendant. We granted Mr. Daniel leave to appeal.

It is well-settled in this state that, in a malicious prosecution action, absent a dispute of fact, the question of probable cause is a question of law to be determined by the court. *Modla v Miller,* 344 Mich 21; 73 NW2d 220 (1955); *Baker v Barach,* 197 Mich 219; 297 NW 472 (1941). The Court of Appeals in this case found that there was a disputed question of fact as to whether Mr. Koski had a claim of right to the funds and, on this basis, concluded that it became a question for the jury whether Mr. Daniel had probable cause to believe

[1] The trial judge's statement that "I do not think that reasonable minds could differ in this" did not mean that he had determined that the question of probable cause was one for the jury. Rather, he was noting that the facts surrounding the issue of probable cause were not open to dispute and that, therefore, the question of probable cause could properly be determined by the court.

that the plaintiff had committed an offense.[2] It was undisputed, however, that Mr. Daniel had knowledge of Mr. Koski's claim.[3] Therefore, the issue of probable cause in this case was a question of law for the judge to be determined on the basis of what Mr. Daniel ascertained during his investigation.[4] Prosser & Keeton, Torts (5th ed), § 119, p 876. The record reflects that at the time Mr. Daniel was authorized to request a warrant, he had taken the following steps and developed the following facts.

Mr. Daniel met initially with Assistant Prosecutor Richard Thompson, Madison Heights Chief of Police Joseph Whitefield, MHPOA President Kenneth Vohs, and two other police officers to discuss allegations that Mr. Koski was converting funds to his own use. Mr. Daniel was advised that the contract between the MHPOA and Mr. Koski provided that all advertisement revenues were to be paid to the MHPOA and that MHPOA was then to pay Mr. Koski's expenses and a profit, if any, of seventy percent of all monies received after the first $5,000. He then interviewed Elsie Keil, secretary to the Chief of Police, who stated that Mr. Koski had picked up checks made out to the MHPOA and that she had only given them to him after Lieutenant Sloan, who was not authorized to

[2] It must be noted that the issue of probable cause is not dependent on whether or not Mr. Daniel made a full and fair disclosure to the prosecutor. If Mr. Daniel had probable cause to believe that Mr. Koski had committed an offense, it is immaterial whether he made a full disclosure. As the Court of Appeals correctly noted, the question of a full and fair disclosure to an attorney is only relevant to an inquiry into whether a complainant is immunized from suit, *even if* there was no independent basis for finding probable cause. *Modla v Miller; Baker v Barach, supra.*

[3] Mr. Koski asserted his claim to Mr. Daniel regarding his right to endorse and cash checks and use the advertising money for expenses during Mr. Daniel's investigation of the complaint.

[4] The Court of Appeals appears to have incorrectly based its conclusion on the issue of probable cause on what was ascertained at trial regarding the situation, rather than the facts at the time of the investigation.

release the checks, ordered her to do so. Mr. Daniel subsequently interviewed Richard Jackson of Spalding, DeDecker & Associates who stated that a man described as sixty years old, small frame with gray hair, had entered his office and requested payment for an advertisement in the Monitor magazine. Mr. Jackson further stated that, when he pointed out that the invoice required checks to be made out to the MHPOA, the person identified himself as Dennis Carley and suggested that it be made out to Monitor/MHPOA. Mr. Daniel then talked to Dennis Carley, the Secretary-Treasurer of the MHPOA who stated that he routinely paid Mr. Koski from monies received and under no circumstances was Mr. Koski authorized to have any money from the advertisements without it first being deposited in the association account. Officer Carley showed Mr. Daniel the record books, and Mr. Daniel instructed him to balance all names of advertisers listed in the magazine against those who had paid the association and provide a list of those who were in the magazine but for whom there was no record of payment to the MHPOA. Mr. Daniel then received a list of eight checks.

After receiving the list, Mr. Daniel interviewed the manager of Howard Johnson's who stated that he had not paid because he never authorized the advertisement. Mr. Daniel then talked to Tony Brenza, the General Manager of Oakland Dodge, Inc., who produced a cancelled check for $420 made payable to the MHPOA and endorsed by Mr. Koski. Mr. Brenza stated that the check would not have been written until the requesting agency arrived to pick it up. Thereupon, Mr. Daniel talked to Edward Hellner, the comptroller, who verified his signature, and to George Hensely, the Sales Manager, who identified a picture of Mr.

Koski as the man who had made the request for the check.

Mr. Daniel then obtained a search warrant authorizing a search of all bank accounts for Monitor magazine at Michigan National Bank. This search turned up the fact that the $100 check from Spalding, DeDecker & Associates was not deposited in either the MHPOA account or the Monitor account, but cashed for Mr. Koski by Rick Dowell, one of the tellers.

Lieutenant Gerald Sloan was then interviewed, and he stated that he had known Mr. Koski for ten years, had filed corporation papers for Mr. Koski, and had named himself as resident agent because a permanent address was needed. Lieutenant Sloan further stated that he only authorized the release of checks because Mrs. Keil had read the address on the envelopes to him on the phone and they were addressed to the Monitor magazine. Mrs. Keil was again interviewed and denied that she had read the envelopes to Lieutenant Sloan, and, further, she again verified that they were addressed to the MHPOA.

Mr. Daniel next interviewed Rick Dowell, the bank teller who had cashed the Spalding, DeDecker check, who stated that he thought it was unusual that Mr. Koski was cashing checks for the police department, but that he had assumed it was all right because Mr. Koski was friends with the bank manager.

Later, Mr. Daniel requested an audit of the MHPOA books and interviewed Mr. Koski informally and then formally, with Mr. Koski's attorney, in the prosecutor's office.

As this Court stated in *Clanan v Nushzno,* 261 Mich 423, 427; 246 NW 168 (1933):

> When the material facts are undisputed and in

> the opinion of the court constitute probable cause, he should direct a verdict in favor of the defendant. When the facts are in dispute, the question is for the jury with instructions as to what constitutes probable cause.
>
> "The general rule of the common law, sustained by the overwhelming weight of authority, both in England and America, is that what facts, and whether particular facts, constitute probable cause is a question of law, which the judge must decide upon the facts found to exist in the particular case, and which it is error of him to submit to the decision of the jury." 18 RCL § 39, p 58,

and, as was reiterated in *Drobczyk v Great Lakes Steel Corp,* 367 Mich 318, 325-326; 116 NW2d 736 (1962):

> Inasmuch as there was no dispute as to the material facts in the case the question whether plaintiff had sustained the burden of proof on the issue of want of probable cause was a *question of law for the court.* [Emphasis added.]

Justice LEVIN relies on *Thompson v Price,* 100 Mich 558; 59 NW 253 (1894), for the proposition that the instant case should properly have been submitted to the jury to determine the question of probable cause. However, in *Thompson* there was a factual dispute as to whether or not the defendant had talked to the only person with knowledge of the facts. As this Court stated, in upholding a jury verdict for the plaintiff,

> [T]he testimony of the defendant is that he talked with Mr. Enos upon the subject, and that Mr. Enos told him that plaintiff did not ask for any statement of his (Enos') taxable property, and the defendant testifies that he communicated this to the prosecuting attorney. . . . But, as before stated, Mr. Enos testified that, according to his

> recollection, he never made any such statement to the defendant prior to the arrest of plaintiff. [*Id.* at 562.]

Because there were disputed facts in *Thompson* as to the probable cause issue itself, the judge was correct in allowing the jury to determine the issues. *Thompson* is inapposite to the instant case.

Therefore, the only determination to be made in this case is whether, where it is undisputed that the plaintiff claimed he had a right to the money but other evidence in defendant Daniel's possession did not support this claim, the trial court correctly found that the evidence presented by the plaintiff was not adequate to prove the element of lack of probable cause.[5] I can find no reason not to so conclude.

As the trial judge properly decided, it was the court, and not the jury, which was required to decide the question of probable cause, a determination which "involves only the conduct of a reasonable man under the circumstances." Prosser & Keeton, *supra,* § 119, p 882. In so doing, it was correct to view the facts, not as a legal technician would view them, but as the prudent, cautious person would see the situation. *Merriam v Continental Motors Corp,* 339 Mich 546; 64 NW2d 691 (1954); *Clanan v Nushzno, supra.* In this case, the standard required a finding that Danny Daniel had probable cause to believe a crime had been committed when he approached the prosecutor. Although it was argued that Mr. Koski's assertion that he was entitled to the money, if found to be true, would negate the specific intent element of

[5] The trial court correctly determined that, in Michigan, discharge of the plaintiff at the preliminary examination is not, of itself, evidence of want of probable cause. *Prine v Singer Sewing Machine,* 176 Mich 300; 142 NW 377 (1913); *Stefanic v Montgomery Ward & Co,* 358 Mich 460; 100 NW2d 250 (1960).

the crime of larceny, the trial judge correctly found that Mr. Daniel was not required to make a determination as to intent "beyond a reasonable doubt" before proceeding or to judge the situation as would a legal scholar.

It is true that, in a criminal trial, a finding of a reasonable doubt as to Mr. Koski's larcenous intent, based upon a bona fide belief in his right to the money, would require acquittal. *People v Hillhouse,* 80 Mich 580; 45 NW 484 (1890); Commentary to CJI 23:6:01, p 23-50. It is clearly not true, however, that probable cause was negated simply because Mr. Koski said he had a right to endorse the checks and apply the proceeds to expenses, when the only people with authority to allow Mr. Koski to endorse the checks, the officers of the Madison Heights Police Officers Association, told Mr. Daniel that Mr. Koski had no such authority. As Danny Daniel noted at trial, when asked if Mr. Koski had asserted he had a right to the money, "That doesn't make it true." Mr. Daniel had been told by the officers of the MHPOA that Mr. Koski did not have permission and Mr. Daniel was also aware that the contract, signed by Mr. Koski, provided that all checks were to be deposited in the MHPOA account.[6]

[6] Specifically, the contract provided:

> 4. It is understood, further, that the ASSOCIATION desires to share in any profits originating from the publication. Therefore, the parties agree that after payment of all expenses required to complete the magazine and distribution of the publication to all homes and businesses in the City of Madison Heights the remaining profit will be divided as covered in the paragraph listed below. Direct costs shall include but not be limited to: salaries, sales commissions, office rent, taxes, telephone, postage, printing, addressing, supplies, typesetting, keylining, photographic, mileage, accounting and legal fees if necessary and other expenses that MONITOR can justify to complete successful publication and distribution of the magazine. MONITOR agrees to exercise prudent business practices to assure that costs and expenses shall remain reasonable.

Since probable cause is a matter of the appearances presented to the defendant, a mistake of fact as to the conduct of the accused will of course not prevent its existence. Some courts have held that a mistake of law, as to whether such conduct amounts to a criminal offense, or to the particular offense charged, cannot protect the instigator of prosecution—apparently upon the antique and questionable theory that he is required at his peril to know the law. For the most part such cases appear to have involved mistakes of law so extreme that they would be unreasonable even for a layman to make. [Prosser & Keeton, *supra,* § 119, p 877.][7]

(a) The ASSOCIATION shall receive a minimum payment of $5,000; providing the conditions stated in this agreement are met, and that revenues generated from advertising sales warrant the payment. The ASSOCIATION shall share in remaining profits at a rate of 30% until an additional $3,000 is attained amounting to a maximum payment of $8,000. MONITOR shall also share in the profits at a rate of 70% after the initial $5,000 is paid to the ASSOCIATION and if the $8,000 is, in fact, achieved, MONITOR shall be entitled to the remaining funds.

5. The ASSOCIATION will open a special bank account, or use it's [sic] existing account for the deposit of all advertising revenues collected, the money to be held in trust to insure publishing costs, expenses and against the profit-split. It is mutually understood that the ASSOCIATION must, in turn, issue payments from this account to MONITOR based on these collections as the day-to-day costs arise for expenses incurred by MONITOR to pay the overhead in carrying out the project.

[7] The dissenting opinion's claim that the Restatement of Torts, 2d, has modified this view is without merit. It is uncontroverted that the Restatement specifically states that one has probable cause for initiating proceedings if he correctly or reasonably believes:

(a) that the person whom he accuses has acted or failed to act in a particular manner, and

(b) that those acts or omissions constitute the offense that he charges against the accused, and

(c) that he is sufficiently informed as to the law and the facts to justify him in initiating or continuing the prosecution. [3 Restatement Torts, 2d, § 662.]

Thus, the relevant inquiry is, *if* Mr. Daniel did make a mistake of law or facts, was it reasonable. As the magistrate noted at the preliminary examination, "determining what the criminal or . . . what a

If the trial court had accepted the argument that Daniel's knowledge of a possible "defense" negated probable cause as a matter of law, it would have been opening up a veritable Pandora's box. At this point, according to my colleagues' reasoning, despite an allegation of a crime, objective evidence in corroboration, and an admission by the suspect, a civilian would have to undertake a full-scale effort to resolve conflicting allegations which would, in essence, amount to a complete trial where guilt and innocence would be determined by a jury of one—one who would still be at peril if a reasonable mistake of law or fact were made.

This Court directly addressed this type of situation in *DeVitis v Newcomb-Endicott Co,* 264 Mich 1; 249 NW 487 (1933), and correctly concluded that such an investigation was not required. In *DeVitis,* the defendant in the malicious prosecution action had informed the prosecutor that the plaintiff had sold property which she had leased by signed contract from the defendant. It was later learned, after the plaintiff had been acquitted, that the plaintiff, according to the custom in the industry at that time, had signed a blank sheet and was unaware that it was a lease and not an open credit account. In reversing a judgment for the plaintiff and finding that a verdict should have been directed for the defendant, we noted:

> The record is wholly to the effect that Mr. Maynard disclosed to the prosecuting attorney all material facts relating to the matter within his knowledge. He did not investigate to learn what defense or contention, if any, plaintiff intended to

person's intent is of course is very difficult, it would be difficult in this case." In light of the circumstances of this case, the trial court correctly found that Daniel had probable cause, according to the Restatement criteria.

make, nor was he required to do so. *Dunlap v New Zealand Fire & Marine Ins Co,* 109 Cal 365 (42 Pac 29) [1895]. He relied on the contract. If he had gone into its antecedents, had checked the original sales slips, he might have learned that the contract had been signed in blank in accordance with store custom, and that plaintiff had had a charge account from which some items were taken into the contract, but he did not do that, and had no such knowledge, nor do we think he was required so to do.

In a note reviewing many cases, 5 ALR 1695, it is said:

"If there are sufficient facts to warrant an ordinarily prudent person in believing that another has committed a crime, failure to make further investigation before instituting a prosecution does not constitute a want of probable cause."

And, at page 1699:

"It does not show a want of probable cause for a person to fail to exhaust all sources of information before instituting a proceeding."

And page 1700:

"It does not show a want of probable cause for a person to fail to verify each item of information received, before proceeding thereon."

* * *

If defendant had instituted a civil suit upon the contract, such contract bearing, unquestionably, plaintiff's signature, would have been *prima facie* evidence in respect of defendant's rights under it. [264 Mich 4-5.]

These cases stand for the proposition that where there are sufficient facts to warrant a prudent person in defendant's position to believe that a crime was committed and the defendant committed it, the failure to make a further investigation does not negate probable cause.[8]

[8] The Restatement takes the view that the accuser cannot have

The dissenting opinion appears to rest on a feeling that Mr. Daniel should have investigated further. As the history of the investigation demonstrates, the anomaly of this position is that there were no further material facts to be investigated. Had Mr. Daniel undertaken further investigation he could have found, as to Mr. Koski, nothing more than that which he already knew, i.e., Mr. Koski claimed he had a right to the money. The fact that Mr. Daniel might have discovered that an officer of MHPOA had been embezzling money or that the MHPOA had not discharged its obligation to retain the money that it had received in trust to pay the expenses, (*post,* pp 446-447), is simply immaterial to the issue either of probable cause or of defendant's duty to investigate regarding Mr. Koski. The possibility that further investigation would have revealed that the person who would have been the chief witness against Mr. Koski was

probable cause unless he holds a personal subjective belief in the guilt of the accused, 3 Restatement Torts, 2d, § 662, comment c. It is only when the accuser honestly but mistakenly believes the accused to be guilty that the question whether his belief was based on reasonable grounds becomes material. In short, under the Restatement test, the accuser must believe in the accused's guilt, and that belief must be reasonable. However, the mere fact that the accuser believes in the accused's guilt does not establish that the belief is reasonable. The belief must rest on facts which would lead a reasonably prudent person to so believe. Thus, as the comment to the Restatement indicates:

> Circumstances known or believed by the accuser may be incriminating to the accused and yet may not so clearly indicate guilt that a reasonable man would initiate criminal proceedings without investigation. [§ 662, comment j on clause (c), p 428.]

We have no occasion to consider whether this Court should adopt the subjective belief standard of the Restatement as that issue has not been raised here. We do not read the Restatement comment as saying anything different regarding the need for investigation than the ALR annotation, but neither have we occasion to consider this question. On this record, there were no additional material facts regarding Mr. Koski that could have been investigated and, in fact, Mr. Daniel did not initiate criminal proceedings without an investigation.

himself chargeable with a separate and distinct criminal offense or that Mr. Koski had a civil claim against the MHPOA for breach of its contractual obligation, might have led the prosecutor's office in the exercise of its discretion to decide not to seek the issuance of a warrant for Mr. Koski. However, the fact that the prosecutor's office might decline to exercise a warrant for reasons extraneous to the probable cause determination is irrelevant to whether Mr. Daniel had probable cause to believe Mr. Koski had committed a crime.

Although the dissent makes it appear that Mr. Koski had been *falsely* accused of larceny by conversion, it is undisputed that the contract provided that the advertising revenues were to be deposited in the police officers association account and that Mr. Koski, in fact, forged the endorsement of the MHPOA on various checks. Mr. Koski admitted to Mr. Daniel that he had done so, but claimed it was proper for him to take such action since the MHPOA owed him money, despite his acknowledgment that no officer of the association had agreed to allow this "conversion." In fact, at one point, Mr. Koski informed Mr. Daniels that the reason he had cashed the checks made out to the MHPOA by Oakland Dodge was because he needed funds "to get up north."

As Judge CAPRATHE correctly noted in his dissent in the Court of Appeals:

> More importantly, no interpretation of these facts would permit plaintiff to use the self-help method of collecting the civil debt which he believed was owed to him by the association. There were proper legal channels open to plaintiff to collect the alleged debt. The mere fact that plaintiff claimed the association owed a debt to him does not affect the probable cause issue, since it is clear that plaintiff had no legal right to endorse

> the checks with the association's name or to cash them and convert the funds to his own use. [137 Mich App 491, 525; 358 NW2d 620 (1984).]

Finally, as appellant contends, it appears on this record that Mr. Daniel did make a full and fair disclosure to the assistant prosecuting attorney who authorized the charge.[9] Although Mr. Daniel stated that he would have had no reason to specifically tell the prosecutor of Mr. Koski's claim of right to the money, he did state that the transcribed interview of Mr. Koski by Mr. Daniel would have been given to the prosecuting attorney. Further, Richard Thompson, the prosecutor who authorized the charge, testified that the interview was in the prosecutor's file and that an assistant prosecutor routinely goes over the documentation in the file. It is well-settled that one who makes a full and fair disclosure to the prosecutor is not subject to an action for malicious prosecution. *Modla v Miller, supra.* In this case, the trial court could have correctly concluded that Mr. Daniel did so and directed a verdict on that basis.

We reverse the decision of the Court of Appeals with regard to Mr. Daniel and reinstate the trial court's order granting the defendant's motion for a directed verdict.

WILLIAMS, C.J., and BRICKLEY and RILEY, JJ., concurred with BOYLE, J.

WILLIAMS, C.J. I concur with Justice BOYLE. However, I am not as fully convinced as she that the trial court correctly exercised its discretion in granting a directed verdict for defendant Daniel.

[9] It must again be noted that, if there was a full and fair disclosure, the question of an independent basis for finding probable cause is moot.

LEVIN, J. (*dissenting*). This is an action for malicious prosecution. I write separately because (1) this Court should not decide—even if the question of probable cause is, in the instant case, solely for a court to decide as a question of law—whether there was probable cause until after the trial court and the Court of Appeals have reviewed the record for that purpose, (2) Daniel, a layman, was not sufficiently informed concerning the law to justify him in initiating the prosecution against Koski unless he was advised to do so by an attorney after full disclosure of the facts within his knowledge and information, and (3) whether Daniel made full disclosure of all the facts is a jury question especially since there were credibility issues.

I

An element of an action for malicious prosecution is that the defendant initiated the criminal proceedings against the plaintiff without probable cause.[1] In the absence of a conflict in the testimony

[1] 3 Restatement Torts, 2d, § 653, p 406.

Two of the four elements of an action for malicious prosecution were clearly satisfied, see Prosser & Keeton, Torts (5th ed), § 119, p 871; *Turbessi v Oliver Iron Mining Co,* 250 Mich 110, 112; 229 NW 454 (1930). A prosecution was caused to be commenced by Daniel against Koski, and those proceedings terminated in Koski's favor.

In directing a verdict, the trial judge did not advert to the element of malice. The Court of Appeals said that for that reason it had not discussed the question of malice, but that on retrial malice would be a jury question. The statement by the Court of Appeals that "if the jury finds a lack of probable cause, it may thereupon infer malice," *Koski v Vohs,* 137 Mich App 491, 520; 358 NW2d 620 (1984), finds support in *Davis v McMillan,* 142 Mich 391, 402; 105 NW 862 (1905). No issue in regard to malice has been presented on this appeal.

I agree with Daniel that the Court of Appeals erred in stating that "the dismissal on the merits of the larceny by conversion charge against plaintiff by the district judge at the conclusion of the preliminary examination is evidence of a lack of probable cause to prosecute on the part of defendant Daniel." *Koski v Vohs, supra,* p 517. While that is, indeed, the rule in many jurisdictions (Prosser & Keeton, Torts [5th ed], § 119, p 881; Restatement Torts, 2d, § 663), the rule in

concerning the circumstances, presenting an issue of fact for jury determination, the court determines—we all agree—whether the defendant had probable cause for initiating the prosecution.[2]

The Court of Appeals concluded that there was, in the instant case, a conflict in the testimony and reversed a directed verdict against plaintiff Aldred E. Koski entered by the trial judge at the conclusion of Koski's proofs.

A majority of this Court concludes that there was no dispute of fact and the question of probable cause should therefore have been decided by the court and not by a jury. The majority proceeds to review the record, and further concludes that defendant Danny R. Daniel had probable cause to initiate the prosecution.

In so ruling, the majority states that the facts should be viewed as a "prudent, cautious person would see the situation,"[3] and, applying that standard, Daniel had probable cause to initiate the prosecution. The majority further states that although Koski would not have been guilty of the charged criminal offense if he did not have a larcenous intent,[4] that would not necessarily negate probable cause because both the contract document and officers of the Madison Heights Police Officers Association disputed Koski's claim that he had been authorized to accept delivery of and to endorse checks to the order of the MHPOA and to use the proceeds for the publication of the

this state is that the discharge of the defendant at the conclusion of the preliminary examination "has not in itself any tendency to show a want of probable cause . . . ." *Davis v McMillan, supra,* p 402. See also *Prine v Singer Sewing Machine Co,* 176 Mich 300, 320; 142 NW 377 (1913); *Stefanic v Montgomery Ward & Co,* 358 Mich 460, 462; 100 NW2d 250 (1960).

[2] 3 Restatement Torts, 2d, § 673, p 448 and accompanying comment on clause (c).

[3] *Ante,* p 432.

[4] *Ante,* p 433.

magazine without running them through the MHPOA account.[5] The majority adds that a reasonable mistake of law as to whether conduct amounts to a criminal offense, as well as a reasonable mistake of fact as to the conduct of the accused, does not preclude a finding of probable cause.[6] The majority further adds that Daniel made full and fair disclosure to the prosecuting attorney and therefore is not subject to liability in an action for malicious prosecution.[7]

II

Neither the trial judge nor the Court of Appeals reviewed the record to determine whether, viewing the question of probable cause as one of law, there was probable cause.

The trial judge apparently thought that the probable cause question was for the jury, and directed a verdict against Koski because the judge did not see how the jury could fail to conclude that there was probable cause: "I do not see how the jury, based upon what has been presented here, could say that there was not probable cause."[8]

[5] *Ante,* p 433.

[6] *Ante,* p 435.

[7] *Ante,* p 439.

[8] The judge explained that, in his view, Koski was asking the jury to draw unreasonable inferences, to indulge in assumptions and to speculate: "And some of the language I hear used here, you're forced to a conclusion, and you have to assume this, you draw some other inference from this inference. And all those things, and I don't think I can let a jury go on all the speculation."

While the judge said that Koski had "not sustained the burden" of establishing probable cause, in the next sentence he said: "I do not think that reasonable minds could differ in this and I'm going to take it away from the jury and grant the motion in this matter." The judge apparently thought that if reasonable minds could differ, the question would have been for the jury; as he said at the beginning of his ruling: "I do not see how the *jury,* based upon what's been presented here, could say that there was not probable cause." (Emphasis supplied.)

Because the Court of Appeals concluded that there were disputed questions of fact, it did not review the record to determine whether, viewing the question as one of law, there was probable cause.

This Court should not bypass the trial court and the Court of Appeals on this issue. Even if, as the majority indicates, the trial court found "that as a matter of law defendants had probable cause to initiate criminal prosecution against plaintiff," the Court of Appeals has not, in all events, reviewed the record to determine whether, viewing the question as one of law, there was probable cause.

The appropriate course—following upon the majority's decision that there was no dispute of fact and the question of probable cause should have been decided by the court and not by a jury—is to remand either to the trial court or the Court of Appeals to determine whether, on the record so far made, there was probable cause. Only after their assessment should this Court consider whether further review by this Court is warranted.

III

The Restatement of Torts, 2d, states that a person has probable cause to initiate criminal proceedings if he "correctly or reasonably believes" that the accused acted in a particular manner, that the acts committed constitute the offense he charges the accused with committing, and "that he is sufficiently informed as to the law

The judge gave no indication that he understood or was proceeding on the basis that probable cause, in the absence of a conflict in the testimony presenting an issue of fact for jury determination, is a question of law for the court.

and the facts to justify him in initiating" the prosecution.[9] (Emphasis added.)

The majority quotes the foregoing language of the Restatement with apparent approval.[10] The majority nevertheless quotes, also with apparent approval, the following excerpt from an ALR annotation:

> If there are sufficient facts to warrant an ordinarily prudent person in believing that another has *committed a crime,* failure to make further investigation before instituting a prosecution does not constitute a want of probable cause"[11] [emphasis added],

and states, on the basis of the ALR excerpts quoted in its opinion:

> These cases stand for the proposition that where there are sufficient facts to warrant a prudent person in defendant's position to believe that *a crime was committed* and the *defendant committed it,* the failure to make a further investigation does not negate probable cause.[12] [Emphasis added.]

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[9] One who initiates or continues criminal proceedings against another has probable cause for doing so if he correctly or reasonably believes

(a) that the person whom he accuses has acted or failed to act in a particular manner, and

(b) that those acts or omissions constitute the offense that he charges against the accused, and

(c) that he is sufficiently informed as to the law and the facts to justify him in initiating or continuing the prosecution. [3 Restatement Torts, 2d, § 662, p 423.]

The commentary to the Restatement of Torts, 2d, explains that a "private prosecutor's mistaken belief that the accused is guilty of the offense charged against him may be due to a mistake of fact, that is, a mistake as to what the accused has done or left undone. On the other hand, it may be due to a mistake of law, that is, a mistake in believing that the actual or supposed acts or omissions of the accused constitute the offense charged against him." 3 Restatement Torts, 2d, § 662, comment d, p 424.

[10] *Ante,* p 434, n 7.

[11] *Ante,* p 436.

[12] *Id.*

A

Manifestly, it is of considerable importance for purposes of a civil action for malicious prosecution, whether a person has probable cause to initiate a criminal prosecution if a prudent person would believe that the person to be prosecuted has committed or probably committed a crime, or whether, as the Restatement states, he must additionally correctly or reasonably believe "that he is sufficiently informed as to the law and the facts to justify him in initiating" the prosecution.

Consistent with its conclusion that probable cause is established when a prudent person would believe that the person to be prosecuted has committed or probably committed a crime, the majority states that where the facts are so sufficient, it is not necessary to investigate a "possible" defense that might "negate probable cause as a matter of law," that a person initiating a prosecution need not undertake a "full-scale effort to resolve conflicting allegations"[13] or "make a further investigation" that might "negate probable cause."[14]

It is, however, well-established, as set forth in the commentary to the black letter of the section of the Restatement quoted with apparent approval by the majority, that although the circumstances may be incriminating, they "may not so clearly indicate guilt that a reasonable man would initiate criminal proceedings *without investigation.*"[15] (Emphasis supplied.)

A rule that further investigation is not required where there is sufficient evidence that a crime was committed and the accused probably committed it would also ignore, as again set forth in the com-

[13] *Ante,* p 435.

[14] *Ante,* p 436.

[15] 3 Restatement Torts, 2d, § 662, comment on clause (c), p 428.

mentary to the Restatement, that "[i]n determining whether a person has probable cause for initiating criminal proceedings upon the facts known or reasonably believed by him to exist, the character of the accused as it is known *or should be known* to the accuser by reputation or experience is a *highly important factor.*"[16] (Emphasis supplied.)

B

It appears that Koski was a man of good reputation. He had worked for many years as a news reporter for various newspapers and radio stations. For three years, he had worked with the Michigan State Police Troopers Association where his duties included editing a monthly tabloid for the state police.

Because Daniel thought that there was no need to investigate further after one of the officers of the MHPOA had contradicted Koski's assertion that he had been authorized to accept, endorse, and use the proceeds of checks made out to the order of the MHPOA, Daniel saw no need to examine the books and records of the MHPOA or of Koski. Koski had asked Daniel to do so and had suggested to Daniel that the money shortage might have been due to misuse of MHPOA money by an officer of the association.

Whether or not such a further investigation was warranted or would have been productive is, of course, a matter of judgment, a judgment which the majority of the Court has concluded, contrary to *Thompson v Price,* 100 Mich 558, 561; 59 NW 253 (1894),[17] is for the court rather than a jury to make.

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[16] 3 Restatement Torts, 2d, § 662, comment h on clause (a), p 426.

[17] The supervisor of a township had been arrested on a charge of having wilfully neglected to require from a resident taxpayer a statement of his taxable property. After the conclusion of the prosecu-

In all events, it is not correct to say or suggest that when there is evidence sufficient to show that the requisite acts constituting the criminal offense have probably been committed by the accused further investigation is not required where there is contradictory evidence concerning the accused's defense.

The danger of such a rule is illustrated by the facts of this case where Daniel was told that Koski was not authorized to endorse the checks or use the proceeds by an officer of the MHPOA who, it was ultimately determined, had been embezzling funds of the MHPOA, but for whose misconduct the chain of events that led to Koski's prosecution probably would not have occurred.

C

The majority, on the basis of its assessment of the record, concludes that Daniel reasonably believed that Koski had acted in the manner charged and that those acts constituted the offense he charged Koski with committing. It is unclear whether the majority also concludes that Daniel was sufficiently informed as to the *facts* to justify him in initiating the prosecution, the majority apparently or possibly being of the view that no more is required to establish that there was probable cause. Be that as it may, it is clear that Daniel was not sufficiently informed as to the *law* to justify him in initiating the prosecution.

Daniel was a layman. As also set forth in the commentary to the black letter of the Restate-

tion, the supervisor commenced an action against the complaining witness for malicious prosecution. This Court held that "it was at least a question for the jury" whether the defendant was justified in initiating the prosecution "without making inquiry, direct, of the only person who was cognizant of the facts," the taxpayer.

ment, "[i]n the ordinary case a layman, aware of his own ignorance of the law, will not be justified in initiating the proceedings unless he has been advised to do so by an attorney, in which case he will be protected"[18] if advice is "sought in good faith" and "given after a full disclosure of the facts within the accuser's knowledge and information."[19] If, however, "the layman elects to proceed without this advice, he is ordinarily not acting as a reasonable man and does not have probable cause, since he knows or reasonably ought to know that he does not" "have sufficient information to justify him in taking the step."[20]

Thus, even if Daniel correctly or reasonably

[18] 3 Restatement Torts, 2d, § 662, comment i on clause (b), p 427.

[19] 3 Restatement Torts, 2d, § 666, p 433.

[20] 3 Restatement Torts, 2d, § 662, comment i on clause (b), p 427. Judicial decisions so holding include *Bain v Phillips,* 217 Va 387; 228 SE2d 576 (1976); *Higgins v Pratt,* 316 Mass 700; 56 NE2d 595 (1944); *Vasser v Berry,* 85 Ga App 435; 69 SE2d 701 (1952); see also *Rose v Whitbeck,* 277 Or 791; 562 P2d 188 (1977); *Brown v Kisner,* 192 Miss 746; 6 So 2d 611 (1942).

> There may, however, be situations in which a layman, even without the advice of counsel, may reasonably believe that he has enough information about the law of the matter to justify him in going ahead. This may be true, for example, if he knows that there is a statute on the books which by its terms clearly makes the conduct in question a crime, and the accused escapes conviction only because the statute is for the first time held to be unconstitutional. In the absence of information to the contrary, the layman is justified in assuming that any statute is valid, and if its terms are clearly applicable to the facts he has probable cause for his action. The same is true when the accused escapes conviction only because the statute is construed by the court in a manner not readily apparent upon its face to be inapplicable to the facts. There may be similar situations in which the conviction fails because of refinements of law that the reasonable layman could not be expected to know or to anticipate and on which he could not reasonably be expected to seek advice. Examples are the lack of jurisdiction of an inferior court over offenses of a particular kind or borderline distinctions in the degrees of larceny provided by particular statutes. [3 Restatement Torts, 2d, § 662, comment i on clause (b), p 427.]

believed that he was sufficiently informed concerning the facts to justify him in initiating the prosecution,[21] he did not act as a reasonable person and did not have probable cause to initiate the criminal prosecution against Koski unless he made full disclosure of the facts within his knowledge and information to an attorney—in this case, because he dealt with no other attorney, the prosecuting attorney.

IV

Daniel acknowledged at the trial that he mainly considered the way the checks were made payable, the way they were endorsed, and how the funds were used. When Daniel requested the prosecutor to issue a warrant for Koski's arrest, he presented three checks endorsed by Koski, an incident report, and his own written report which did not disclose Koski's claim that he was authorized to endorse the checks and use the proceeds without running them through the MHPOA account.

The majority states:

> Although Mr. Daniel stated that he would have had no reason to specifically tell the prosecutor of Mr. Koski's claim of right to the money, he did state that the transcribed interview of Mr. Koski by Mr. Daniel *would have been given* to the prosecuting attorney. Further, Richard Thompson, the prosecutor who authorized the charge, testified that the interview was in the prosecutor's *file* and that an assistant prosecutor *routinely* goes over the documentation in the file. It is well-settled that one who makes a full and fair disclosure to the prosecutor is not subject to an action for malicious prosecution. *Modla v Miller,* [344 Mich 21; 73 NW2d 220 (1955)]. In this case, the trial court could have correctly concluded that Mr. Daniel did

[21] See n 9.

so and directed a verdict on that basis.[22] [Emphasis supplied.]

Although it is indeed ordinarily the function of the court to determine whether the defendant had probable cause for initiating the proceedings, it is "for the jury to find whether the accused laid before the attorney all the facts he knew or of which he had reliable information . . . ."[23]

A jury is not required to accept even the uncontradicted testimony of a disinterested witness.[24] Neither Daniel nor the assistant prosecutor can, in all events, properly be regarded as disinterested witnesses. Daniel was a defendant, and the assistant prosecutor's superior, the Oakland County Prosecutor, was also a defendant.[25]

It was for the jury to decide whether Daniel did in fact deliver a copy of the transcribed interview with Koski to the assistant prosecutor, whether if this was done at all it was done before the warrant was issued, and whether the manner and time of delivery was such as to constitute presenting "all the facts" for advice before the warrant was issued.

In sum, it was for the jury to decide whether "all the facts" that Daniel knew or "of which he had reliable information" were presented to the assistant prosecutor before the warrant was issued. Daniel, absent such a full disclosure, would not have acted reasonably in initiating the criminal

[22] *Ante,* p 439.

[23] 3 Restatement Torts, 2d, § 666, comment g on clause (b), p 437; *Webster v Fowler,* 89 Mich 303, 304; 50 NW 1047 (1891).

[24] See *People v Jackson,* 390 Mich 621, 625; 212 NW2d 918 (1973); *Woodin v Durfee,* 46 Mich 424, 427; 9 NW 457 (1881).

[25] At the conclusion of the plaintiff's proofs, the judge directed a verdict in favor of all the defendants, including the Oakland County Prosecutor. The Court of Appeals affirmed as to all the defendants except Daniel. The issues on this appeal concern only Daniel.

prosecution against Koski because, as a layman, Daniel was not sufficiently informed concerning the law to initiate the prosecution absent advice to do so by an attorney. The majority therefore errs in concluding that Daniel had probable cause simply because, in its assessment of the record, he was sufficiently informed of the facts to justify him in concluding that Koski had acted in the manner charged and that those acts constituted the offense charged.

I would remand to the trial court for further proceedings consistent with this opinion.

CAVANAGH and ARCHER, JJ., concurred with LEVIN, J.

AUTOMATIC MUSIC AND VENDING CORPORATION v LIQUOR CONTROL COMMISSION

Docket No. 76285. Argued October 9, 1986 (Calendar No. 15). Decided November 24, 1986.

Officers of the Liquor Control Commission confiscated a draw poker machine as a gambling device from and brought a complaint before the Liquor Control Commission against the Fraternal Order of Eagles, Sanford Aerie, No. 3677. The commission found the machine to be an illegal gambling device under MCL 750.303; MSA 28.535, and the Liquor Control Commission Appeal Board affirmed. Automatic Music and Vending Corporation, the owner of the machine, and the Sanford Eagles Club, brought an action in the Ingham Circuit Court seeking superintending control. The court, Robert Holmes Bell, J., reversed, finding that free replays do not constitute a reward and are not gaming as statutorily defined. The Court of Appeals, CYNAR and GILLESPIE, JJ. (D. E. HOLBROOK, JR., P.J., concurring), affirmed, holding that the draw poker machine was not a gaming device and that MCL 750.303(2); MSA 28.535(2) was unconstitutional (Docket No. 71889). The commission appeals.

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

The draw poker machine at issue in this case is an illegal gaming device under MCL 750.303(1); MSA 28.535(1) and does not qualify for an exemption under MCL 750.303(2); MSA 28.535(2). The statutory exemption is constitutional.

1. Gaming (or gambling) requires the presence of three elements: price or consideration, chance, and prize or reward. A machine which encompasses these elements is a machine used for gaming under MCL 750.303(1); MSA 28.535(1). The draw poker machine at issue in this case is a gambling device as defined by the statute. It requires money to play, employs

REFERENCES

Am Jur 2d, Gambling § 10 *et seq.*

Coin-operated pinball machine or similar device, played for amusement only or confining reward to privilege of free replays, as prohibited or permitted by antigambling laws. 89 ALR2d 815.

chance in the random distribution of cards, and provides a reward in the form of free replays. The machine does not qualify as an exempt amusement device because it allows the accumulation of more than fifteen replays, allows free replays to be discharged without actually being played, and keeps a record of the number of free replays awarded, contrary to the provisions of MCL 750.303(2); MSA 28.535(2).

2. The exemption provided under the statute for certain devices does not deny equal protection. The requirements for exemption are reasonably related to a legislative goal. A classification having some reasonable basis does not offend the Equal Protection Clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. Nor is the statute unconstitutionally vague. The meanings of the enumerated exemption requirements are obvious and comprehensible.

Reversed.

141 Mich App 458; 367 NW2d 413 (1985) reversed.

1. LICENSES — GAMING DEVICES — DRAW POKER MACHINES.

A draw poker machine which required insertion of money to play, employed chance in the random distribution of playing cards, and provided a reward in the form of free replays, and which did not qualify as an exempt amusement device because it allowed the accumulation of more than fifteen replays, allowed free replays to be discharged without actually being played, and kept a permanent record of the number of free replays awarded was an illegal gaming device (MCL 750.303[1], [2]; MSA 28.535[1], [2]).

2. CONSTITUTIONAL LAW — EQUAL PROTECTION — VAGUENESS — GAMING DEVICES — AMUSEMENT DEVICES.

The provision of the Penal Code which exempts from the statutory proscription of gaming devices mechanical amusement devices which, through application of an element of skill, reward a player with free replays of the device, and which do not allow more than fifteen replays or the discharge of free replays without actually being played or keep a permanent record of the replays awarded is not unconstitutionally vague (US Const, Am XIV; Const 1963, art 1, § 17; MCL 750.303[1], [2]; MSA 28.535[1], [2]).

Cooper & Fink (by *Daniel S. Cooper, P.C., Mark J. Zausmer,* and *David H. Fink, P.C.*) for the plaintiffs.

Frank J. Kelley, Attorney General, *Louis J. Caruso,* Solicitor General, and *Frank J. Pipp, Larry F. Brya, Kevin Thom,* and *James L. Stropkai,* Assistant Attorneys General, for the defendant.

WILLIAMS, C.J. The issue in this case is whether a draw poker machine is an illegal gaming device under MCL 750.303; MSA 28.535. We hold that the machine in question is an illegal device under that statute. We also reject plaintiff's challenges to the constitutionality of the statute.

FACTS

The facts are accurately and concisely summarized in the opinion of the Court of Appeals, 141 Mich App 458, 461-462; 367 NW2d 413 (1985):

> Early in 1982, officers of the Michigan Liquor Control Commission became aware that the Sanford Eagles Club had a "draw poker" video machine in the club. This machine has five windows. When twenty-five cents is inserted in the machine, a playing card appears in each window. Below each window is a button. If a player is dissatisfied with the card first appearing in a window, he may press the button under that card and the first card will disappear and be replaced by another card.
>
> The machine has two counters on the inside, one which keeps track of the number of quarters placed into the machine and the other which keeps track of the number of free replays erased off the machine without playing them. The device also has a key mechanism which can erase free replays without the replays being played.
>
> Once a satisfactory hand is established, the game is played as five-card draw poker. When certain hands are obtained, credits are given which entitle the player to free plays.

On March 30, 1982, the local inspector for the MLCC, Robert Basket, and his supervisor, Donald French, went to the Sanford Eagles Club and played the machine. Supervisor French won 54 free games on that date.

The officers asked the bartender, Lydia Oswald, if the games could be traded for cash. She informed them that the Eagles did not pay off in cash but only in free replays.

On May 25, 1982, the same Liquor Control Commission officers returned to the club and played the machine. After this the officers confiscated the machine as a gambling device and issued a complaint with the Michigan Liquor Control Commission against the Sanford Eagles Club. A hearing was held before Hearing Commissioner Andrew Metcalf, Jr., who rendered an opinion on December 1, 1982, finding the machine to be a game "partly of skill and partly of chance" and an unlawful gambling device under MCL 750.303(1) and 1980 AACS R 436.1013(2). Commissioner Metcalf also ruled that Automatic Music and Vending Corporation could not intervene in the hearing as it was not an involved party. The commissioner ordered a fine of $250 and costs. He did not confiscate the machine.

Commissioner Metcalf's decision was upheld by the commission on appeal in January, 1983.

Automatic Music then applied to the circuit court for Ingham County for an order of superintending control to review the actions of the commission. Judge Robert Holmes Bell, in a terse order, reversed the commission and found that free replays do not constitute a reward and are not gaming as defined by MCL 750.303; MSA 28.535.

The Court of Appeals affirmed the order of the circuit court and held: (1) that the draw poker machine was not a gaming device, and (2) that MCL 750.303(2); MSA 28.535(2) was unconstitutional. This Court granted leave to appeal, 424 Mich 877 (1986).

I. STATUTORY PROVISIONS

The plaintiff, the Fraternal Order of Eagles, holds a club license issued by the Michigan Liquor Control Commission. As the holder of a club license, plaintiff is subject to regulation 1980 AACS, R 436.1013 which provides in part:

> A licensee shall not allow any gambling devices on the licensed premises which are prohibited by the statutes of this state.

MCL 750.303; MSA 28.535, the statute which discusses gambling devices, provides in relevant part:

> (1) A person who for hire, gain, or reward, keeps or maintains a gaming room, gaming table, game of skill or chance, or game partly of skill and partly of chance, used for gaming, or who permits a gaming room, or gaming table, or game to be kept, maintained, or played on premises occupied or controlled by the person, is guilty of a misdemeanor, punishable by imprisonment for not more than 2 years, or a fine of not more than $1,000.00. . . .
>
> (2) This section shall not apply to a mechanical amusement device which may through the application of an element of skill reward the player with the right to replay the mechanical device at no additional cost if the mechanical amusement device is not allowed to accumulate more than 15 replays at 1 time; the device is designed so that accumulated free replays may only be discharged by reactivating the device for 1 additional play for each accumulated free replay; and the device makes no permanent record directly or indirectly of the free replays awarded.

A. ANALYSIS OF MCL 750.303(1); MSA 28.535(1)

Since MCL 750.303(1); MSA 28.535(1) does not

define the term "gaming,"[1] we refer to the common-law definition which requires the presence of three elements: (1) price or consideration, (2) chance, and (3) prize or reward. 89 ALR2d 815, 827. See also *State v Pinball Machines,* 404 P2d 923, 925 (Alas, 1965); *Farina v Kelly,* 147 Conn 444, 449-450; 162 A2d 517 (1960); *State v Paul,* 43 NJ Super 396, 402-404; 128 A2d 737 (1957); *Westerhaus Co v Cincinnati,* 165 Ohio St 327, 335-336; 135 NE2d 318 (1956). Therefore, a machine which encompasses these three elements is a machine "used for gaming" under MCL 750.303(1); MSA 28.535(1).

With respect to the draw poker machine which is the subject of this dispute, both parties agree that consideration, in the form of the money needed to play the game, and chance, in the random distribution of the cards, are present. The more controversial issue is whether or not a free game constitutes a reward or prize. This issue has previously been considered and decided by this Court.

In *Oatman v Port Huron Chief of Police,* 310 Mich 57, 59; 16 NW2d 665 (1944), we held that "[s]ince these free plays, the testimony shows, would ordinarily cost the player five cents each, the opportunity to have free plays is a thing of value." See also *Henry v Kuney,* 280 Mich 188, 192; 273 NW 442 (1937).

> "[W]here there is an element of chance in the operation of the slot machine—where the one who plays the machine stands to win or lose money, *trade checks,* or prizes, by a chance,—the machine is a gambling device . . . ." [Emphasis added.]

[1] In accordance with the generally accepted view that the terms "gaming" and "gambling" are synonymous, they are used interchangeably. See, e.g., Black's Law Dictionary (5th ed), which defines "gaming" as "the practice or art of gambling."

We see no reason to reverse this decision as we are not persuaded that changes in the amusement machine industry have rendered the statute meaningless.[2] Therefore, the draw poker machine is a gambling device under MCL 750.303(1); MSA 28.535(1).

B. RELEVANCE OF THE STATUTORY EXCEPTION

In 1975, the Legislature amended MCL 750.303; MSA 28.535 and added subsection 2. That section provides for the exemption of certain devices from subsection 1. The exemption states that it

> *shall not* apply to a mechanical amusement device which may through the application of an element of skill reward the player with the right to replay the mechanical device at no additional cost if the mechanical amusement device is not allowed to accumulate more than 15 replays at 1 time; the device is designed so that accumulated free replays may only be discharged by reactivating the device for 1 additional play for each accumulated free replay; and the device makes no permanent record directly or indirectly of the free replays awarded.

The draw poker game at issue does not qualify for this exemption because: (1) it allows the accumulation of more than fifteen replays, (2) there is a button on the machine which can discharge all the free replays, and (3) there is a permanent

[2] Numerous cases decided since the *Oatman* decision have reached the conclusion that a free replay is a thing of value. See, e.g., *State v Pinball Machines, supra* at 926; *State v Lake Geneva Lanes,* 22 Wis 2d 151, 153-154; 125 NW2d 622 (1963); *Worl v State of Indiana,* 243 Ind 116, 122; 183 NE2d 594 (1962); *Farina, supra* at 449-450; *State v Paul, supra* at 402-404; *State v Sandfer,* 93 Okla Crim 228, 234-235; 226 P2d 438 (1951); *State v Doe,* 242 Iowa 458, 463-464; 46 NW2d 541 (1951). See also *Commonwealth v Two Electronic Poker Game Machines,* 502 Pa 186, 195-196; 465 A2d 973 (1983) (holding a free game in the presence of other factors such as a "knock off" button and a meter to record unplayed free games was a thing of value).

record kept in the machine of the number of free replays awarded.

II. CONSTITUTIONALITY OF THE STATUTORY EXCEPTION

The Court of Appeals held that MCL 750.303(2); MSA 28.535(2) unconstitutionally denies equal protection and is unconstitutionally vague. We disagree with both findings.

A. EQUAL PROTECTION CHALLENGE

The Court of Appeals correctly stated that the appropriate test for an equal protection claim under both the Michigan and the United States Constitutions is whether the legislation bears a reasonable relationship to a legitimate goal of the Legislature. As we stated in *Johnson v Harnischfeger Corp,* 414 Mich 102, 114; 323 NW2d 912 (1982), in challenging a statute on equal protection grounds, a plaintiff must show that the classifications created "are so arbitrary that they cannot be supported under any state of facts, either known or which could reasonably be assumed." See also *Shavers v Attorney General,* 402 Mich 554, 613; 267 NW2d 72 (1978); *Mutchall v Kalamazoo,* 323 Mich 215, 227; 35 NW2d 245 (1948).

It appears that the Court of Appeals in this case found that the distinction made in the statute between machines which allow fifteen or fewer free replays and those which allow more was unconstitutionally arbitrary. We cannot agree. The Legislature may reasonably believe that the larger the number of free replays available, the greater the incentive to make cash payoffs. As the existence of such payoffs may be difficult to prove, the Legislature strove to avoid the problem simply by allowing only a small number of replays to accu-

mulate on these machines. The fact that the Legislature picked a particular number as the dividing line is a matter purely within its discretion.

As we have noted in the past, "A classification having some reasonable basis does not offend [the Equal Protection] clause merely because it is not made with mathematical nicety or because in practice it results in some inequality." *Naudzius v Lahr,* 253 Mich 216, 222-223; 234 NW 581 (1931).

B. VAGUENESS CLAIM

In its review of MCL 750.303(2); MSA 28.535(2), the Court of Appeals also found that the language used was vague. The Court stated:

> We are unable to fathom what the Legislature meant by 15 games. What is meant by one replay? What is the purpose of prohibiting a "knock off" button or making recordation of free games illegal. [141 Mich App at 466.]

We find these objections unpersuasive. Obviously, one replay is a single game awarded by the machine. A "knock off" button is a button which allows free replays to be discharged without actually being played thus violating that section of the statute which requires free replays to be discharged only by reactivating the machine for one additional play. The statutory requirement that exempt machines keep no permanent record of the free replays is likewise perfectly comprehensible.[3]

[3] In prohibiting "knock off" buttons and the recording of free replays, the Legislature was attempting to make it more difficult for the owners of machines to make cash payoffs. See, e.g., *United States v One Bally "Barrel-O-Fun",* 224 F Supp 794, 797-798 (MD Pa, 1963):

> "The knock-off button for releasing free plays and the meter for recording the free plays released . . . serve no useful purpose on a machine designed merely for amusement and they

We do not find the language of the statute unconstitutionally vague.

CONCLUSION

We hold that the draw poker machine at issue is an illegal gaming device under MCL 750.303(1); MSA 28.535(1) and that it does not qualify for an exception under MCL 750.303(2); MSA 28.535(2). We hold the statutory exception constitutional. The decision of the Court of Appeals is reversed.

LEVIN, BRICKLEY, CAVANAGH, BOYLE, RILEY, and ARCHER, JJ., concurred with WILLIAMS, C.J.

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increase the cost of the machine without increasing the income from the machine when used for amusement." [Quoting *Turner v United States,* 9 AFTR2d 2031 (1962).]

Peachey v Boswell, 240 Ind 604, 614; 167 NE2d 48 (1960) ("It seems apparent that it would be much more improbable that *unrecorded* free games might be exchanged for money or other things of value . . . ."). Emphasis in the original; citing *Tinder v Music Operating, Inc,* 237 Ind 33, 55; 142 NE2d 610 (1957); *Eads v J & J Sales Corp,* 257 Ind 485, 487; 275 NE2d 802 (1971), suggesting that a device which records replays awarded may be used to compute payoffs.

SHERIDAN ROAD BAPTIST CHURCH v DEPARTMENT OF EDUCATION

Docket No. 73665. Argued November 13, 1985 (Calendar No. 14). Decided November 24, 1986. Rehearing denied 427 Mich 1202.

The Sheridan Road Baptist Church and the First Baptist Church of Bridgeport and their pastors, parents of children attending schools run by the churches, and certain members of the faculties of the schools brought an action in the Ingham Circuit Court against the Department of Education, seeking a declaration that the requirement of the nonpublic schools statute that teachers in nonpublic schools be certified by the state is unconstitutional. The court, Ray C. Hotchkiss, J., found the certification requirements unconstitutional as interfering with the plaintiffs' rights to the free exercise of religion and creating excessive government entanglement with religion. The Court of Appeals, M. J. KELLY, P.J., and HOOD and SHEPHERD, JJ., reversed, holding that the requirements violated neither the Free Exercise nor the Establishment Clauses of the First Amendment of the United States Constitution (Docket No. 69050). The plaintiffs appeal.

The judgment of the Court of Appeals is affirmed by an equally divided Court.

Chief Justice WILLIAMS would hold that the interest of the state in ensuring that all teachers meet certain minimum requirements outweighs the slight burden placed on the plaintiffs' rights to the free exercise of religion by the certification requirements. As applied, the requirements are not discriminatory and do not require adherence to a particular religious outlook. They are not violative of the Establishment Clause; nor do they lead to excessive entanglement of church and state.

1. To teach in a school in Michigan, a teacher must be certified by the State Board of Education as meeting certain minimum requirements promulgated by the board. Objections to state regulations on the ground that they violate a person's right to the free exercise of religion are analyzed by determining whether the plaintiff's claims are rooted in religious beliefs; whether the regulation infringes upon the plaintiff's right; if so, whether any incidental burden on the right is justified by a compelling state interest in the regulation; and whether a less

obtrusive form of regulation is available to the state. Where an objection to a regulation is raised on the ground that it is violative of the Establishment Clause, the state must show that it has a secular legislative purpose for the requirement, that the regulation's principal, primary effect neither advances nor inhibits religion, and that it does not foster an excessive government entanglement with religion.

2. In this case, while the plaintiffs' objections are premised on their religious beliefs, any minimal infringement on their right of free exercise of religion is outweighed by the compelling interest of the state in furthering the education of its citizens through competent teachers by requiring teacher certification. As applied, the certification requirements do not enable the board to discriminate on the basis of religious belief. No less intrusive method of satisfying the state's interest was shown. The regulations at issue have a secular purpose and do not have the primary effect of advancing or inhibiting religion. In addition, it is clear that the certification requirements do not impermissibly entangle government with religion. The state merely enforces minimum standards with regard to persons who wish to teach. Once a teacher is certified, there is no continuing relationship between the government and the churches and schools.

Justice BOYLE, joined by Justice BRICKLEY, concurring with Chief Justice WILLIAMS, would hold that at issue primarily in this case is whether the teacher certification requirement imposed by the state impinges upon the plaintiffs' First Amendment right of freedom of religion. In evaluating free exercise claims, it must be determined whether the government has shown that an unusually important interest is at stake and that the granting of an exemption to the challenged requirement would do substantial harm to the interest. Application of the standard, at a minimum, must involve a balancing process, requiring great circumspection in weighing the state's legitimate social interest and the request for religious exemption.

1. The Freedom of Religion Clause of the First Amendment embraces the freedom to believe and the freedom to act. The freedom to believe is absolute, but the freedom to act is subject to regulation. Where the state regulates conduct by enacting a neutral law within its power for the purpose and effect of furthering its secular goals, the statute may be valid despite an indirect burden on religious conduct unless the purpose may be achieved through less burdensome means.

2. The standard for determining free exercise claims involves a balancing that countenances shifting burdens of persuasion

in proportion to the proofs admitted at trial. A mathematically certain formula cannot be created which will account for the internal evaluation of each factor and its relative weight with respect to each other factor. The essential judicial task is to evaluate the asserted conflicts between private rights and public interests to ensure that neither is compromised or destroyed.

3. In this case, the teacher certification requirements constitute, at most, an indirect and minimal burden on the plaintiffs' free exercise rights, and the interest of the state is of such a high order as to override the interest for which protection is claimed. Alone, the regulation compels the plaintiffs neither to refrain from religiously motivated conduct nor to engage in conduct they find objectionable. The requirements represent a compelling state interest and a state regulation narrowly drawn to achieve the broader goal of quality education. The alternative offered by the plaintiffs does not fulfill the prophylactic goal of the state requirement to prevent children from being exposed to unqualified teachers.

Justice RILEY, joined by Justices LEVIN and CAVANAGH, would hold that the plaintiffs' religious practice with regard to employment of teachers is protected by the First Amendment, and the regulation as applied is constitutionally suspect. The trial court found that the plaintiffs' refusal to comply with the certification requirement is based upon sincerely held religious beliefs and that the requirement affirmatively interferes with the free exercise of those beliefs. The crucial question is whether the state established that enforcement of the requirement is essential to the fulfillment of a compelling governmental interest. It was incumbent upon the state to show that exempting the plaintiffs would unduly impair its interest in compulsory education and that enforcing the requirement is the least intrusive means by which to accomplish the objective. The state failed to meet its burden. The record firmly establishes that accommodating the plaintiffs' religious practice with regard to the hiring of teachers will have no adverse effect on the state's interest in compulsory education, and that less intrusive means are available by which the state could adequately supervise and ensure the future fulfillment of the legitimate public interests underlying the compulsory education law. Establishing that the teacher certification regulation is rationally related to the state's interest is insufficient to demonstrate the necessity of overriding the plaintiffs' First Amendment rights. The teacher certification employment regulation alone, however, does not violate the Establishment Clause.

Justice ARCHER took no part in the decision of this case.

132 Mich App 1; 348 NW2d 263 (1984) affirmed by equal division.

Ball & Skelly (by *William Bentley Ball, Philip J. Murren,* and *Sandra E. Wise*) and *Michael E. Thomas* for the plaintiffs.

Frank J. Kelley, Attorney General, *Louis J. Caruso,* Solicitor General, and *Gerald F. Young* and *Paul J. Zimmer,* Assistant Attorneys General, for the defendants.

Amici Curiae:

Steven F. McDowell, General Counsel, and *Lawson, Marcus & Portko* (by *Jeffrey R. Portko*) for Catholic League for Religious and Civil Rights.

Foster, Swift, Collins & Coey, P.C. (by *James A. White* and *William K. Fahey*), for Michigan Education Association.

Miller, Cohen, Martens & Ice, P.C. (by *Mark H. Cousens* and *Glenda L. Pittman*), for Michigan Federation of Teachers, AFL-CIO.

WILLIAMS, C.J. This case involves primarily a free exercise of religion challenge based on the First, Ninth, and Fourteenth Amendments of the United States Constitution and art 1, § 4, and art 8, § 1, of the Michigan Constitution[1] to the state

[1] United States constitutional provisions:

I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

XIV. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

statute requiring teachers in nonpublic schools to be certified by the state. The lower court also found that the regulations resulted in an Establishment Clause violation.

Specifically, the free exercise challenge is in two parts. The first part is phrased as follows in plaintiffs' reply brief:

> To repeat: the Churches' point is not that a certified teacher may not teach in the Churches' schools' [sic]; it is that restricting the freedom of churches to engaging *only* government-certified teachers in its school ministry is abhorrent to their Scriptural beliefs. It is not for the State to play theologian in this matter. [Emphasis in original.]

The second part involves objections to the teacher certification rules. The plaintiffs' reply brief states:

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shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan constitutional provisions:

> 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 beliefs. [Const 1963, art 1, § 4.]
>
> Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. [Const 1963, art 8, § 1.]

> [T]he certification rules . . . intrude upon or threaten the operation of the church-schools in their selection of their teachers . . . . [T]he rules clearly evidence reservation of the ultimate State subjective control over important aspects of the making of a teacher in areas portending deep philosophical and religious differences between the plaintiff church-schools and prevailing secular philosophies concerning education matters. See, e.g. Roth testimony *supra* re "skills essential to . . . inquiry in modern society."[2]

Using the balancing analysis developed by the United States Supreme Court in *Wisconsin v Yoder,* 406 US 205; 92 S Ct 1526; 32 L Ed 2d 15 (1972), and *Sherbert v Verner,* 374 US 398; 83 S Ct 1790; 10 L Ed 2d 965 (1963), we find that the state's interest in ensuring that *all* teachers have met certain minimum requirements outweighs the slight burden the regulatory scheme poses to plaintiffs' free exercise rights. As applied, we find that the certification requirements are not discriminatory and do not require plaintiffs to adhere to any particular religious outlook. We also find that there is no Establishment Clause violation as the regulations do not lead to excessive entanglement between church and state.

We decline to reach the other issues initially raised by the plaintiffs as it appears they are no

[2] Another issue raised in the briefs is the applicability of the emergency teacher permit provision. Defendants suggest that if religious schools were unable to find certified teachers who also met their religious qualifications, 1979 AC, R 390.1145 would allow emergency permits to be issued. Plaintiffs respond by noting that the regulation gives the *public* school authorities the ability to recommend that such permits be issued. They express some doubt about whether these officials would define emergency so as to include situations in which state certified and religiously qualified applicants were unavailable.

Because there is no evidence in the record that there is a shortage of certified teachers deemed religiously qualified by the plaintiffs or that the plaintiffs have been unable to fill their teaching positions, we offer no opinion as to the applicability of this provision in those circumstances.

longer in controversy. Plaintiffs, both at oral argument and in their brief, and defendants at oral argument, indicated that there was agreement between the church and the state on the other points.[3]

I. FACTS

In September, 1979, the Department of Education, acting under the authority of the state's nonpublic school statute, 1921 PA 302, MCL 388.551 *et seq.*; MSA 15.1921 *et seq.*,[4] sought to

[3] Both state and church herein are agreed that, as the State interprets the Michigan statutes, no constitutional issue with respect to curriculum, licensing, or the reporting of enrollment or courses of study is presented.

[4] PRIVATE, DENOMINATIONAL, AND PAROCHIAL SCHOOLS
Act 302, 1921, p 560; eff August 18.

AN ACT to provide for the supervision of private, denominational and parochial schools; to provide the manner of securing funds in payment of the expense of such supervision; to provide the qualifications of the teachers in such schools; and to provide for the endorsement of the provisions hereof.

The People of the State of Michigan enact:

Sec. 1. The superintendent of public instruction is hereby given supervision of all the private, denominational and parochial schools of this state in such matters and manner as is hereinafter provided. He shall employ such assistants and employes as may be necessary to comply with the provisions hereof and fix the compensation thereof; the number of assistants and employes and the compensation payable thereto being subject to the approval of the state administrative board. Such salaries and expenses shall be paid by the treasurer of the state of Michigan upon the warrant of the auditor general from the fund as herein designated, at such time and in such manner as other state officers and employes are paid. The superintendent of public instruction shall have the authority to remove any appointee under this act at any time that he may deem such removal advisable. It is the intent of this act that the sanitary conditions of such schools, the courses of study therein, and the qualifications of the teachers thereof shall be

of the same standard as provided by the general school laws of the state. [MCL 388.551; MSA 15.1921.]

Sec. 2. A private, denominational or parochial school within the meaning of this act shall be any school other than a public school giving instruction to children below the age of 16 years, in the first 8 grades as provided for the public schools of the state, such school not being under the exclusive supervision and control of the officials having charge of the public schools of the state. [MCL 388.552; MSA 15.1922.]

Sec. 3. No person shall teach or give instruction in any of the regular or elementary grade studies in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public schools of the state: Provided, however, That any person who shall have taught in any elementary school or schools of the standard specified in this act for a period of 10 years or more preceding the passage of this act, shall, upon filing proof of service with the superintendent of public instruction, be entitled to a certificate by said superintendent of public instruction in such form as he shall prescribe, to teach in any of the said schools within the state: Provided further, That teaching in such schools shall be equivalent to teaching in the public schools for all purposes in obtaining a certificate: Provided further, That the teachers affected by this act may take any examination as now provided by law and that the superintendent of public instruction may direct such other examinations at such time and place as he may see fit. In all such examinations 2 sets of questions shall be prepared in subjects ordinarily written on Saturday, 1 of which sets shall be available for use on Wednesday by applicants who observe Saturday as their Sabbath; Provided further, That any certificate issued under or by virtue of this act shall be valid in any county in this state for the purpose of teaching in the schools operated under this act; Provided further, That any person holding a certificate issued by the authorities of any recognized or accredited normal school, college or university of this or other state shall be entitled to certification as now provided by law: Provided, however, That teachers employed in such private, denominational or parochial schools when this act takes effect shall have until September first, 1925, to obtain a legal certificate as herein provided. [MCL 388.553; MSA 15.1923.]

Sec. 4. In event of any violation of this act the superintendent of public instruction shall serve the person, persons, corporation, association or other agencies who operate, maintain and conduct a private, denominational or parochial school within the meaning of this act with a notice, time and place of hearing, such hearing to take place within 15 days after the date of said notice and at a place located in or conveniently near the county where such violation took place, accompanied by a copy of the complaint stating the substance of said violation: Provided, That no person shall be called to attend any such hearing on any day observed by him as the Sabbath.

obtain information about student enrollment and teacher qualifications from two church schools. The schools refused to comply with the requests,

If at such hearing the superintendent of public instruction shall find that the violation complained of has been established he shall then serve said person, persons, corporation, association or other agencies with an order to comply with the requirements of this act found to have been violated within a reasonable time not to exceed 60 days from the date of such order: Provided, That in the event that such order refers to sanitary conditions that the said person, persons, corporation, association or other agencies shall have 6 months in which to remedy the defect. If the order of the superintendent of public instruction as specified in said notice shall not have been obeyed within the time specified herein said superintendent of public instruction may close said school and prohibit the said person, persons, corporation, association or other agencies operating or maintaining such private, denominational or parochial school from maintaining said school or from exercising any of the functions hereunder until said order of the superintendent of public instruction has been complied with. The children attending a private, denominational or parochial school refusing to comply with the requirements hereof after proceedings herein set forth shall be compelled to attend the public schools or approved private, denominational or parochial school under the provisions of the compulsory education act, the same being Act. No. 200 of the Public Acts of 1905, as amended. And it shall be the duty of the person or persons having charge of the enforcement of the said compulsory education act, upon notice from the superintendent of public instruction that said private, denominational or parochial school has not complied with the provisions hereof, to compel the attendance of the children of said school or schools at the public schools or approved private, denominational or parochial school. [MCL 388.554; MSA 15.1924.]

Sec. 5. The superintendent of public instruction by himself, his assistants, or any duly authorized agent, shall have authority at any time to investigate and examine into the conditions of any school operating under this act as to the matters hereinbefore set forth and it shall be the duty of such school to admit such superintendent, his assistants or authorized agents and to submit for examination its sanitary condition, the records of enrollment of pupils, its courses of studies as set forth in section 1 of this act and the qualifications of its teachers. Any refusal to comply with provisions herein on the part of such school or teacher shall be considered sufficient cause to suspend the operation of said school after proceedings taken as stated in section 4 of this act.

and, as a result, the state scheduled an administrative hearing to determine whether the schools were in violation of the statute.

On December 6, 1980, the schools, the church pastors, members of the schools' faculties, and parents of children enrolled in the schools filed a declaratory action in the Ingham Circuit Court, alleging that the statute which the state sought to enforce was unconstitutional on the basis of the First, Ninth, and Fourteenth Amendments of the United States Constitution, and art 1, § 4, and art 8, § 1, of the Michigan Constitution. Plaintiffs' request for a restraining order was granted, but subsequently vacated, after the state agreed to take no further action until the case was decided. On February 12, 1981, the defendants filed a counterclaim requesting that the court declare the nonpublic school statute constitutional on its face and as applied to the plaintiffs.

A six-day bench trial was held in April before Judge Ray C. Hotchkiss. At trial, it was established that Sheridan Road Baptist Church operates the Sheridan Road Christian School, and that First Baptist Church of Bridgeport operates the Bridgeport Baptist Academy. Both schools offer a kindergarten through grade twelve program. The plaintiffs were identified as the church schools, the pastors of the churches, and certain teachers at the schools and parents of students attending the schools.

In an opinion dated December 29, 1982, the trial court found that § 3 of 1921 PA 302, requiring teacher certification, was unconstitutional because it violated plaintiffs' free exercise rights and created excessive government entanglement with religion.[5]

[5] The court also found § 1 of the act, requiring that "the courses of

Defendants appealed this decision to the Court of Appeals which reversed the circuit court, holding that the certification requirements violated neither the Free Exercise nor the Establishment Clauses of the First Amendment.[6] *Sheridan Road Baptist Church v Dep't of Education,* 132 Mich App 1; 348 NW2d 263 (1984).

Plaintiffs' application for leave to appeal to this Court originally was denied, 419 Mich 916 (1984), but, after reconsideration, leave was granted on April 5, 1985, 422 Mich 857 (1985).

II. FREE EXERCISE OBJECTION TO CERTIFICATION

A. STATE SYSTEM OF REGULATION

The Legislature has determined that teachers in *all* schools in the state must be certified. MCL 388.551; MSA 15.1921 and MCL 388.553; MSA 15.1923, respectively, provide in relevant parts:

> It is the intent of this act that the sanitary conditions of such schools, the courses of study therein, and the qualifications of the teachers thereof shall be of the same standard as provided by the general school laws of the state.
>
> No person shall teach or give instruction . . . in

study [in private schools] and the qualifications of the teachers thereof shall be of the same standard as provided by the general school laws of the state" was unconstitutional because of excessive government involvement with religion. Section 5 of the act, providing for examination of school records to determine compliance with the act, was upheld, with the restriction that information obtained be used only for statistical or comparative purposes. Section 4 of the act, providing for hearings and sanctions for violations of the act, was upheld.

[6] The court also found that the curriculum requirements were constitutional and that the trial court had erred in limiting the purposes for which statistical data from nonpublic schools could be used. Plaintiffs' contentions that the regulatory scheme was vague or that it created a danger of future abuses were not accepted by the court.

> any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public schools of the state . . . .

The regulations governing teacher qualifications are promulgated by the State Board of Education and contained in the Teacher Certification Code, 1979 AC, R 390.1101 *et seq.*, 1981 AACS, R 390.1101 *et seq.* In order to obtain a provisional teaching certificate,[7] an applicant must demonstrate the following:

1) completion of at least forty semester hours in a program of general or liberal education and demonstration of an acquaintance with the substance, concepts, and methods of the principal areas of human knowledge and skills essential to communication and inquiry in modern society;

2) completion of a program providing for depth in the substantive field to be taught;

3) completion of twenty semester hours in education courses (including at least six hours of directed teaching);

4) completion of a major of at least thirty semester hours and a minor of twenty semester hours (or for an elementary certificate completion of *either* a major of at least thirty semester hours *or* three minors of twenty semester hours each);

[7] Upon receiving a degree from an undergraduate institution, an applicant is entitled to only a *provisional* certificate. To acquire a continuing certificate, a teacher must complete three years of successful teaching and complete 18 post-graduate semester hours or obtain a master's degree. 1981 AACS, R 390.1132.

5) a bachelor's degree obtained from an approved Michigan college or university or an acceptable certificate issued by another state.

Under these regulations, the State Board of Education has issued thousands of provisional certificates to out-of-state college graduates, including graduates of Catholic and fundamentalist Christian schools.

B. TEST FOR ANALYZING FREE EXERCISE OBJECTIONS TO STATE REGULATIONS

The United States Supreme Court has developed a method of analyzing free exercise objections to state statutes. The following three quotations will serve as a basis for our development of a four-part test for this analysis.

The first quotation is from *Wisconsin v Yoder,* 406 US 215, and reads as follows:

> [T]o have the protection of the Religious Clauses, the claims must be rooted in religious belief.

The second quotation is from *Sherbert v Verner,* 374 US 403, and reads as follows:

> If therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary [of unemployment compensation] represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . ." *NAACP v Button,* 371 US 415, 438 [83 S Ct 328; 9 L Ed 2d 405 (1963)].

The third quotation is also from *Sherbert,* 374 US 407, and reads as follows:

> [I]t would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.

From these three quotations we derive the following four rules with which to analyze the instant case:

1. Plaintiffs' "claims must be rooted in religious belief." *Yoder.*

2. If the regulation poses "no infringement by the State of [plaintiffs'] constitutional right[ ] of free exercise," *Sherbert,* the regulations will be upheld. If the regulation is upheld for this reason, rules three and four are inapplicable.

3. "[A]ny incidental burden on the free exercise of [plaintiffs'] religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . .' " *Sherbert.*

4. No less obtrusive form of regulation is available to the state. *Sherbert.*

1. THE RELIGIOUS NATURE OF THE CLAIMS

There is no dispute as to the religious nature of the plaintiffs' objections to the certification requirement. The trial court found that

> [p]laintiffs are members of the Fundamentalist Christian movement . . . . The fundamentalist movement believes the church to be not only a

> place of worship but [a] place for instruction of the young. An outgrowth of this belief is the belief that the school is an extension of the church or a ministry of the church . . . . As fundamentalists, plaintiffs object to state regulation of their schools which they consider a mission ordained by God. They further object to the certification of their teachers, believing that the course of study required to obtain a certificate teaches a humanistic rather than a religious approach to education.

Defendants note that they agree that plaintiffs' objections to the statute are premised on their religious beliefs.

2. BURDEN ON FREE EXERCISE RIGHTS

The churches advance two ways in which the regulations burden their religious interests. The primary objection is that "no one may carry out a teaching ministry in a church-school without a government permit to do so." We accept plaintiffs' claim that such licensing has an effect on their free exercise rights, and we therefore must determine whether this burden is outweighed by a compelling state interest. Second, they object to the discretion given to the state to determine whether an applicant is qualified to receive a provisional teaching certificate. The regulations require an applicant to demonstrate "an acquaintance with the substance, concepts, and methods of the principal areas of human knowledge, and skills essential to communication and inquiry in modern society." 1979 AC, R 390.1122. Other portions of these regulations enable the state to implement this with virtually unlimited discretion because it is the board which determines the acceptability of particular courses from out-of-state institutions, the acceptability of out-of-state candidates with certificates from their states and the acceptability of the educational institutions themselves in Mich-

igan.[8] We acknowledge that the regulation *could* be applied in a manner which discriminates against those taught at religious colleges or universities.

The other plaintiffs also testified about the burden certification posed to them. A teacher at the Bridgeport Baptist Academy testified at trial that her rights would be infringed upon if she were forced to comply with the state certification requirements since attending courses taught at a state-approved school would force her to violate the Biblical command not to listen to instruction causing one to err. She stated that if compliance with the statute were ordered, she would be unable to fulfill her religious calling to teach. Parents of children attending the church schools stated that they would not want their children taught by those who were themselves taught other philosophies. For reasons discussed later, we do not find these claims to be supported by the record.

3. COMPELLING STATE INTEREST IN EDUCATION

In *Sherbert,* 374 US 403, the United States

[8] 1979 AC, R 390.1115 provides:

> The state board reserves the right to determine the acceptability of credits presented for certification from approved teacher education institutions located in other states.

1979 AC, R 390.1125 provides:

> An applicant for a provisional certificate shall have been granted a bachelor's degree and shall be recommended by a Michigan college or university approved for teacher education by the state board.

1979 AC, R 390.1130 provides:

> The state board *may* issue a provisional certificate to a person who has, or who is reported eligible for, a teaching certificate issued by the certificating authority of any state in which requirements for certification are deemed equivalent to those in effect in this state. [Emphasis added.]

Supreme Court stated that if there were any "incidental burden" on a free exercise right, it must "be justified by a 'compelling state interest within the State's constitutional power to regulate . . . .'"

There is no doubt that a state has a compelling interest in the education of its citizens. In *Pierce v Society of Sisters,* 268 US 510, 534; 45 S Ct 571; 69 L Ed 1070 (1925), the Court, while ruling that a state cannot compel all students to be educated in public schools, noted that

> [n]o question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

In *Brown v Topeka Bd of Ed,* 347 US 483, 493; 74 S Ct 686; 98 L Ed 873 (1954), the Supreme Court again emphasized the magnitude of the state's interest:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child

may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Finally, in *Central Dist No 1 Bd of Ed v Allen,* 392 US 236, 245-247; 88 S Ct 1923; 20 L Ed 2d 1060 (1968), the Supreme Court explicitly acknowledged the state's interest in *private* schools:

> [A] substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. . . . [I]f the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.

Michigan particularly has a significant and deeply rooted interest in education. Our Constitution, art 8, § 1, reflects the language of the Northwest Ordinance of 1787:

> Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Governor James Blanchard elaborated on this in his January 18, 1984, State of the State address:

> For decades, the promise of education has been the ladder of opportunity in this state. Hard-working people, honest people, lived here or came here, knowing that they themselves could earn a decent living working with their hands—but even more important, that their children could find an even better future working with their minds because of

> Michigan's fine schools and colleges and universities.

See also *Michigan Female Seminary v Secretary of State,* 115 Mich 118, 120; 73 NW 131 (1897) ("It has always been the policy of this State, as indicated by the provisions of its Constitution and a long line of legislative enactments, to encourage the cause of education.").

It is clear that Michigan's interest in education is long-standing and of the highest importance.

A compelling state interest in education does not necessarily justify *all* forms of educational regulation. For example, in *Yoder,* 406 US 236, the United States Supreme Court balanced the religious claims of the Amish against the state's interest in requiring compulsory education until age sixteen. The Court concluded that despite the state's "admittedly strong interest in compulsory education," it had failed to demonstrate with sufficient particularity how its interest would be adversely affected by granting an exemption to the Amish. The Court placed great emphasis on the adequacy of the Amish vocational education alternative to secondary education, the fact that the Amish children were not going to live in society at large, but in a closed, farming society, and the fact that compulsory high school education could ultimately destroy the Amish community. *Yoder,* 406 US 212. None of these factors are relevant in this case, and, more importantly, the state's interest here is not how much time should be spent in school, but the qualifications of the teachers themselves.

The state's interest in education necessarily extends to an interest in teachers because a primary and vital ingredient to a good education is good

teachers. James Garfield expressed this sentiment in the following manner:

> I am not willing that this discussion should close without mention of the value of a true teacher. Give me a log hut, with only a simple bench, Mark Hopkins on one end and I on the other, and you may have all the buildings, apparatus and libraries without him. [Address to Williams College Alumni, New York, December 28, 1871. Bartlett's Familiar Quotations (14th ed), p 741a.]

Michigan has long recognized the importance of qualified teachers. In 1843, O. C. Comstock, Superintendent of Public Instruction, stated:

> Eligible teachers are all-important. This fact is now more deeply and generally impressed on the public mind than formerly . . . . It was once imagined that almost every man of a competent education could teach a school. But to this proposition there are many exceptions. It does not follow that because a man has received a liberal education, he is therefore a lawyer or physician . . . . And, by parity of reasoning, it is plain that an acquaintance with general literature and science does not, of necessity, prepare one for the arduous but delightful business of educating the underlying mind. Such preparation is chiefly derived from the study of the science and art of teaching. [Jackson, *State Control of Public Instruction in Michigan,* pp 154-155 (1926) (quoting O. C. Comstock).]

Therefore, to the extent that certification of teachers furthers education, it can be considered a compelling state interest. Those certification requirements which involve gaining expertise in a particular substantive field, taking classes in a program of general or liberal education, student teaching, and taking a few basic courses in educa-

tion, are clearly aimed at and closely related to the goal of producing competent teachers.[9]

4. STATE'S INTEREST OUTWEIGHS THE MINIMAL INFRINGEMENT

While complying with the certification requirements may mean that schools will have a smaller pool of applicants from which to select their teachers, there is no evidence that acceptable, certified people are not available. Parents have stated that they have no religious objection to having their children taught by certified teachers as long as they are also religiously acceptable to them. Religious school teachers may have to receive more training in order to become certified, but the regulations do not require anyone to attend courses taught from a perspective contrary to their beliefs. The teachers can fulfill all the state certification requirements while attending either a religious or nonreligious institution. For these reasons, we find the infringement on free exercise rights is minimal and is outweighed by the state's interest.

Other state courts confronted with religious objections to the state certification of teachers have found for the state. In *State v Rivinius,* 328 NW2d 220 (ND, 1982), cert den 460 US 1070 (1983), the North Dakota Supreme Court balanced the state's interest in education against parents' right to educate their children in the religion of their choice. The court found that the state law, which

[9] As one writer has noted:

> It can . . . be assumed that a teacher with a college degree will in almost all cases be a better teacher than one with little or no education. The teacher with a college degree, has, at the very least, demonstrated the mastery of certain basic skills. [Baker, *Regulation of fundamentalist Christian schools: Free exercise of religion v the state's interest in quality education,* 67 Ky L J 415, 427 (1979).]

included a requirement that all teachers be certified by the state, did impose a burden on religion. However, the court found that the compelling state interest in education "outbalances the resulting strain or imposition on the defendants' religious beliefs." *Rivinius,* 328 NW2d 229. The court relied in part on the fact that there was no evidence suggesting that a certified teacher was unable to teach in a manner consistent with the religious beliefs of the parents. See also *Nebraska ex rel Douglas v Faith Baptist Church,* 207 Neb 802; 301 NW2d 571 (1981), app dis 454 US 803 (1981) (state law requiring a baccalaureate degree as a prerequisite to teaching at any school upheld); *State v Shaver,* 294 NW2d 883 (ND, 1980) (certification requirement upheld, in part because religious convictions of the parents did not prohibit the use of certified teachers). Cf. *Kentucky State Bd of Ed v Rudasill,* 589 SW2d 877, 879, n 3 (Ky, 1979), cert den 446 US 938 (1980) (certification requirements for private school teachers held unconstitutional under the *state* constitution. The court noted, "it is obvious that Section 5 of the Kentucky Constitution is more restrictive of the power of the state to regulate private and parochial schools than is the first amendment").

5. THE REGULATIONS HAVE NOT BEEN APPLIED IN A DISCRIMINATORY MANNER

The plaintiffs' second allegation is that the certification regulations give the board the power to withhold certificates on the basis of an applicant's religious beliefs. Those portions of the regulations, discussed in part II(B)(2), which give the board the discretion to grant or withhold a certificate on the basis of vague and subjective criteria certainly could be applied in a discriminatory manner. Such

provisions are also less clearly related to the state's goal of producing competent teachers. However, there is no evidence that any applicant who has fulfilled the objective requirements has been denied a certificate because of religious beliefs. Graduates of religious institutions, including both fundamentalist Christian and Catholic schools, have been certified. We assume from this that the board is concerned with the applicant's compliance with the objective requirements and that it does not attempt to determine whether an applicant has a "humanistic" world view or has taken courses taught from that perspective. We therefore find that the certification regulations, as applied, directly further the state's interest in education and do not enable the board to discriminate on the basis of religious beliefs.

6. NO LESS INTRUSIVE METHOD IS AVAILABLE TO THE STATE

We are also satisfied that there is no less intrusive method by which the state could satisfy its interest in the education of its citizens. The only alternative which has been proposed is standardized testing of private school students. This is an inadequate substitute because deficiencies in teaching would be discovered only after the damage has occurred. *State v Shaver,* 294 NW2d 883 (ND, 1980). Further, we are not persuaded that testing would guarantee less intrusion by the state into the functioning of the private schools. See, e.g., *Rivinius, supra,* 328 NW2d 229. See also *Johnson v Charles City Community Schools,* 368 NW2d 74, 79 (Iowa, 1985), cert den 474 US —; 88 L Ed 2d 574 (1985) ("[w]hatever limitations are imposed on the state's general right and duty to see to the education of its youth, the right extends beyond occasional testing").

III. OBJECTION TO CERTIFICATION REQUIREMENT ON THE BASIS OF THE ESTABLISHMENT CLAUSE

In *Lemon v Kurtzman,* 403 US 602, 612; 91 S Ct 2105; 29 L Ed 2d 745 (1971), the Supreme Court stated that in order to survive an Establishment Clause challenge, a statute must meet a three-part test:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster "an excessive government entanglement with religion." [Citations omitted.]

See also *Grand Rapids School Dist v Ball,* 473 US 373, —; 105 S Ct 3216; 87 L Ed 2d 267, 277 (1985) ("We therefore reaffirm that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria.").

The parties here have not discussed the first two parts of this test because it is clear that the statute involved in this case has a secular purpose and that it does not have a primary effect of either advancing or inhibiting religion. With respect to the third part of the test, the circuit court found that teacher certification did cause excessive government entanglement with religion.

In reviewing this conclusion, we are aware that the United States Supreme Court has stated:

> Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples

of necessary and permissible contacts. [*Lemon,* 403 US 614. Citations omitted.]

Those kinds of state actions which have been found to violate this third prong are those which create "an intimate and continuing relationship between church and state." *Lemon,* 403 US 622. See also *Walz v New York City Tax Comm,* 397 US 664; 90 S Ct 1409; 25 L Ed 2d 697 (1970); *Wolman v Walker,* 433 US 229; 97 S Ct 2593; 53 L Ed 2d 714 (1977) (finding that the use of state funds for nonpublic school field trips would require close supervision of the nonpublic school teachers, thus creating excessive entanglement).

In this case, it is clear that requiring all teachers to be certified does not impermissibly tangle government with religion. The state is merely enforcing minimum standards with regard to individuals. The requirement does not involve the government in any continuing relationship with the churches or the schools. Once the individual teacher is certified, the state does not require the individual to teach from any particular perspective. We find, therefore, that there is no unconstitutional government entanglement with religion.

IV. CONCLUSION

We agree with the Court of Appeals that requiring all teachers in the state to be certified is not unconstitutional. Neither the Free Exercise nor the Establishment Clauses of the First Amendment support claims to the contrary.

BOYLE, J. (*concurring*). While we concur in the result reached by the opinion for affirmance, we write separately to expand both on the nature of the balancing test which we believe appropriate in

the instant case, and on the issue which divides the Court. The analysis which follows is an effort to distill from prior precedent those principles which will inform our obligation both to "move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements," *Wisconsin v Yoder,* 406 US 205, 235; 92 S Ct 1526; 32 L Ed 2d 15 (1972), and to assure that government authority not improperly inhibit the religious freedom guaranteed by the First Amendment.

I

THE STANDARD OF REVIEW

Primarily at issue in this case is whether the teacher certification requirement imposed by the state impinges upon the plaintiffs' First Amendment right of freedom of religion. According to plaintiffs, also at issue are the fundamental rights of parents to guide the religious future and education of their children, see *Pierce v Society of Sisters,* 268 US 510; 45 S Ct 571; 69 L Ed 1070 (1925), as well as the First Amendment right to express, transmit, and receive ideas, see *West Virginia State Bd of Ed v Barnette,* 319 US 624; 63 S Ct 1178; 87 L Ed 1628 (1943), and the liberty to impart and receive religion, see *Cantwell v Connecticut,* 310 US 296, 307; 60 S Ct 900; 84 L Ed 1213 (1940); *Widmar v Vincent,* 454 US 263; 102 S Ct 269; 70 L Ed 2d 440 (1981).

The foregoing claims are distinct and separate, and, if brought individually, the claims would not be reviewed under the same standard. The First Amendment claims would be reviewable under a strict scrutiny or compelling state interest stan-

dard.[1] The standard of review for the Fourteenth Amendment interest of the parents appears to be in a state of flux,[2] but in no case would the standard be higher than that commanded by the First Amendment claims. It follows, therefore, that because the claims are brought together, should the plaintiffs' free exercise challenge not prevail, plaintiffs' other claims could not succeed. Moreover, if plaintiffs' free exercise claims are successful, the need to review plaintiffs' other claims becomes moot. Therefore, we confine our analysis to plaintiffs' free exercise challenge.

The standard for evaluating free exercise claims has not been consistently articulated by the United States Supreme Court.[3] Despite that fact, two constant principles can be identified.

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[1] See, e.g., *Wisconsin v Yoder, supra* (free exercise claim), and *United States v O'Brien,* 391 US 367; 88 S Ct 1673; 20 L Ed 2d 672 (1968) (free speech claim).

[2] See *Pierce v Society of Sisters, supra,* compare *Wisconsin v Yoder, supra.* See also *Project, education and the law: State interests and individual rights,* 74 Mich L R 1373, 1434-1435 (1976).

[3] Justice O'Connor summarized the various ways the standard has been articulated in *Goldman v Weinberger,* 475 US —, —; 106 S Ct 1310, 1324; 89 L Ed 2d 478, 498 (1986) (O'Connor, J., dissenting).

> In *Sherbert v Verner,* 374 US 398 [83 S Ct 1790; 10 L Ed 2d 965] (1963), and *Thomas v Review Board,* 450 US 707 [101 S Ct 1425; 67 L Ed 2d 624] (1981), the Court required the States to demonstrate that their challenged policies were "the least restrictive means of achieving some compelling state interest" in order to deprive claimants of unemployment benefits when the refusal to work was based on sincere religious beliefs. *Thomas, supra,* at 718. See also *Sherbert, supra,* at 406-408. In *Wisconsin v Yoder,* 406 US 205, 215 (1972), the Court noted that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion" in deciding that the Amish were exempt from a State's requirement that children attend school through the age of 16. In *United States v Lee,* 455 US 252, 257-258 [102 S Ct 1051; 71 L Ed 2d 127] (1982), the Court stated that "[t]he State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest," and held that the Amish could not exempt themselves from the Social Security system on religious grounds. See also *Gillette v United States,* 401 US 437 [91 S Ct 828; 28 L Ed

First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the "least restrictive" or "essential," or that the interest will not "otherwise be served." [*Goldman v Weinberger,* 475 US —, —; 106 S Ct 1310, 1325; 89 L Ed 2d 478, 498 (1986) (O'Connor, J., dissenting).][4]

The difficulty in articulating a standard for free

2d 168] (1971) (rejecting claims under the Establishment and Free Exercise Clauses to the Federal Government's refusal to give conscientious-objector status to those objecting on religious grounds only to a particular war rather than to all wars).

4 Compare *United States v O'Brien, supra,* 376-377:

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to § 12(b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

exercise claims pales considerably in comparison to the difficulty encountered in the application of the standard. At a minimum, application of the standard is a balancing process requiring great circumspection in performing the sensitive and delicate weighing of a state's legitimate social interest and a request for a religious exemption.[5]

Contrary to the opinion for reversal, we do not believe that the belief/action and direct/indirect interference dichotomies have long been abandoned when it is necessary to determine the scope of protections afforded by the First Amendment.[6] Indeed, the former has been reiterated and the latter debated in an opinion issued by the United States Supreme Court on June 11, 1986.[7]

The Freedom of Religion Clause of the First Amendment embraces two concepts—the freedom to believe and the freedom to act.

> The first is absolute but, in the nature of things, the second cannot be. 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 v Connecticut,* 310 US 296, 303-304; 60 S Ct 900; 84 L Ed 1213 (1940).][8]

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[5] See *Wisconsin v Yoder, supra,* 235.

[6] Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute. [*Bowen v Roy,* 476 US —, —; 106 S Ct 2147, 2152; 90 L Ed 2d 735, 744 (1986).]

[7] While Justice Brennan's opinion for the Court in *Sherbert v Verner,* n 3 *supra,* would appear to have eliminated the distinction, the controversy between Justice Burger and Justice O'Connor in *Bowen v Roy,* n 6 *supra,* demonstrates that the issue still has vitality.

[8] It is true that activities of individuals, even when religiously

Where the regulation involved conflicts directly with a religious practice, "accommodation between the religious action and an exercise of state authority is a particularly delicate task [*Prince v Massachusetts,* 321 US 158, 165; 64 S Ct 438; 88 L Ed 645 (1944)], because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution." *Braunfeld v Brown,* 366 US 599, 605; 81 S Ct 1144; 6 L Ed 2d 563 (1961). But where the burden on the exercise of religion is indirect, i.e., the legislation does not make the religious practice itself unlawful, the most critical scrutiny must be employed or the operating latitude of the Legislature would be severely restricted. *Id.,* 606.

Admittedly, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion," *Wisconsin v Yoder, supra,* 220, citing *Sherbert v Verner,* 374 US 398; 83 S Ct 1790; 10 L Ed 2d 965 (1963), that is, if, although indirect, the effect of the regulation is to put "substantial pressure on an adherent to modify his behavior and to violate his beliefs . . . ." *Thomas v Review Bd of Indiana,* 450 US 707, 718; 101 S Ct 1425; 67 L Ed 2d 624 (1981). However, if the state regulates conduct by enacting a neutral law within its

based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. . . . But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. [*Wisconsin v Yoder, supra,* 220. Citations omitted.]

power, the purpose and effect of which is to further the state's secular goals, the statute may be valid despite its indirect burden on religious practice unless the state's purpose may be achieved through less burdensome means. *Braunfeld v Brown, supra,* 607.[9]

The fundamental issue which divides this Court is the nature of the proofs required by the parties in order to satisfy their respective burdens in this free exercise case, an issue which the United States Supreme Court has not directly addressed.[10] In our judgment, it is apparent from Supreme Court precedent that the extent and nature of the burden imposed by the enforcement of the regulation is relevant to the kind and quantity of proofs required by the government to satisfy the strict scrutiny test. Cf. *Wisconsin v Yoder, supra; United States v Lee,* 455 US 252; 102 S Ct 1051; 71 L Ed 2d 127 (1982); *Braunfeld v Brown, supra,* and

[9] Despite the accusation of the opinion for reversal, we do not suggest that "legislation which imposes only indirect burdens upon the free exercise of religion . . . is *outside* the protections afforded by the Free Exercise Clause, or that such legislation mandates a lower level of judicial scrutiny . . . ." *Post,* p 572.

[10] In *State v Patzer,* 382 NW2d 631 (ND, 1986), cert den 479 US —; 93 L Ed 2d 50 (1986), the North Dakota Supreme Court found for the state in spite of the fact that the state did not formally introduce any evidence during the lower court proceedings relating to "compelling state interest" and "least restrictive means." The defendants in that case unsuccessfully sought leave to appeal to the United States Supreme Court raising three questions for that Court's consideration:

> (1) Can the state satisfy its burden of establishing compelling state interest if it introduces no evidence of any kind to substantiate its assertions of such interest? (2) Is there proof that compelling state interest is served when there is no scientific or academic evidence that children learn better from certified teachers than when they are taught by their uncertified parents at home? (3) Has North Dakota chosen the least restrictive alternative to assure its interests in education, in view of [the] fact that all 22 states enacting home school laws in [the] past 30 years have not made such [a] requirement? [55 USLW 3101 (August 12, 1986).]

compare *Goldman v Weinberger, supra.* It also appears that a belief/action and direct/indirect analysis remains indispensable to the delicate balancing required of this Court because this analysis relates to both the degree that the regulation is neutral and the degree to which the challenged regulation interferes with the religious practice or belief.[11]

The opinion for reversal characterizes as "inescapable" the conclusion that the certification requirement is a direct regulation of plaintiffs' religious activity. The opinion thereby eschews examination of the nature and extent of the burden on plaintiffs' First Amendment rights and proceeds directly to application of the compelling state interest analysis. Our colleague's characterization of the nature of these claims seems to follow from the willingness to accept the premise that all state regulation of religious schools is a direct restraint on religious liberty.

While taking us to task for allegedly interpreting plaintiffs' religious beliefs and requirements, our colleague herself characterizes the religious burden in a manner which inexorably dictates the conclusion.[12] No less than three times does the opinion for reversal characterize the burden on

[11] See also Baker, Comments, *Regulation of fundamentalist Christian schools: Free exercise of religion v the state's interest in quality education,* 67 Ky L J 415, 417-420 (1978-1979).

[12] In *Illinois State Bd of Elections v Socialist Workers Party,* 440 US 173, 188-189, 99 S Ct 983; 59 L Ed 2d 230 (1979), a case concerning the First Amendment right to associate, Justice Blackmun wrote:

> Although we join the Court's opinion and its strict-scrutiny approach for election cases, we add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as "compelling [state] interest" and "least drastic [or restrictive] means." . . . we have never been able fully to appreciate just what a "compelling state interest" is. If it means "convincingly controlling," or "incapable of being overcome" upon any balancing process,

plaintiffs' religious beliefs as "substantial." *Post,* pp 545, 550, 555. A court may not interpret an individual's religious beliefs or requirements, *United States v Lee, supra,* 257; *Thomas v Review Bd of Indiana, supra,* 716. However, unless an allegation of a burden on a sincerely held religious belief is to automatically require invalidation of a governmental regulation, a court must analyze the degree of the burden.[13]

A

Plaintiffs' primary objection to the teacher certification requirement is that "no one may carry out a teaching ministry in a church-school without a government permit to do so. . . ." Plaintiffs do not contend that they were denied a certification to teach upon the basis of their religious beliefs. Were this the basis of their objections, plaintiffs would be clearly entitled to relief, for "[t]he Free Exercise Clause categorically prohibits government

then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, "least drastic means" is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation and thereby enable himself to vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification.

I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented, and I must endeavor to disassociate myself from them. [Citations omitted.]

More recently, in *Bowen v Roy,* n 6 *supra,* 90 L Ed 2d 749, n 17, three other justices expressed doubt concerning the propriety of applying strict scrutiny to free exercise claims. See n 21.

[13] In our view, the certification requirement can only be viewed as a direct restraint on plaintiffs' free exercise rights if the contention is accepted that all secular regulation of private religious schools violates the First Amendment, a conclusion which is unsupported by any previous precedent.

from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel v Paty,* 435 US 618, 626; 98 S Ct 1322; 55 L Ed 2d 593 (1978).

Slightly rephrased, plaintiffs' objection is that they are precluded from teaching on the basis of their uncertified *status.* By Michigan law, the certified status involved here is defined in terms of conduct, not belief.[14] Because the state requirement is focused on status, conduct, and acts, this Court "should be cautious in expanding the *scope* of [the absolute protections afforded belief by the First Amendment] since to do so might leave government powerless to vindicate compelling state interests." *McDaniel v Paty, supra,* 627, n 7 (emphasis supplied).[15]

B

The burden on plaintiffs' religious practices is also indirect. The pastors' primary objection to teacher certification is their belief that God has given them the criteria by which to discern who should teach their children, and that licensure itself is an infringement on their religious liberty. Plaintiffs' religious tenets do not prohibit them from hiring a teacher simply because the teacher is certified. The record establishes that certified teachers are employed by the schools.[16] Further,

[14] See WILLIAMS, C.J., *ante,* pp 472-473.

[15] Cf. *Wisconsin v Yoder, supra,* 234-235; *Braunfeld v Brown, supra,* 606.

[16] Plaintiff Sharon E. Swain, a parent whose children attend Bridgeport Baptist Academy, testified that she had no religious objection to having her children taught by a person possessing a Michigan teacher's certificate. Testimony to a similar effect was elicited from Michael D. Cox and Gregory and Susan Boese, also parents of children in attendance at the school.

Gerald M. Somero, pastor of Sheridan Road Baptist Church, testified that a certified teacher could teach at the church school without violating the tenets of the church, and that the church school currently employed a certified teacher.

while there was testimony indicating that plaintiffs believe courses of study leading to certification teach a humanistic, rather than a religious approach to education, the record does not establish and indeed belies the conclusion that pursuing such courses compromises in any way the plaintiffs' ability to teach from a religious point of view.[17] Rather, the burden asserted, in plaintiffs' own words, is that "engaging *only* government certified teachers in its school ministry is abhorrent to their scriptural beliefs." Although every First Amendment objection based on the religion clauses involves an objection to governmental compulsion, in this case it is not the certification that is "abhorrent," but the possibility that the government certification requirement will limit the pool of individuals from which the schools can hire their teachers.

This objection, although couched in religious terms, borders on secular concerns. The economic and administrative burden imposed by the certification requirement is clearly more palpable than the burden on plaintiffs' religion. According to the record, there are religious institutions in existence which provide the classes required for certification and which teach the classes in a manner unobjectionable to plaintiffs' religious beliefs. Moreover, it may be possible for teachers at the schools to satisfy the educational requirements for certifica-

[17] The record indicates that William Swain, a teacher at the Bridgeport school at the time testimony was taken in this case, did possess a Michigan teaching certificate. Iris Kwaitkowski, also a teacher at the Bridgeport school, testified that she received a South Carolina teacher's certificate upon her graduation from the Bob Jones University in Greenville, South Carolina. She further testified that she only needed a Michigan history course in order to be eligible for a Michigan teacher's certificate. Although Ms. Kwaitkowski claimed that she would not pursue a Michigan teacher's certificate because she did not want to "listen to instruction that causes [her] to err," she did not testify that certification would affect her ability to pursue her teaching ministry.

tion by presenting evidence of an equivalent as determined by the state board such as college graduation, standardized examination scores, prior teaching experience, or any combination of these or other appropriate criteria. 1979 AC, R 390.1152. Plaintiffs' teaching mission appears, therefore, more inconvenienced by the certification requirement rather than precluded.

Without doubt, an integral part of plaintiffs' beliefs is that it is their duty and right to educate their children in the manner they believe is best for their children. Our respect for the sincerity of their beliefs does not, however, require us to lose sight of the fact that the education of plaintiffs' children is also a well-established compelling concern and a constitutional interest of the state, Const 1963, art 8, § 1.[18] The United States Supreme Court has long recognized that the parents' right to educate their children in the school of their choice is subject to the state's interest in assuring that every child receive at least a minimal education.[19] Moreover, regulation of the teaching profes-

[18] *Wisconsin v Yoder, supra,* p 213. See also *Pierce v Society of Sisters, supra,* 534; *Brown v Topeka Bd of Ed,* 347 US 483, 493; 74 S Ct 686; 98 L Ed 873 (1954).

[19] In *Central Dist No 1 Bd of Ed v Allen,* 392 US 236, 245-247; 88 S Ct 1923; 20 L Ed 2d 1060 (1968), the United States Supreme Court explained the relationship between the two interests:

> In the leading case of *Pierce v Society of Sisters,* 268 US 510 (1925), the Court held that although it would not question Oregon's power to compel school attendance or require that the attendance be at an institution meeting State-imposed requirements as to quality and nature of curriculum, Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this holding was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters. Since *Pierce,* a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide mini-

sion is a recognized and identifiable means of furthering that state interest. See *Central Dist No 1 Bd of Ed v Allen,* 392 US 236, 245-247; 88 S Ct 1923; 20 L Ed 2d 1060 (1968).

II

THE BALANCING PROCESS DESCRIBED

The standard for free exercise claims is a balancing test which countenances shifting burdens of persuasion in proportion to proofs admitted at trial. For example, once a plaintiff has established that a regulation burdens the exercise of religion, the state must establish that a "compelling state interest" is at issue and that the interest cannot otherwise be served. If the plaintiff sets forth alternative means which rebut the government's claim of necessity, then the state is required to show with more particularity that no lesser restrictive alternative is available. Compare *Wisconsin v Yoder, supra,* 234-236.

The balancing process which is required has been diversely described by the United States Supreme Court.[20] In *Sherbert v Verner, supra,* 403, the Court applied traditional "strict scrutiny" review and required that a governmental regulation which burdens the free exercise of religion be

mum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce v Society of Sisters:* if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.

[20] See n 3.

justified by a "compelling state interest."[21] In *Wisconsin v Yoder, supra,* 214, the Court required a showing of a "sufficient" state interest to override the burdened religious interest. See also *United States v Lee,* 455 US 252, 257-258; 102 S Ct 1051; 71 L Ed 2d 127 (1982). One commentator has observed that the Court's failure to use the "compelling state interest" language "suggest[s] the use

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[21] While the strict scrutiny standard as variously described remains the appropriate standard and is applied in the case at bar, this test has also been recently criticized by three justices of the United States Supreme Court in the free exercise context:

> It is readily apparent that virtually every action that the Government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection. For example, someone might raise a religious objection, based on Norse mythology, to filing a tax return on a Wednesday (Woden's day). Accordingly, if the dissent's interpretation of the Free Exercise Clause is to be taken seriously, then the Government will be unable to enforce any generally applicable rule unless it can satisfy a federal court that it has a "compelling government interest." While libertarians and anarchists will no doubt applaud this result, it is hard to imagine that this is what the Framers intended. [*Bowen v Roy,* n 6 *supra,* 90 L Ed 2d 749, n 17 (opinion of Chief Justice Burger, with Justices Powell and Rehnquist concurring).]

Chief Justice Burger's comment appears to be based in part upon the expansive view of religion taken by the Supreme Court in free exercise cases. While the Court has expressed the view that beliefs based on secular considerations are not entitled to the same deference as beliefs based on religious concerns, see *Wisconsin v Yoder, supra,* 215-216, cf. *Braunfeld v Brown, supra,* 605-606, the Court has consistently indicated a willingness to accept a petitioner's assertion that the enforcement or adherence to a regulation is a burden upon the petitioner's religious belief without questioning the petitioner's interpretation of that religious belief. See, e.g., *United States v Lee, supra,* 257; *Thomas v Review Bd of Indiana, supra,* 716. This approach is based on an aversion to the Court's formulation of a definition of religion, a most delicate endeavor which could pose a threat to religious pluralism.

Given the present posture of the Supreme Court, it is not difficult to embrace Chief Justice Burger's prediction. It is more likely, however, in our judgment, that rigid application of the compelling state interest standard articulated in the dissent to *Bowen v Roy* will result in an unfortunate dilution of the standard itself. See also Note, *The myth of religious neutrality,* 71 Va L R 127, 159 (1985).

of a more open balancing test." Nowak, Rotunda & Young, Constitutional Law (2d ed), p 1060.

At least one member of the United States Supreme Court has posited that the majority of decisions has placed "an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes [or prescribes] conduct that his religion prescribes [or proscribes] . . . ."[22] Although this is the pronounced view of only one justice, we cannot ignore the conclusion that even the Supreme Court has acknowledged that certain government interests are so compelling that the state need not show that the means chosen is absolutely essential to further that interest, and that no lesser restrictive alternative could be substituted. It thus appears that the degree of importance attached to the governmental interest can well dictate the extent the government is required to diminish the effectiveness of the regulation by granting an exemption.[23]

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[22] *United States v Lee, supra,* 263 n 3 (Stevens, J., concurring). Justice Stevens further noted, "The principal exception is *Wisconsin v Yoder* in which the Court granted the Amish an exemption . . . by actually applying the subjective balancing approach it purports to apply today. . . . There is also tension between this standard and the reasoning in *Thomas v Review Board of Indiana Employment Security Div* and *Sherbert v Verner.* Arguably, however, laws intended to provide a benefit to a limited class of otherwise disadvantaged persons should be judged by a different standard than that appropriate for the enforcement of neutral laws of general applicability." (Citations omitted.)

[23] Once it is shown that the law burdens the practice of a religious belief the state must show that it has an overriding or compelling secular reason for refusing to grant an exemption from the regulation. In balancing the interest the court must first determine the degree of burden on the religious practice. Then, in assessing the state's interest, the court will have to determine the importance of the secular interest and the extent to which that interest would be impaired by an exemption for the religious practice. *If the state interest is truly compelling,*

Those cases in which the state has failed in its burden are the exceptions, not the rule.[24] They have occurred where the effect of a law on religious practices is severe and, as in *Yoder, supra,* where a lesser restrictive alternative has been clearly and convincingly established by the plaintiffs challenging the regulation,[25] or where the interest of the state in refusing to extend a legislative exemption has been found subordinate to the free exercise rights of those who were deprived by that interest and has suggested a discriminatory intent.[26] *Sherbert v Verner, supra; Thomas v Review Bd of Indiana Employment Security, supra.*

there will be no requirement that the state diminish the effectiveness of its regulation by granting the exemption. However, if the state could achieve its goal as well by a means which would not burden the religious practice, it will be required to adopt the alternative means. If the state's interest is of a lesser magnitude it will be required to grant the exemption and accept a less effective means of fulfilling its goal. [Nowak, Rotunda & Young, *supra,* 1054. Emphasis added.]

[24] The state was found to have met its burden in the following cases: *Goldman v Weinberger,* 475 US —; 106 S Ct 1310; 89 L Ed 2d 478 (1986) (military regulations); *United States v Lee, supra* (social security laws); *Gillette v United States,* 401 US 437; 91 S Ct 828; 28 L Ed 2d 168 (1971) (selective service laws); *Braunfeld v Brown, supra* (Sunday closing laws); *Prince v Massachusetts,* 321 US 158; 64 S Ct 438; 88 L Ed 645 (1944) (child labor laws); *Reynolds v United States,* 98 US 145; 25 L Ed 244 (1878) (polygamy law).

[25] The opinion for reversal concludes from our observation of what occurred in *Yoder* that we would hold that the burden on plaintiffs in free exercise cases is to clearly and convincingly establish the existence of a lesser restrictive alternative to the challenged regulation. *Post,* p 574. We have never stated that this is the law. Rather, we have only taken note of the fact that the United States Supreme Court in *Yoder* explained in great detail why the Amish were entitled to an exemption from the compulsory education regulation in that case. In doing so, they found the fact that the Amish had "carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education" of particular significance. 406 US 235.

[26] Concerning *Sherbert* and *Thomas,* Chief Justice Burger recently explained:

Those exceptions are clearly distinguishable from the case at bar.

A

In *Wisconsin v Yoder, supra,* 215, the balancing test was based on "the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries." In that case the Amish persuasively established almost three hundred years of consistent practice which pervaded and regulated the respondents' entire mode of life. This evidence supported their claim that "enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise" of their religious beliefs. *Id.,* 219.

The *Yoder* Court accepted the proposition that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Id.,* 221. It also recog-

The statutory conditions at issue in those cases provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was urged in *Thomas,* to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, towards religion. [*Bowen v Roy,* n 6 *supra,* 106 S Ct 2156; see also *Sherbert, supra,* 401-402, n 4; *United States v Lee, supra,* 264, n 3 (Stevens, J., concurring) (*Sherbert* and *Thomas* may be viewed "as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect").]

nized that education prepares citizens to become self-reliant and self-sufficient participants in society.

The Court then found that the Amish had carried the burden of demonstrating the sufficiency of their alternative mode of continuing informal vocational education in the same terms of those interests advanced by the state in support of its compulsory high school education. *Id.,* 235. It was then, the Court concluded, that in light of this convincing showing, and considering the minimal difference between what the state required and the Amish accepted, the state must show with more particularity how the admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. *Id.,* 235-236.

The most recent case applying the balancing test we believe appropriate where a paramount government interest is demonstrated is *Goldman v Weinberger, supra.* In *Goldman,* a case decided this year, the petitioner contended that the Free Exercise Clause permitted him to wear a yarmulke while in uniform despite a United States Air Force regulation mandating uniform dress for Air Force personnel. The ultimate governmental interest at stake was congressional authority to raise and support armies and to regulate their performance. The intermediate goals or interests asserted were discipline, uniformity, the need to inculcate the virtue of obedience, and the subordination of the interests of the individual to the needs of the service. In order to achieve these objectives, the military promulgated dress regulations. Such regulations, as interpreted, prohibited the wearing of the yarmulke.

The petitioner asserted that his religious beliefs *required* him to wear the yarmulke and that,

under *Sherbert v Verner, supra,* and *Wisconsin v Yoder, supra,* the regulation as applied to him burdened his free exercise of religion. A majority held that the governmental interest in the military is so important that any regulation which reasonably relates to achievement of any of the asserted intermediate interests was permissible even though the effect of the regulation was to cause a person to violate his religious beliefs.

Whereas the opinion for reversal in this case argues that it is inescapable that *Sherbert v Verner, supra,* sets the standard for all claims of violation of free exercise of religion, in *Goldman* only two justices agreed. Justices O'Connor and Marshall applied that standard and, in dissent, held that the granting of an exemption should be required. Justice Blackmun, in dissent, would have required an exemption as well, but he declined to apply *Sherbert* because the military was involved.

Seven of nine justices agreed that the granting of an exemption would create no danger of impairment of the military mission of the Air Force. Three justices, in a separate concurring opinion, noted that where a regulation is neutral regarding religion, is based on an objective standard, is not motivated by hostility against, or any special respect for, any religious faith, to require an exemption simply because the governmental interest would not be impaired, thereby would invite nonuniform treatment for members of different religious faiths.[27]

[27] It may be argued that *Goldman,* based on the military interest, is sui generis. If that argument is sound, then five members of our nation's highest court have no fidelity to the constitution. The First Amendment makes no exception for the military. The military in this free society is not a separate branch of government. It is subordinate to the President and Congress. It acts under laws created by Congress. The First Amendment proscribes laws made by Congress which prohibit the free exercise of religion.

The issue in the conflict between religiously motivated conduct and the military interest in uniformity of dress was resolved as it was because a majority recognized the paramount importance of the military interest. Although a majority of justices applied a rational basis test, a standard clearly not applicable here, *Goldman* nonetheless refutes any mechanistic and simplistic application of *Sherbert* to all free exercise claims. The point is that the congressional power to raise and regulate armies, including the requiring of uniform dress, is so important that the most important of personal rights, the free exercise of religion, even where directly burdened, must give way to the governmental regulation even where the relationship between the governmental interest and the means to achieve it is not only not essential or necessary, but the logical nexus is far from clear. *Goldman* suggests that the higher in rank the governmental interest, the less the need for necessity to support the means chosen to achieve it even where paramount personal rights are directly burdened.

B

The opinion for reversal sharply criticizes both the opinion of Chief Justice WILLIAMS and this opinion for articulation and application of the standard of review in this case. *Post,* pp 566-578. In summary, the opinion for reversal states that the standard for review in free exercise claims is clear. Once the claimant has asserted that a governmental regulation burdens the free exercise of religion, the government is obligated to articulate and prove that it has a compelling interest, that the means selected to achieve that end is essential for that purpose, that no means less burdensome to free exercise exists to achieve such purpose, and

that the granting of the exemption would effectively destroy the government's ability to achieve its purpose.

Our colleague implies, further, that the claim of religious practice as well as the burden thereon is defined by the claimant and that scrutiny of the claim is perhaps beyond the competence of the judiciary.

While the test used by Chief Justice WILLIAMS' opinion and in this opinion is articulated somewhat differently, we have applied the test articulated by the opinion for reversal in this case. Whether Supreme Court precedent requires this standard remains unclear. From the case law, however, the following factors do emerge as required considerations.

One obvious factor is the governmental interest. As *Yoder* and *Goldman* teach, questions regarding the importance of the interest are inescapable. As a practical matter, the level of abstraction employed by a court in recognizing the interest can often be controlling. The higher the level of generality, in general, the better the government will fare in the contest. The more concrete or fact-specific the interest recognized, the worse the government will fare in the balancing.

A second and third factor involve the means chosen by government to achieve its interest and the logical nexus between the end and the means. Evaluation of the latter relationship involves concepts such as necessity, essentiality, broadness versus narrowness, objective versus subjective, whether the regulation is one of general application, and whether the regulation is one of several different ways to accomplish the objective or is the only way of doing so. In short, the stronger and more direct the logical nexus, the better the government will fare in the balancing.

A fourth factor is the private right asserted as affected. The rank given to such a right is also an inescapable consideration. Whether the right is explicit in the constitution, whether a court is asked to recognize such a right as a matter of first impression, or whether the right is claimed to exist by extension of, or analogy to, other explicit rights, some definition of the scope and nature of the right asserted is necessary. A fifth apparent factor is the nature of the conflict between the private right and the means chosen by the government to achieve its objective. Among other formulations of the concept employed here are direct versus indirect, belief versus conduct, purpose versus effect, and least restrictive alternative.

A sixth factor is the extent of the conflict. At this point in the analysis the amount of the burden or restraint is relevant, as well as to what extent the state's effectiveness in achieving its goal would be diminished if required to relieve the burden. A final factor is the role of the individual exemption. Whether it is required to be offered depends upon analysis of the above six factors.

If the governmental objective is compelling, if the means to achieve it is closely and narrowly drawn, and if the effect on religious exercise is indirect, unintended, and marginal, then an exemption as an alternative to avoid the claimed conflict is not necessary.

In summary it appears that the higher the rank of the governmental interest, the stronger the logical nexus between such interest and the means selected to accomplish it, the less important the private right, the less direct the conflict between the exercise of the right and the regulation in question, and the lower the amount of the burden, the less likely the claimant will win in the balanc-

ing process. A mathematically certain formula cannot be created which accounts for the internal evaluation of each factor and its relative weight with respect to each other factor. The essential judicial task is to evaluate asserted conflicts between private rights and public interests to ensure that neither is compromised or destroyed.

III

ANALYSIS OF THE PLAINTIFFS' CLAIMS

Turning to the claims advanced by plaintiffs in the case at bar, we are unconvinced that compliance with the state teacher certification program will endanger or restrict the free exercise of their religious beliefs. The state's interest in education is paramount. The means selected to achieve that end, that is, a certification program to require that only academically qualified teachers are used to fulfill the mandatory educational requirements is narrowly drawn to accomplish that objective. The means selected is also neutral regarding religion, is based on an objective standard, and is not motivated by hostility against, or any special respect for, any religious faith. Moreover, ensuring that teachers are academically qualified is an independent legitimate state interest.

The private right asserted is extremely important, but the nature and extent of the conflict are far less clear. On this record it does not appear that certification, as such, contravenes plaintiffs' beliefs (as churches, pastors, teachers, or parents) except to the extent that some plaintiffs assert that any and all regulations of their church schools violate their religious beliefs.

Indeed, plaintiffs' free exercise claim is that certification itself is not opposed, but the govern-

ment compulsion to attain it.[28] While plaintiffs object, on a religious basis to a course of study that teaches humanistic values, this objection is directed not to certification but to the institutions through which it is obtained. Pastor Ouellette testified that it is his belief that God has determined the criteria for the teaching ministry and that because there are very few people of plaintiffs' beliefs who have a teaching certificate, the certification requirement would make it very difficult and very burdensome to provide teachers for their schools.

Neither pastor testified to a religious objection to hiring certified teachers or that the requirement would force closure of their schools, and the record establishes that it is possible to become qualified for a state teaching certificate through a number of ways in harmony with plaintiffs' beliefs. It thus appears that the certification requirement alone neither compels plaintiffs to refrain from religiously motivated conduct nor to engage in conduct they find objectionable. Certification, qua certification, does not contravene either the pastors' or the teachers' religious beliefs.

The only alternative for teacher certification offered in these proceedings is student testing. But, as the majority aptly points out, this testing comes too late.[29] The teacher certification requirements are essentially prophylactic in nature. Certification does not guarantee that a person will be an effective teacher, but it increases the probability that a

[28] In their reply brief, plaintiffs stated their central contention of injury: "[T]he Churches' point is not that a certified teacher may not teach in the Churches' schools, it is that restricting the freedom of churches to engaging *only* government-certified teachers in its school ministry is abhorrent to their Scriptural beliefs."

[29] We also agree with Chief Justice WILLIAMS that testing could result in the schools "teaching to the test," thus allowing more intrusion by the state into the functioning of private schools. See *ante*, p 484.

teacher will be competent. Therefore, the certification requirements help prevent children from being exposed to unqualified teachers. Testing can at best only identify problems that require remedies. Testing, therefore, does not fulfill the prophylactic goal of the state's requirement.

There was also testimony offered by plaintiffs that the free market will naturally operate to eliminate inadequate schools. But plaintiffs offered no testimony that the children who attend such inadequate schools prior to their identification and elimination will not be harmed.

We further note that the plaintiffs' pastors and plaintiffs' own expert agreed that academic qualifications are desirable in the teaching profession. Plaintiffs' expert also listed other factors he considered important in a good teacher such as talent, dedication, and ethical convictions. But these characteristics are not susceptible to the type of government regulation involved here. As a preventive measure assuring at least a minimal competency, academic qualifications for teachers are the only requirements a government can objectively establish.

Unlike the Amish in *Yoder,* the departure from the requirements of the state here are not minimal. Carried forward, the logic of the position advanced by plaintiffs would require the state to give up any attempt to advance its interest in fostering education whenever persons opt for religious education as a matter of religious conviction. Such a result could effect a substantial deregulation of the teaching profession in the private sector, a profession critical to the proper and necessary education of our citizens.[30] The record here

[30] See also n 33.

does not establish the long history of the Amish indicating the competence of their alternative method for selecting qualified teachers so as to ensure that the government interest in educating the citizenry is not endangered. Moreover, the children involved here will not return to an isolated agrarian community, but will be assimilated into modern society as a whole, a factor requiring closer scrutiny of plaintiffs' claims.

The plaintiffs in the case at bar have not established a case as strong and assuring as that established by the Amish in *Yoder.* For that reason, we do not find it necessary to require the state in this case to show with more particularity how its compelling interest in compulsory education will be adversely affected by granting an exemption to plaintiffs.[31]

The teacher certification requirements represent, at once, a compelling state interest of their own right and a state regulation narrowly drawn to achieve the broader goal of quality education. They constitute, at most, an indirect and minimal burden on the free exercise of religion by plaintiff.

IV

SUMMARY

In *Sherbert v Verner, supra,* and *Thomas v*

[31] The opinion for reversal finds "curious" our analysis of the free exercise claim in this case. *Post,* pp 543-544, n 34. The reason for this, in our estimation, is that, while asserting that the burden on plaintiffs' free exercise of religion is both apparent and substantial, the opinion for reversal appears to actually proceed from the premise that *any* interference with a sincere religious belief or practice triggers the compelling state interest analysis. The opinion is well-written and aggressively presented. It may even be a sound prognostication of the outcome in the United States Supreme Court if and when that Court confronts the issue. It is, however, simply a prognostication. We have written to describe the analysis of that precedent which we conclude is required in the instant case. As the legion of scholarly comment on the Free Exercise Clause illustrates, if there is one thing that is clear in the history of the United States Supreme Court cases on free exercise issues, it is that very little is clear.

Review Bd, supra, the Court reaffirmed a thirty-nine-year-old principle: A state may not exclude "Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson v Ewing Twp Bd of Ed,* 330 US 1, 16; 67 S Ct 504; 91 L Ed 711 (1947) (emphasis deleted). In those cases, the states were unable to demonstrate a sufficiently compelling governmental interest. See *Thomas, supra,* 719 and *Sherbert, supra,* 406-409. Thus, the question whether the states' interests could be served through less burdensome means was not reached.

In the case at bar, "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." *Wisconsin v Yoder, supra,* 213. This paramount responsibility has been made to yield to the right of parents with respect to the religious upbringing of their children only when the parents have assured an equivalent education in a privately operated system. *Wisconsin v Yoder, supra; Pierce v Society of Sisters, supra.*

This Court must not lose sight of the fact that our courts "are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discreet aspects of a State's program of compulsory education."[32] *Wisconsin v Yoder, supra,* 235. As the

[32] The opinion for reversal takes judicial notice of the fact that the majority of states do not currently impose certification requirements upon teachers at nonpublic schools; that where they have been imposed, the trend is to grant exemptions for religious schools; and that the Michigan Legislature is currently considering altering this state's teacher certification program. *Post,* pp 561-562, ns 58-60. We question the relevancy of this information. The issue before us is whether an exemption to the certification requirements is constitutionally mandated, not how the Legislature should develop its education program. We further note that the legislation pending in Michi-

United States Supreme Court has cautioned, "[t]his should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemptions from generally applicable educational requirements." *Id.,* 235.

In the case sub judice, an alternative means by which the state can ensure that academically qualified teachers will further its interest in providing education to its citizenry has not been established. Although certification is not a guarantee of teacher competence, logic and experience indicate that it furthers that goal. The lack of statistics bearing out this corollary is not due to the fact that the corollary does not exist, but rather is because it is impossible to isolate the effect of certification when so many other variables, such as the talent and dedication of the teacher, the support of the family, and available resources and environment, are incapable of control. We are not unmindful of the current controversy regarding the effectiveness of the certification program in producing the quality of teachers every parent would have teach their child. But we are here to scrutinize the constitutional limitations of the Legislature, not its wisdom. Cf. *Braunfeld v Brown, supra,* 608.[33]

We would conclude that the certification require-

gan to which my colleague refers contemplates making certification more difficult to attain, thereby improving the quality of teachers. The fact that such legislation is pending does not support the conclusion that certification requirements are unnecessary to further the states' interest in maintaining quality education for all. Indeed, the opposite conclusion may be drawn, i.e., the state views its interest as so vital that the requirements should be retained and improved upon, not abandoned.

[33] Were we to require the state to offer the exemption requested in this case, it is quite possible that the requested exemptions would result in substantial deregulation of the teaching profession in the private sector, so that the state would be severely hampered in the

ment in the case at bar is an indirect and minimal burden on plaintiffs' free exercise rights and that the interest of the state is of such a high order as to override the interest claiming protection.

V

THE REMAINING ISSUES

We also agree with the treatment of the remaining issues in the opinion for affirmance. We note that the parties have reached an agreement as to the meaning of the other regulatory statutes involved. Because there is no longer a disagreement among the parties as to these points, see *Detroit v Street Electric Ry & Motor Coach Employees Union,* 332 Mich 237, 258; 51 NW2d 228 (1952), app dis 344 US 805 (1952), reh den 344 US 882 (1952),[34]

support of its interest. Testimony at trial indicated that of the 30,000 parochial schools in this country, 12,000 are of plaintiffs' fundamentalist faith and 1,200 new schools are begun each year.

[34] The cases cited by the opinion for reversal for the proposition that issues on appeal do not become moot because an appellee concedes that error occurred in the court below are inapposite to the case at bar. In *United States v W T Grant Co,* 345 US 629; 73 S Ct 894; 97 L Ed 1303 (1953), at issue was the legality of certain conduct alleged to be in violation of the Clayton Act. This issue did not become moot when the defendant voluntarily ceased the conduct because the public interest in having the legality of such practices settled militated against a mootness conclusion. Nor did the discontinuance of the illegal conduct preclude the court's power to grant injunctive relief. The moving party, however, was required to satisfy the court that relief was necessary by establishing cognizable danger of recurrent violation.

In *Young v United States,* 315 US 257; 62 S Ct 510; 86 L Ed 832 (1942), at issue was conduct alleged to be in violation of the Harrison Anti-Narcotic Act, as amended. In the appeal from defendant's conviction, the government confessed error. The government's confession of error in that case, although entitled to great weight, did not preclude independent examination of the question by the Court. "The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. . . . [T]he proper administration of the criminal law cannot be left merely to the stipulation of parties." 315 US 259.

Unlike the cases above, this case does not involve the meaning or

further disposition of these issues by this Court is

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application of a criminal or quasi-criminal statute which by nature, is generally subject to strict construction and cannot be sustained unless its mandates are so clearly expressed that an ordinary person can determine in advance whether his conduct is or is not punishable under the statute. See *People v Silver*, 302 Mich 359; 4 NW2d 687 (1942). At issue in this case is the meaning of certain regulatory statutes and the interpretation of the statutes by the governmental agency charged with the responsibility of enforcing them. At this point, the plaintiffs have no quarrel with the state's interpretation of the statute, and there is no indication that the state intends to enforce the regulations according to any other interpretation. Because the conflict between the parties as to these issues is now resolved, we would be reluctant to create unnecessary precedent which could diminish the current flexibility in this area of the law.

It is a longstanding principle of jurisprudence that a court should avoid ruling on constitutional challenges to the legality of state statutes where such avoidance is possible. "[T]he Court will not pass upon the constitutionality of legislation . . . until it is necessary to do so to preserve the rights of the parties," *Coffman v Breeze Corps, Inc*, 323 US 316, 324-325; 65 S Ct 298; 89 L Ed 264 (1945). Where the parties have reached agreement that their interests are satisfied without the need to resolve a constitutional claim, it is generally unwise for a court to disregard such agreement.

The opinion for reversal criticizes that approach and comments that it leaves standing the decision of the Court of Appeals on those issues. Our colleague would adopt as a controlling construction of the fifteen statutes the agreement of the parties. In the place of avoidance of rulings on constitutional claims, our colleague would thus delegate to the parties the authority to construe acts of the Legislature. Whatever merit there may be to the argument that this Court should rule upon the constitutionality of the curricula, licensing, and reporting requirements of the statutes involved despite the agreement of the parties, in our judgment, there is no merit to the position that the claim of the parties ought to be adopted relative to the constitutionality of statutes, thereby delegating to the parties the authority not only to reverse a decision of the Court of Appeals, but to construe acts of the Legislature and to effectively bind nonparties without the benefit of advocacy.

We intimate no opinion whether the Court of Appeals is correct or incorrect in the resolution of these issues. We intimate no opinion whether the Department of Education, here represented by the Attorney General, reached an appropriate agreement with the plaintiffs on these issues.

The interests of the plaintiffs are obviously furthered by such resolution since the State of Michigan is bound by its agreement. Whether the interests of the State of Michigan or its Department of Education are furthered, and whether the state is bound to treat all similarly situated citizens in accord with such agreement, we decline to decide.

inappropriate.[35] See *Flint v Consumers Power Co,* 290 Mich 305; 287 NW 475 (1939).

We would affirm the decision of the Court of Appeals.

BRICKLEY, J., concurred with BOYLE, J.

RILEY, J. This case involves the appropriate construction, constitutional validity, and enforceability of the private and parochial schools act, 1921 PA 302, MCL 388.551 *et seq.;* MSA 15.1921 *et seq.,* through the compulsory public education statute, MCL 380.1561 *et seq.;* MSA 15.41561 *et seq.* Plaintiffs successfully challenged the enforcement of several of the act's provisions on vagueness, free exercise, Establishment Clause, and substantive due process grounds. The Court of Appeals reversed the trial court's decision and upheld each provision of the act as applied. In deciding the vagueness and Establishment Clause challenges, both courts were required to construe some of the act's broadly expressed provisions.

A number of issues in this case which were constitutionally adjudicated may now be resolved on nonconstitutional grounds by expressly adopting limiting constructions for several of the act's broadly expressed regulatory provisions.[1] The remaining question concerns the constitutionality of closing down two independent fundamentalist

[35] The parties would dispose of the curriculum issue on the basis of this Court's decision in *Snyder v Charlotte Public School Dist,* 421 Mich 517, 539-540; 365 NW2d 151 (1984). While we express no opinion on the merits of the parties' agreement, we would point out that a majority of this Court stated in *Durant v State Bd of Ed,* 424 Mich 364; 381 NW2d 662 (1985), that *Snyder* did not establish that public and parochial schools are required by law to provide a core curriculum. Rather, "*Snyder* stands for the proposition that *if a district chooses to offer certain courses, it must make them available to all students in the district." Id.,* 388. (Emphasis supplied.)

[1] I am persuaded that my colleagues have failed to adequately address these issues by inappropriately dismissing them.

Christian schools, and compelling the children attending those schools to attend the public schools or a nonpublic school against the wishes of their parents, not on the ground that the schools are failing to adequately "educate" these children (and thereby defeating the legitimate public interests underlying the compulsory public education law), but because of each school's religiously based refusal to comply with the statutory teacher certification requirement, which requires *all* denominational and parochial schools to employ *only* teachers who hold a certificate such as would qualify them to teach in the public schools.[2]

The record abundantly supports the trial court's findings that plaintiffs' refusal to comply with the certification requirement is based upon sincerely held religious beliefs and that the certification requirement affirmatively interferes with the free exercise of those beliefs. Thus, plaintiffs' religious practice with regard to the employment of teachers is protected by the First Amendment, and the statutory regulation, as applied, is constitutionally suspect. The crucial question, therefore, concerns whether the state has established that enforcing the certification requirement is essential to the fulfillment of a compelling governmental interest —here, the objectives of the compulsory education law. In this regard, it was incumbent upon the state to show, first, that exempting plaintiffs from the certification requirement would unduly impair its interest in compulsory education and, second, that enforcing the certification requirement is the

[2] MCL 388.553; MSA 15.1923. See 1979 AC, R 390.1101 *et seq.;* 1981 AACS, R 390.1101 *et seq.* (the Teacher Certification Code). The state conceded at the outset of trial that plaintiffs' children were in no way receiving an "inadequate" education. See n 53. The state has not asserted that plaintiffs' teachers are incompetent, academically or otherwise, but only that they have not all complied with the administrative requirements to obtain the requisite certificates to teach in the public schools.

least intrusive means (upon plaintiffs' free exercise rights) by which to accomplish its objective.

The state has never asserted, in this case, that exempting plaintiffs from the state teacher certification regulation will detract in any way from its interest in furthering the objectives of compulsory education. Furthermore, it conceded that plaintiffs were in no way failing to adequately educate their children, even though they were not employing only teachers who held certificates to teach in the public schools. See n 53. Plaintiffs, on the other hand, although not required to do so, have presented persuasive empirical evidence that an exemption would not harm the state's interest. In this regard, the record contains the documented academic achievement records of the children, objectively measured by their performance on standardized achievement tests. Additionally, it reflects the existence of numerous empirical studies, through the testimony of nationally recognized education experts, conducted in the overwhelming majority of states which do not impose the regulation that all children be educated only by state certified teachers to implement their compulsory education laws (no more than five other states currently impose such a regulation),[3] which support the factual conclusion that religious schools that do not employ only state certified teachers pose no threat to the state's interest in education. It is uncontested, on the record in this case, that no correlative relationship in fact exists, in religious schools, between state teacher certification and student learning or teacher competence.

My colleagues, per the opinion of Chief Justice

[3] Those states are: Hawaii, Idaho, South Dakota, Washington and Iowa. See n 58. At the time of this writing, the Iowa Legislature, upon the recommendation of a special Governor's task force report, is considering abrogating that state's certification requirement. See n 59.

WILLIAMS, would uphold the enforceability of the legislation as applied, as did the Court of Appeals, by finding that it is *reasonably related* to furthering the state's interest in education.[4] Justice BOYLE, concurring in that result, applies her version of the "balancing test" appropriate in this case, of which the ultimate characteristic is to relieve the state of its burden to justify the enforcement of legislation which affirmatively interferes with fundamental First and Fourteenth Amendment rights.[5] Justice BOYLE would uphold

[4] In reaching its decision in this case, reversing the trial court's ruling, the Court of Appeals also applied that standard of review. The Court of Appeals reasoned:

> Plaintiffs have urged that there is no compelling state interest in any of the specific state requirements involved in this case but this argument misplaces the emphasis. The issue is not whether there is a compelling state interest in any individual regulation but whether the individual regulations are *reasonable means to give effect to a broader compelling state interest*—in this case the provision of an education to all children, for the reasons stated herein, we believe the regulations are a *reasonable* exercise of state authority in the field of education. [Emphasis added. *Sheridan Church v Dep't of Ed,* 132 Mich App 1, 22; 348 NW2d 263 (1984).]

[5] I disagree with Justice BOYLE's assertion that the United States Supreme Court has not addressed the burden of proof imposed upon the state in order to justify the enforcement of legislation which infringes upon individuals' rights afforded by the Free Exercise Clause. See *ante,* p 492 and n 10. The Supreme Court's decisions construing the Free Exercise Clause, including *Wisconsin v Yoder,* 406 US 205; 92 S Ct 1526; 32 L Ed 2d 15 (1972), have consistently held that it is the state's burden of proof in this regard to establish that granting the appropriate remedy, exemption, will unduly interfere with the fulfillment of a compelling governmental interest. Indeed, Justice BOYLE's opinion acknowledges that " '[t]he government must show that granting the requested exemption will do substantial harm to th[e] [state's] interest . . . .' " (Citation omitted.) *Ante,* p 489.

Justice BOYLE's opinion for affirmance, like Chief Justice WILLIAMS' opinion, does not impose that burden of proof upon the state in this case. Her opinion does not conclude, either by reference to the extensive record or otherwise, that exempting plaintiffs from the certification requirement will result in any harm whatsoever to the state's interest in compulsory education. Instead, Justice BOYLE's opinion concludes that plaintiffs have not established "an alternative

the challenged legislation, as applied, because "logic and experience indicate that it furthers [the state's interest in education]," essentially applying, as did the Court of Appeals and Chief Justice WILLIAMS, a rational-basis standard of review. I am convinced that my colleagues, with all respect, have not applied the constitutionally mandated standard of review, that they have substantially ignored the factual record, and that they have inappropriately disposed of several of the other constitutional questions presented with regard to the private and parochial schools act.

The record in this case does not support the factual conclusion that enforcing the teacher certification provision of the act, as applied, is essential to the state's interest in compulsory education. Indeed, the state, upon which the burden to justify enforcing that legislation unquestionably rests, has failed to establish any substantial relationship between the enforcement of that regulation and the governmental interest in compulsory education. Unless, and until, the state can show otherwise, I would reverse the decision of the Court of Appeals and reinstate the decision of the trial court enjoining the enforcement of that statute as applied. Furthermore, I would expressly adopt limiting constructions for several of the act's other provisions and uphold their constitutional validity as construed, and I would reverse the decision of the Court of Appeals to the extent that it is inconsistent with those constructions.

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means by which the state can ensure . . . its interest in providing education to its citizenry . . . ." *Ante,* p 513.

I am persuaded that Justice BOYLE's opinion effectively shifts the state's burden to justify the enforcement of the regulation challenged in the present case upon the plaintiffs to justify its nonenforcement. I am equally persuaded that her opinion's reference to *Yoder, supra,* to support that approach, is entirely misplaced. See part VI(B).

I

An understanding of the constructional and constitutional issues involved in this case requires a brief discussion of the operative provisions of the private and parochial schools act of 1921.

Section 1 of the act, after vesting supervision of "all the private, *denominational* and *parochial* schools of this state" to the Superintendent of Public Instruction, declares:

> It is the intent of this act that . . . the courses of study [in such schools], and the qualifications of the teachers thereof shall be of the same standard as provided by the general school laws of the state.

Section 2 of the act defines "private, denominational or parochial school," within the meaning of the act, as "any school other than a public school giving instruction to children below the age of 16 years, in the *first 8* grades as provided for the public schools of the state." (Emphasis added.)

Section 3 of the act expressly imposes the teacher certification requirement:

> No person shall teach or give instruction in any of the regular or elementary grade studies in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public schools of the state.

Section 4 of the act authorizes the Superintendent of Public Instruction to enforce the provisions of the act and sets forth enforcement procedures. If a violation of the act is established, after an administrative hearing, the Superintendent of Public Instruction is to "order [compliance] with the requirements of th[e] act found to have been

violated . . . ." If such an order is not obeyed within sixty days, the "superintendent . . . may close [the] school and prohibit . . . [the] operating or maintaining [of the] school . . . until [the] order . . . has been complied with." The children attending a school which has refused to comply with the requirements of the act

> shall be compelled to attend the public schools or approved [nonpublic] school under the provisions of the compulsory education act . . . of 1905, as amended. And it shall be the duty of the persons having charge of the enforcement of the said compulsory education act . . . to compel the attendance of the children . . . at the public schools or approved private, denominational or parochial school.[6]

Finally, § 5 of the act authorizes the Superintendent of Public Instruction "by himself, his assistants, or any duly authorized agent," to "at any time . . . investigate and examine into the conditions of any school operating under this act," and imposes a duty upon such schools to "submit for examination its sanitary condition, the records of enrollment of pupils, *its courses of studies as set forth in section 1 . . . and the qualifications of its teachers.*" (Emphasis added.) Any refusal to comply with the provisions of § 5 "shall be considered sufficient cause to suspend the operation of [the] school . . . ."

II

Plaintiffs, Sheridan Road Baptist Church, First Baptist Church of Bridgeport, their pastors, par-

[6] The compulsory education act of 1905, has survived relatively unchanged and is currently incorporated in part 24 of the School Code. MCL 380.1561-380.1599; MSA 15.41561-15.41599.

ents of children enrolled in the churches' schools, and members of the faculties, commenced this action in the Ingham Circuit Court after the Department of Education and the Superintendent of Public Instruction sought suspension of the operation of the schools operated by each church for failure to comply with the reporting requirements of the act.[7]

Plaintiffs sought injunctive and declaratory relief, challenging the constitutional validity and application of several of the act's provisions, and regulations promulgated thereunder, as violative of the Free Exercise and Establishment Clauses of the First Amendment, the Ninth Amendment, the Due Process Clause of the Fourteenth Amendment,[8] and art 1, § 4, and art 8, § 1, of the Michigan Constitution. Plaintiffs constitutionally challenged provisions of the act which attempt to impose curriculum requirements, licensing (or "approval") requirements, teacher certification requirements, and reporting requirements, as applied, to regulate the existence and operation of plaintiffs' independent fundamentalist Christian schools.

The state counterclaimed, seeking an injunction to require plaintiffs to comply with the regulations, and a declaration that 1921 PA 302 is constitutional on its face and as applied to plaintiffs.

After a six-day trial, the court issued a memorandum decision in which, having considered all of the testimony, it made specific findings as to: the

[7] Sheridan Road Baptist Church operates the Sheridan Road Christian School; First Baptist Church of Bridgeport operates the Bridgeport Baptist Academy. Procedures were instituted to suspend the operation of each school and to determine compliance with the provisions of the act. Plaintiffs' schools were the only schools against which such procedures were instituted.

[8] Plaintiffs challenged provisions of the act as unconstitutionally vague and as violative of the "privacy" rights of parents to direct the academic, social, and religious education of their children.

plaintiffs' religious beliefs, practices, and ministries; the nature of Michigan's interest in demanding certification of the teachers in church schools; the correlative relationship between teacher certification, teacher "competence," and student learning; the vagueness of the curriculum requirement and its inability, as construed, to ensure uniform "quality" in education; and the inappropriateness of vesting authority over religious school curricula in local public school officials operating without standards or guidelines.[9]

The trial court upheld plaintiffs' constitutional challenges and enjoined application and enforce-

[9] The trial court found that, as currently implemented, § 1 of the act requires the curricula of nonpublic schools to be "comparable" to public schools in *the same district,* and that local school district officials are charged with evaluating nonpublic schools. The court found, further, that guidelines for local school district officials in evaluating nonpublic schools do not exist.

The Superintendent of the Bridgeport Spalding Community School District, within which plaintiffs' schools are located, testified that it was within his power to determine whether a nonpublic school was "comparable" and that in his opinion nonpublic schools must teach "appropriate" courses of the same quality as those taught in the public schools within the district.

The superintendent also admitted concern with the loss of $2,000 in state aid for every student who leaves the public school and enrolls in area nonpublic schools when plaintiffs introduced a newsletter entitled *The Spotlight* which is sent to "key communicators in the school district" by the superintendent. The superintendent read the following excerpts from that publication into evidence:

> At the present time, we in the school district have established some basic principles we hope will assist us in getting by during this economic depression.
>
> * * *
>
> Number 4, to prevent loss of students to nonpublic schools . . . . We lose $2,000 for every student who leaves our school district."

The trial court found that local school district officials are ill-prepared to implement the broad provisions of the act and the corresponding provisions of the compulsory attendance statute without guidelines, and expressed concern that they have a vested interest in maintaining enrollment in the public schools. Circuit court opinion, part v, issued December 29, 1982.

ment of the curricula and teacher certification requirements as applied to plaintiffs.[10]

The state filed a claim of appeal, and the Court of Appeals reversed, upholding the constitutionality of 1921 PA 302, as applied, because it found that the infringement of plaintiffs' free exercise rights was justified by each challenged regulation's *reasonable* relationship to the state's interest in education.[11]

This Court granted plaintiffs' application for leave to appeal to consider the constitutional enforceability of the private and parochial schools act, as applied to plaintiffs, with respect to each of plaintiffs' constitutional challenges, and to review the Court of Appeals decision which reversed the decision of the trial court with regard to each challenge. 422 Mich 857 (1985).

III

It now appears that a number of the constitutional issues which were adjudicated by the Court of Appeals and the trial court may be resolved on nonconstitutional grounds if this Court adopts a limited construction of the statutory curricula and licensing ("approval") requirements.[12]

The state has advanced a limited construction of the provisions imposing curricula and licensing

[10] The trial court held § 1 of the act, which requires courses of study to be of "the same standard as provided by the general school laws in the state," to be unconstitutional as applied to plaintiffs; § 3 of the act, which requires teachers employed in religious schools, without exceptions, to hold a Michigan teacher's certificate, to be unconstitutional as applied to plaintiffs; and that the information gained from plaintiffs pursuant to § 5 of the act may not be used for purposes of approval of plaintiffs' schools.

[11] *Sheridan Church, supra,* 22.

[12] My colleagues have inappropriately treated plaintiffs' position in this regard as a dismissal of their appeal from the Court of Appeals decision.

requirements upon *all* nonpublic schools, which, apparently, it did not advocate in the Court of Appeals or in the trial court.[13] Plaintiffs, responding to these proposals, have stated that adopting this limiting construction would remove plaintiffs' constitutional objections to those two aspects of the state's regulatory scheme. Likewise, plaintiffs would no longer object to the reporting requirement as it relates to those aspects of the scheme.

Thus, if this Court adopts the limited construction now advanced with respect to the statutory curriculum, licensing, and reporting requirements, the only remaining question requiring constitutional adjudication concerns the plaintiffs' challenges to the teacher certification requirement. I would adopt those limiting constructions to avoid constitutional adjudication with regard to those statutory requirements. A statute "ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB v Catholic Bishop of Chicago,* 440 US 490, 500; 99 S Ct 1313; 59 L Ed 2d 533 (1979).[14]

The intent of the private and parochial schools act to directly regulate religious schools is clearly expressed.[15] While the reasonable regulation of all

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[13] The limiting constructions now advanced by the state conflict with the constructions given to those provisions by both the Court of Appeals and the trial court.

[14] See *Ashwander v Tennessee Valley Authority,* 297 US 288, 348; 56 S Ct 466; 80 L Ed 688 (1936) (Brandeis, J., concurring); *Snyder v Charlotte Public School Dist,* 421 Mich 517; 365 NW2d 151 (1984). But cf. *Heckler v Mathews,* 465 US 728, 741; 104 S Ct 1387; 79 L Ed 2d 646 (1984) (seeking alternative construction does not "license a court to usurp the policymaking and legislative functions").

[15] The act expressly refers to "denominational and parochial schools." Additionally, it should be emphasized that the overwhelming majority of nonpublic schools are in fact religiously affiliated. It has recently been noted, for example, that "[i]n the 1980-81 school year, 84% of private schoolchildren (including those in kindergarten) attended church-affiliated schools." Note, *Tuition tax deductions and credits in light of* Mueller v Allen, 31 Wayne L R 157, n 3 (1984)

nonpublic schools is permissible within the state's police power, such regulation is not beyond the limitations of the Bill of Rights. Set against the governing principles of neutrality and accommodation inherent in the First Amendment's protection of religious freedom, the facts of the present case give rise to serious constitutional questions concerning the extent to which the government may regulate "nonpublic" education, without consideration for religious exemptions and the individual freedoms of parents and their children. With regard to plaintiffs' free exercise claims, the constitutionally recognized right of parents to direct the religious and intellectual education of their children is directly implicated. See *Wisconsin v Yoder,* 406 US 205; 92 S Ct 1526; 32 L Ed 2d 15 (1972); *Pierce v Society of Sisters,* 268 US 510; 45 S Ct 571; 69 L Ed 1070 (1925). See also *Project, Education and the law: State interests and individual rights,* 74 Mich L R 1373 (1976). Furthermore, the intrusive nature of the enforcement provisions of the act, §§ 4 and 5, elevates the need for careful consideration of plaintiffs' free exercise and due process challenges.

Additionally, the act's broadly expressed continuous regulatory authority may give rise to serious constitutional questions under the Establishment Clause. See *Lemon v Kurtzman,* 403 US 602, 616; 91 S Ct 2105; 29 L Ed 2d 745 (1971).

Nevertheless, I am persuaded that a limited construction may be given to the curricula, licensing, and reporting requirements, which, within the facts of the present case, would be consistent with the First and Fourteenth Amendments, and would make it unnecessary to apply the constitutionally mandated heightened standard of review to deter-

(citing National Center for Education Statistics, US Dep't of Education, Digest of Education Statistics, 49 (1982).

mine the enforceability of those statutory provisions.

A

The act does not define curricula requirements per se, other than its reference in the general intent sentence of § 1 that "the courses of study . . . shall be of the same standard as provided by the general school laws of the state." In addition to the inherent vagueness of "the same standard," the numerous constructions that could be given to the phrase "provided by the general school laws of the state" render the act's attempt to impose "required" courses of study cryptic.[16]

Plaintiffs' attempt to ascertain the meaning of the "curriculum requirement," to which it must comply, was of no avail at trial; the examination of state officials and the production of documentary evidence resulted in contradictory and confusing evidence.[17] The trial court ultimately held this

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[16] At least three possible constructions could be given to the phrase "provided by the general school laws of the state": courses mandated in the general school laws expressly for nonpublic schools, which would include only Civics and Government (MCL 380.1166; MSA 15.41166); courses provided for in the general school laws not expressly limited to public schools, which would include sex education (MCL 380.1501; MSA 15.41501), reproductive health (MCL 380.1506; MSA 15.41506), and other courses that plaintiffs object to on religious grounds; the reference to courses of study in the compulsory education statute (MCL 380.1561; MSA 15.41561), which is not directly applicable to schools, but is a truancy law enforceable against parents, and requires courses "comparable" to those offered in the public schools of the particular school district in which the nonpublic school is located.

[17] For example, a consultant from the Department of Education testified that it means the same "courses," but that "there are questions concerning the meaning of the act." The school superintendent testified that it means "quality," not "subjects." A Department of Education official testified that it means "basic core subjects," but that only two are required, "Government and civics," but that any course that a consensus in Michigan deemed "basic" would have to be taught. The Associate Superintendent for Elementary and Secondary

statutory requirement to be unconstitutional on its face.[18]

According to a Department of Education publication which was produced and admitted at trial, the curricula requirement imposed by § 1 of the act requires that the courses of study provided by nonpublic schools "*be the same or equivalent to* that provided by the public school district in which the said nonpublic school is located geographically." (Emphasis added.)[19] That construction seems consistent with the compulsory education statutes' exception to mandatory *public* school attendance for:

> (a) A child who is attending regularly and is being taught in a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools . . ., as determined by the course of study for the public schools of the district within which the nonpublic school is located. [MCL 380.1561(3)(a); MSA 15.41561(3)(a).][20]

Education testified that it means only Civics and Government and that a nonpublic school need not teach mathematics.

[18] The trial court found § 1 of the act to be violative of the Establishment Clause, because it causes excessive government entanglement and, as construed, does not further the state's interest in education. The court's holding was premised, at least partially, upon the factual finding that local public school officials are charged with evaluating and enforcing the curricula requirements without guidelines. See n 9.

[19] Department of Education publication, *Statutory Provisions for the Establishment and Operation of Elementary and Secondary Non-Public Schools,* p 12. That publication states, additionally, that "[s]pecific subject contents, as prescribed by the legislature in the General School Law, [must] be included in the basis [sic] course of study of the nonpublic school."

[20] Other exceptions to mandatory public school attendance (MCL 380.1561[3][b]-[e]; MSA 15.41561[3][b]-[e]) are:

(b) a child who is employed as a page or messenger in the Legislature during the period of employment;

(c) a child under nine years old who does not reside within two and one-half miles of a public school;

(d) a child from the age of twelve to fourteen while in attendance at *Confirmation* classes;

Citing this provision of the compulsory education statute, the Court of Appeals held that nonpublic schools, "[i]n order to win state approval," must offer "courses 'comparable' to those offered by the public schools in the district within which the nonpublic school is located." 132 Mich App 1, 25; 348 NW2d 263 (1984). As construed by the Court of Appeals, the curricula that a nonpublic school is statutorily required to adopt depends upon the geographical location of the school and would include courses other than "core curriculum courses" and courses religiously objectionable to plaintiffs.[21]

However, the state now rejects the Court of Appeals construction and asserts a more limited construction of the statutory curricula regulation, citing this Court's decision in *Snyder v Charlotte Public School Dist,* 421 Mich 517; 365 NW2d 151 (1984), in which this Court referred to the curricula requirement. This limited construction, which plaintiffs have stated would remove their constitutional objections,[22] would not depend upon geo-

(e) a child enrolled in the public schools attending *religious instruction* classes for not more than two class hours per week, upon written request of the parent.

[21] Statutorily prescribed courses include: critical health problems education (MCL 388.382 *et seq.;* MSA 15.1958(2) *et seq.*); communicable diseases (MCL 380.1169; MSA 15.41169); physiology and hygiene (MCL 380.1170; MSA 15.41170); humane treatment of animals (MCL 380.1171; MSA 15.41171); instruction in the pluralistic, multiracial, and multiethnic nature of society (MCL 380.1173; MSA 15.41173); instruction in the culture of ethnic, religious, and racial minorities, and the contributions of women (MCL 380.1174; MSA 15.41174); sex education (MCL 380.1501; MSA 15.41501); health and physical education (MCL 380.1502; MSA 15.41502); and reproductive health instruction (MCL 380.1506; MSA 15.41506).

[22] In addition to challenging the curricula requirements imposed by § 1 of the act as violative of the religious freedom guarantees of the First Amendment and parental privacy protections of the Fourteenth, plaintiffs challenge that statutory regulation as unconstitutionally vague. See *State v Newstrom,* 371 NW2d 525 (Minn, 1985). See also *Keyishian v Bd of Regents,* 385 US 589; 87 S Ct 675; 17 L Ed 2d 629 (1967).

graphical location and would require nonpublic schools to provide a " 'core curriculum' . . . such as basic reading, mathematics, writing, English, etc." *Id.,* 540.[23] Plaintiffs maintain an extensive "core curriculum" of required courses, and the state agrees that plaintiffs are not in violation of the curriculum requirement.[24]

Further, the state affirmatively asserts that the private and parochial schools act should not be construed as authorizing state officials to "inject themselves into the operation of nonpublic schools," or to "examine content of courses," or to engage in "monitoring" the churches' schools, or to "evaluate curriculum . . . , teaching techniques and methods, textbooks, or testing procedures."[25]

B

With regard to the licensing/approval issue, the state now asserts that Michigan law "does not provide for or require the approval or licensing of any school"; it merely confers the authority to " 'disapprove' for noncompliance with specific re-

Plaintiffs now agree, however, that should this Court "adopt the construction of the curriculum requirement now offered by the State (in the face of the 'comparability' requirement of 1976 PA 451, Section 1561), the vagueness challenge of plaintiffs is dispelled."

[23] Additionally, pursuant to MCL 380.1166; MSA 15.41166, which is applicable to both public and nonpublic schools, "courses of instruction [are required] in the constitution of the United States, . . . constitution of Michigan, . . . government of the United States [including history thereof], Michigan, and its political subdivisions, [and] [a] high school . . . course . . . in civics . . . [stressing] the rights and responsibilities of citizens." MCL 380.1166(1), (2); MSA 15.41166(1), (2).

[24] The state conceded at the outset of the trial in this case that plaintiffs are in compliance with the curricula regulations. See n 53.

[25] As the trial court found, there are no significant guidelines restricting the supervisory authority granted to local public school district officials to evaluate local nonpublic schools. The local official charged with evaluating plaintiffs' schools testified that it was within his authority to evaluate textbooks and teaching techniques to determine "comparability."

quirements." The state urges that although 1921 PA 302, § 4, and the compulsory education statute[26] refer to "'approved' nonpublic schools . . . this simply means a school which has not been 'disapproved,'" and, thus, no "prior restraint" is imposed to the beginning or continuing of plaintiffs' teaching ministry.

Plaintiffs agree that, if adopted, this construction would remove their constitutional objections to the "licensing" requirement which "has been of deepest concern [to them] since . . . they are religiously disabled to seek a governmental permit to initiate a ministry."

C

Adopting the proposed limited construction of the curricula and "approved" requirements would also remove plaintiffs' objection to the reporting requirements imposed under § 5 of the act as they relate to those aspects of the regulatory scheme. Plaintiffs have never objected to the reporting requirements imposed by § 1578 of the School Code, MCL 380.1578; MSA 15.41578, which does not require information for purposes of enforcing regulations religiously objectionable to plaintiffs.[27]

[26] MCL 380.1561(3)(a); MSA 15.41561(3)(a). See text accompanying n 20.

[27] Section 1578 requires nonpublic schools to report the following data, at the beginning of the school year:

> (a) the name and age of each child who is enrolled at the school.
>
> (b) The number or name of the school district and the city or township and county in which the parent, guardian, or person in parental relation resides.
>
> (c) The name and address of the parent, guardian, or other person in parental relation.
>
> (d) The name and age of each child enrolled in the school who is not in regular attendance. [MCL 380.1578; MSA 15.41578.]

D

I would expressly adopt the limited constructions of those provisions of the act and thereby reverse and modify the decision of the Court of Appeals to the extent that the constructions given to those provisions by that Court are inconsistent with the limited constructions here adopted. My colleagues' treatment, or, more precisely, nontreatment of these issues does not appropriately resolve the constitutional questions presented. Plaintiffs have not dismissed their constitutional challenges to the enforcement of those provisions, as construed in the binding decision of the Court of Appeals. That the state has modified its position with respect to the appropriate statutory construction of the requirements imposed upon all nonpublic schools and its authority to enforce those requirements, does not, in itself, remove plaintiffs' constitutional objections. Statutory construction is within the province of the courts, and the constructions now urged by the state, which conflict with the constructions adopted by the binding decision of the Court of Appeals, are without legal effect. Plaintiffs have not agreed to dismiss, by stipulation of the parties, the constitutional questions presented with regard to those provisions. While stipulations as to questions of fact are binding upon the parties, stipulations concerning questions of law are inoperative, and without legal effect. See *People v Levisen,* 404 Ill 574; 90 NE2d 213 (1950).

The cases cited in Justice BOYLE's opinion do not support my colleagues' avoidance of these issues. In *Detroit v Street Ry Employees Union,* 332 Mich 237, 258; 51 NW2d 228 (1952), the issue referred to "was not decided by the lower court." In *Flint v Consumers Power Co,* 290 Mich 305, 308; 287 NW

475 (1939), no actual controversy existed at the time the declaratory judgment action was instituted in that case.

This Court may not appropriately dispose of these issues by deciding that no "case or controversy" exists, or that the issues have been mooted. The case or controversy requirement of the federal constitution, which prohibits the federal courts from issuing advisory opinions, is completely inapplicable in this situation. An actual controversy does exist, with actual parties, and, indeed, it has been decided by both the trial court and the Court of Appeals. The inapplicability of the mootness doctrine is also apparent. Issues on appeal do not become moot, and therefore not reviewable, because the appellee changes its position and thereby concedes that the decision being reviewed was incorrect to that extent. See, e.g., *United States v W T Grant Co,* 345 US 629; 73 S Ct 894; 97 L Ed 1303 (1953); *Young v United States,* 315 US 257; 62 S Ct 510; 86 L Ed 832 (1942). The effect of my colleagues' nontreatment of these issues is to allow the Court of Appeals constructions of these provisions of the act to stand, effectively affirming them, and to ignore the substantial constitutional questions presented.

Justice BOYLE articulates her disapproval of adopting the limiting constructions now advanced by the state to uphold the constitutional validity of these statutes and avoid reviewing the decision of the Court of Appeals, stating that that position has "no merit." *Ante,* p 515, n 34. However, contrary to Justice BOYLE's assertions, my point is that the appropriate resolution of these issues requires either (1) adopting limiting constructions of these statutes to uphold their constitutional validity and make it unnecessary to review the decision of the Court of Appeals, or (2) reviewing

the substantial vagueness, Establishment Clause, free exercise, and other issues decided by the Court of Appeals as it construed these statutes. Because my colleagues are not inclined to adopt any limiting constructions of these statutes, I would suggest that the only other appropriate disposition would require reviewing the Court of Appeals decision, which is binding upon these parties and all others regardless of the so-called "agreement" of the parties, in its entirety.

The error in Justice BOYLE's assertion that "the State of Michigan is bound by its [so-called] agreement" (*ante,* p 515, n 34), is exemplified by her own inapposite criticism that I would "delegate to the parties the authority to construe acts of the Legislature," and "the authority . . . to reverse a decision of the Court of Appeals." *Ante,* p 515, n 34.

IV

The remaining constitutional question concerns the enforceability, consistent with the First and Fourteenth Amendments of the United States Constitution, of the teacher certification statute, MCL 388.553; MSA 15.1923, and regulations promulgated thereunder, 1979 AC, R 390.1101 *et seq.;* 1981 AACS, R 390.1101 *et seq.* (the Teacher Certification Code), as applied.

The state teacher certification requirement is imposed by § 3 of the 1921 act. It requires all parochial and denominational schools to employ *only* teachers who "hold a certificate such as would qualify him or her to teach in . . . the public schools of the state." The administrative requirements for securing state certification are promulgated by the State Board of Education, and include the completion of a program of study at a

state-approved teacher training institution. Upon the recommendation of such an institution, a provisional certificate is issued. To obtain a continuing certificate, the candidate must complete eighteen semester hours of additional study, which is not restricted to any particular subject matter but which must be approved by the training institution. See, generally, 1979 AC, R 390.1101 *et seq.;* 1981 AACS, R 390.1101 *et seq.,* for additional specific regulations regarding teacher certification.

The enforcement provisions of the act, §§ 4 and 5, authorize the state to close any parochial or denominational school which is in violation of § 3 (i.e., does not employ *only* teachers who hold a valid state certificate).

Plaintiffs challenge the enforcement of the teacher certification statute as an unnecessary interference with their First Amendment rights to freely exercise their religion. Additionally, plaintiff parents assert their fundamental rights, as parents, to direct the intellectual and religious education of their children, and the rights of their children to receive that direction without unnecessary interference by the state. This "fundamental right" has been recognized independent of the First Amendment, as protected under the "personal" substantive due process rights inherent in the liberty protections of the Fourteenth Amendment. See *Pierce, supra; Prince v Massachusetts,* 321 US 158; 64 S Ct 438; 88 L Ed 645 (1944); *Farrington v Tokushige,* 273 US 284; 47 S Ct 406; 71 L Ed 646 (1927); *Meyer v Nebraska,* 262 US 390; 43 S Ct 625; 67 L Ed 1042 (1923). See also *Project, education and the law: State interests and individual rights, supra.* The fundamental liberty right recognized in those cases has been reaffirmed by the Supreme Court, moreover, in several recent decisions in which it has cited those earlier deci-

sions with approval. See *Yoder, supra,* 233. See also *Moore v East Cleveland,* 431 US 494; 97 S Ct 1932; 52 L Ed 2d 531 (1977); *Runyon v McCrary,* 427 US 160, 178, n 15; 96 S Ct 2586; 49 L Ed 2d 415 (1976); *Roe v Wade,* 410 US 113, 152-153; 93 S Ct 705; 35 L Ed 2d 147 (1973).[28]

In *Pierce, supra,* the Court held unconstitutional an Oregon compulsory education act which required public school attendance with limited exceptions not including private school attendance.[29] The Court said:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers *only.* The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. [Emphasis added. *Id.,* 535.][30]

[28] See also *Norwood v Harrison,* 413 US 455, 461; 93 S Ct 2804; 37 L Ed 2d 723 (1973) ("a State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice"); *Committee for Public Ed & Religious Liberty v Nyquist,* 413 US 756, 788; 93 S Ct 2955; 37 L Ed 2d 948 (1973) ("a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause").

[29] The Oregon Compulsory Education Act, adopted in 1922, provided exemptions "for children who are not normal, or who have completed the eighth grade, or who reside at considerable distances from any public school, or whose parents or guardians hold special permits from the County Superintendent." *Pierce, supra,* 530-531.

[30] *Pierce* was decided before the religious freedom guarantees of the First Amendment were held applicable to the states through the Fourteenth Amendment in *Cantwell v Connecticut,* 310 US 296; 60 S Ct 900; 84 L Ed 1213 (1940), and *Everson v Ewing Twp Bd of Ed,* 330 US 1; 67 S Ct 504; 91 L Ed 711 (1947). The constitutional analysis in *Pierce* was grounded upon the "substantive" due process rights of parents with respect to the fundamental freedom of controlling the education and socialization of their children.

Such a right was recognized at common law. See, e.g., *Gordon v Los Angeles Bd of Ed,* 78 Cal App 2d 464, 480; 178 P2d 488 (1947); *School*

In *Meyer, supra,* the Court held unconstitutional state legislation which prohibited "the teaching in school of any subject except in English," and "the teaching of any other language until the pupil has attained and successfully passed the eighth grade." *Id.,* 400. In finding that legislation to be violative of the Fourteenth Amendment, as applied, the Court noted that the education systems envisioned in Plato's "Ideal Commonwealth," and by the ancient Spartans, would be inconsistent with the nature of our constitutional democracy:

> For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State

Bd Dist No 18 v Thompson, 24 Okla 1, 4; 103 P 578 (1909); *Rulison v Post,* 79 Ill 567, 573 (1875). See also *People v Levisen, supra,* 577.

That parents should have the prior right, and primary role, in directing the education of their children was endorsed by the United Nations General Assembly in *The Universal Declaration of Human Rights,* GA Res 217, art 26 (1948) (cited in *Project, Education and the law: State interests and individual rights,* 74 Mich L R 1373, 1389, n 83 [1976]).

> without doing violence to both letter and spirit of the Constitution. [*Id.,* 401-402.]

In *Bartels v Iowa,* 262 US 404; 43 S Ct 628; 67 L Ed 1047 (1923), the Court invalidated similar legislation which had been enacted in Iowa and Ohio. See also *Farrington, supra,* in which the Court invalidated, as violative of the Fourteenth Amendment, an Hawaii statute which interfered with the educational freedom of parents and their children.

In *Yoder, supra,* 233, the Court said that the "additional obligations" referred to in *Pierce* "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship," and stated that

> *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.

In *Yoder,* the Court emphasized that this parental interest is particularly compelling combined with a free exercise claim. *Id.*

Because plaintiffs' challenge to the enforcement of the certification requirement is asserted within the context of the religious freedom guarantees of the First Amendment, independent consideration of their parental rights afforded by the Fourteenth Amendment would be unnecessary. Because I conclude that plaintiffs have established their burden of proof with respect to their free exercise claim, their parental privacy challenge may be considered simultaneously.[31]

Finally, plaintiffs challenge the certification reg-

[31] Consideration of the nature and scope of the unenumerated, though constitutionally recognized, fundamental "substantive" rights embodied in the Due Process Clause of the Fourteenth Amendment, and their application to determine the enforceability of the state legislation challenged in the present case, would require independent analysis. Because plaintiffs have established that the legislation in question affirmatively regulates the exercise of their individual rights

ulation as violative of the Establishment Clause, asserting that it creates excessive entanglements between government and religious schools.

V

Consideration of plaintiffs' free exercise challenge requires, first, determining the applicable standard of review. The United States Supreme Court, in several recent decisions, has considered the standard of review applicable to state legislation which interferes with individuals' rights to freely exercise their religious beliefs. See, e.g., *United States v Lee,* 455 US 252; 102 S Ct 1051; 71 L Ed 2d 127 (1982); *Thomas v Review Bd of Indiana Employment Security Div,* 450 US 707; 101 S Ct 1425; 67 L Ed 2d 624 (1981); *Yoder, supra; Sherbert v Verner,* 374 US 398; 83 S Ct 1790; 10 L Ed 2d 965 (1963).[32] While the Court has not enunciated the applicable standard in identical terms, it has become increasingly clear that such legislation requires strict judicial consideration.

In *Lee, supra,* the Court said that "[t]he state may justify a limitation on religious liberty [only] by showing that it is essential to accomplish an overriding governmental interest." Inherent in determining whether the limitation is "essential" to the governmental interest, is consideration of whether accommodation by the state would "un-

expressly afforded by the First Amendment, such independent analysis is unnecessary. It may be presumed, in light of the First Amendment's historical significance and the importance attached to the judiciary's obligation to safeguard the individual rights expressly protected therein, that no stricter standard of review would be mandated.

[32] See also *Bob Jones Univ v United States,* 461 US 574; 103 S Ct 2017; 76 L Ed 2d 157 (1983); *Gillette v United States,* 401 US 437; 91 S Ct 828; 28 L Ed 2d 168 (1971); *West Virginia Bd of Ed v Barnette,* 319 US 624; 63 S Ct 1178; 87 L Ed 1628 (1943); *Murdock v Pennsylvania,* 319 US 105; 63 S Ct 870; 87 L Ed 1292 (1943); *Cantwell v Connecticut,* 310 US 296; 60 S Ct 900; 84 L Ed 1213 (1940).

duly interfere with fulfillment of th[at] governmental interest." *Id.,* 257-259.

Similarly, the Court, in *Thomas, supra,* 718, said that "[t]he state may justify an inroad on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest." See also *Sherbert, supra,* 406-408. In *Sherbert,* 406, the Court said "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Referring to the nature of such a "compelling state interest," the *Thomas* Court quoted the following passage from the opinion of the Court in *Yoder, supra,* 215:

> The essence of all that has been said and written on the subject is that only those interests of the highest order *and those not otherwise served* can overbalance legitimate claims to the free exercise of religion. [Emphasis added.]

Thus, while not phrased in identical terms, the standard of review applied by the Court in its decision in each of those cases consistently reflects both aspects of a heightened scrutiny standard: inquiry concerning the magnitude of the state's interest, and the necessity of the means chosen to further that interest. Furthermore, and perhaps most noteworthy, in each of those cases the Court focused on the effect that accommodating individuals' free exercise rights would have upon the achievement of the asserted governmental interest, in considering the necessity of overriding their First Amendment freedoms.[33] For example, re-

[33] The rights protected by the Free Exercise Clause are individual rights, and the remedy afforded is exemption. In determining whether some "compelling" governmental interest justifies overriding individuals' bona fide claims to the exercise of those rights, accordingly, the Court has consistently focused on the effect granting exemptions would have upon the achievement of the governmental interest asserted.

sponding to the State of Wisconsin's assertion that any incidental burden upon the free exercise rights of the religious observers in that case was justified because requiring school attendance of all children until the age of sixteen was essential to the achievement of the state's interest in compulsory education, the *Yoder* Court said:

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed [religious observers'] exemption. [*Yoder,* 221. Citation omitted.]

The Court's most recent free exercise decision in *Bowen v Roy,* 476 US —; 106 S Ct 2147; 90 L Ed 2d 735 (1986), in which the Court was divided three-two-four, has not overruled or modified the standard of review consistently applied in each of those prior controlling decisions. The Court's five-to-four decision in *Goldman v Weinberger,* 475 US —; 106 S Ct 1310; 89 L Ed 2d 478 (1986), is, of course, inapplicable. The issue presented in *Goldman,* which was expressly limited to the military context, concerned "the appropriate level of scrutiny of a military regulation that clashes with a constitutional right . . . ." 89 L Ed 2d 483. While Justice BOYLE's assertion that "[t]he First Amendment makes no exception for the military" (*ante,* p 504, n 27) is arguably persuasive, it was precisely that assertion which was rejected in *Goldman.* The five-member majority, relying upon a long line of precedent, held that a lower level of scrutiny is applicable to claims of constitutional violations within the specialized military society. That *Gold-*

man was sui generis and, thus, has not affected the Court's generally applicable prior controlling decisions cannot be seriously questioned.

Thus, if the record in the instant case supports plaintiffs' claims that their refusal to comply with the teacher certification statute is based upon sincerely held religious beliefs, and that the certification requirement interferes with or burdens the free exercise of those beliefs, the determinative question requires an inquiry concerning the nature of the state's asserted interests, and the necessity of enforcing the certification statute, as applied, to further those interests. Inherent in this inquiry is consideration of the effect accommodation by the state would have upon the achievement of that interest. If accommodating plaintiffs' religious practices with regard to the employment of teachers would cause no ascertainable harm to the state's asserted interests, no ad hoc "balancing" concerning the extent of the burden upon plaintiffs' free exercise rights is necessary; if accommodation would cause no harm to the asserted interest, then no infringement of plaintiffs' First Amendment rights may be justified by characterizing the infringement as "minimal."[34] Likewise, if a

[34] The analyses of my colleagues' opinions, in this regard, is curious. Both opinions agree, reluctantly, that plaintiffs have established that the regulation from which they seek exemption imposes a burden upon the exercise of their religious beliefs. Rather than turning to whether the state has established its required burden of proof to justify enforcing the regulation as applied, my colleagues then decide, without adequate explanation, that the interference with plaintiffs' religious beliefs is only "minimal." Neither opinion even considers whether granting plaintiffs' claimed exemption would interfere, to any extent, with the fulfillment of the state's asserted "compelling" interest.

The constitutional standard by which to determine whether the state has established its burden of proof to justify enforcing state legislation against individuals who have established bona fide religious objections to compliance therewith is identifiable. That standard does not include determining whether the state, rather than those individuals, has more correctly interpreted those individuals' religious

less intrusive alternative means is available by which the state may ensure the continuing fulfillment of its asserted "compelling" interest, that alternative must be employed.

A

Consideration of plaintiffs' free exercise challenge must begin with a review of the facts regarding the nature of plaintiffs' schools and the effect upon plaintiffs' exercise of religion posed by enforcement of the state's teacher certification requirement. Individuals seeking exemption from complying with an otherwise valid state regulation, claiming protection under the First Amendment's Free Exercise Clause, must establish that their objection to compliance is based upon sincerely held "religious" beliefs, and that the regulation, from which exemption is sought, interferes with or burdens the free exercise of those religious beliefs. *Lee, supra,* 256-257. In determining whether plaintiffs have sufficiently established that the certification statute interferes with the free exercise of their religious beliefs, due regard must be given to the factual findings and conclusions of the trial court. *Thomas, supra,* 716; *Lee, supra,* 257.

The record in this case, including the testimony of plaintiff pastors, parents, teachers, and children, and of qualified expert witnesses in both religion and education, clearly supports the trial court's conclusion that the certification statute substantially interferes with the free exercise of plaintiffs' religious beliefs. The record supports the following factual conclusions. Plaintiffs believe themselves required to establish and maintain schools as an integral part of their religious mission and con-

beliefs and requirements, nor does it allow the reviewing court to make such a determination.

sider the schools to be church ministries.[35] The record reflects that that belief stems from literal scriptural interpretation and represents a revival of the views of the earliest Christian movement, with roots in the Old Testament.[36] The plaintiffs'

[35] The pastors of each church testified that their religious beliefs require them to maintain schools as an integral part of their church. The following excerpt from the testimony of Rene B. Ouellette, pastor of the First Baptist Church of Bridgeport, is illustrative:

> *Q.* [*Plaintiffs' Attorney*]: Does the church maintain and operate a school?
>
> *A.* [*Mr. Ouellette*]: Yes, we do, the Bridgeport Baptist Academy.
>
> *Q.* Is the school incorporated?
>
> *A.* No, sir, the school is a ministry of our church and therefore not separately incorporated.
>
> * * *
>
> *Q.* Can you describe the relationship between the church and the school?
>
> *A.* Yes. As I mentioned, the school is an integral part of the church's ministries. All of our teachers of our school are members of our church. We don't maintain a separate checking account for the school. In fact, all the teachers' paychecks come from the First Baptist Church general fund. The governing body of the church is also the governing body of the ministry. In every way we treat the school as one of the many ministries of our church.
>
> *Q.* Why does the church operate a school?
>
> *A.* The only reason we operate our school is because the Bible says, Deuteronomy, chapter six, that we are responsible to give to our children a godly education. The reading of that chapter will bear out the fact that it is to be a continual education, not something that takes place occasionally or on the weekend, but something that is to be done on a daily basis. So we have a divine mandate to give godly teaching and instruction to our children.

[36] Plaintiffs interpret Deuteronomy, chapter 6, as *requiring* their churches to maintain and operate schools and their children to attend those schools.

Religious expert, Dr. Rousas J. Rushdoony, testified with respect to modern fundamentalist Christian beliefs, and their relationship to orthodox Christianity. Dr. Rushdoony described the relationship of plaintiffs' churches' schools to fundamentalism as follows:

> The word "church" to fundamentalism, because of it's [sic] biblical emphasis, is reproducing the meaning that character-

ized the church in the early century and in terms of old testament faith. The church of the old testament and the days of the new testament was the synagogue. And the synagogue was made up of an instructional ministry on the Sabbath and a weekly weekday teaching ministry to children. The early church reproduced this pattern. Joseph Bingham, in his two-volume index of a few thousand pages, points out that the early church was a place of worship, a place of instruction for the young and a library. These were the three functions of the church in the early centuries of Christian era.

Well, fundamentalism has gone back to that definition which, as I indicated, has roots in the old testament. In the old testament the ministry was two-fold: A priestly ministry that was sacrificial and levitical which was instructional. Deuteronomy 33:10 says that the function of the Levites is to be the instructors of Israel. And in Jeremiah 10:2 the warning is emphatically given from God, "Learn not the ways of the heathen." So that education is to be a function of the levitical ministry.

Well the early church, of course, did not have a sacrificing priesthood; it had a levitical ministry, and therefore it carried on the functions of the synagogue. Now, this, with barbarian invasions and the overthrow of Rome, collapsed, was reestablished with the medieval church, with the onset of enlightenism and humanism. Again there was a collapse in the educational ministry. In this country state control of education began only with Horace Mann and his associates in the early 1830s. Now we are having a return to the older concept so that fundamentalist Christianity is reviving the historic faith at this point.

* * *

The school is an integral part of the ministry of the church, since the ministry is an instructional ministry from the pulpit and from the classroom. Throughout its functioning the fundamentalist church is a levitical or instructional ministry.

Dr. Rushdoony testified with respect to fundamental Christian teaching concerning the role of the state, the religious concept of limited state "sovereignty," and the historical origin of those beliefs in both American and world history. Responding to the question whether fundamentalist Christian faith has any scriptural mandates with regard to the education of their children, he said:

Yes they do. They believe very strongly the children belong to the Lord, not to the State, and therefore they are to be reared in the nurture and admonition of the Lord. They believe that separation, the premise in terms in which their churches are established, applies very strictly also to their children as well as to their personal lives.

schools are pervasively religious; the biblical faith is applied to every subject offered in class. Every class, including those deemed by the state to be "secular" in nature, is taught from a religious perspective, and all the textbooks used are permeated with religious doctrine.[37]

The teachers in plaintiffs' schools must be members of the independent churches, "born again" Christians, and live Christian lives in and out of the classrooms, in addition to possessing the qualifications and ability to teach the academic subject matter.[38] Their role in the schools is considered a ministry for the inculcation of Christian principles, moral standards, and biblical beliefs in the lives of the children they teach, in addition to providing a religious academic environment in which the students may develop scholastically.[39]

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[37] The record reflects that plaintiffs believe themselves religiously mandated to teach all subjects from a biblical perspective, in addition to independent Bible study. Accordingly, all textbooks used are written from a religious perspective, incorporate biblical scripture, and relate scriptural interpretation to each subject. Specific examples were offered at trial with respect to mathematics and biology textbooks.

[38] The pastors from each church testified regarding the qualifications required to teach at their schools. Pastor Ouellette explained:

> They have to have two types of qualifications. One type is a spiritual qualification. They must feel God has called them to this ministry. They must be born-again Christians. They must believe the Bible and live in and out of the classroom in accordance with our church and our faith. Then they must have the technical abilities to communicate truth to the students.

In determining a teacher's qualifications, educational background is considered by both churches. The record reflects, for example, that all of the teachers, teaching in grades one through twelve, employed by First Baptist Church of Bridgeport are college graduates.

[39] Pastor Ouellette testified as follows:

> To teach in our school is a ministry. It is not simply an occupation or profession. It's a calling.
>
> * * *
>
> It's a ministry first, because the teacher must give evidence

The teachers believe themselves to be "called" to engage in a ministry, a religious apostolate. Plaintiff teacher Kwaitkowski testified that, on religious grounds, she could not submit to the state certification regulations, even though her academic qualifications—having obtained an education degree from an out-of-state university—substantially qualifies her for provisional certification.[40]

The parents believe they are religiously required to provide their children with a fundamentalist education and that their children must be taught only by fundamentalist Christian teachers. On religious grounds, they may not enroll their children in a public school or the school of another denomination. They are deeply pleased with the education their children receive at their schools, and are closely involved in the process.[41]

The sincerity of plaintiffs' religious beliefs is supported by continuous reference to literal scriptural interpretations, and was substantiated by expert testimony. The sincerity of plaintiffs' reli-

to us that God is leading them to teach from a biblical perspective. We are not interested in folks who merely want a job.

Secondly, it's a ministry because every teacher has as their goal reaching the child with the gospel of Jesus Christ. Seeing that child accept the Lord Jesus as their savior and as their Lord.

Then every teacher has as their goal the inculcation into the child's life a behavior of Christian principles, moral standards that are found in God's word."

[40] Ms. Kwaitkowski testified that she could not, consistent with her religious obligations, submit to state certification. The sincerity of Ms. Kwaitkowski's religious objection is substantiated by the fact, reflected in the record, that her educational background may substantially qualify her for provisional certification.

[41] The parents of children attending each school, including plaintiffs Mr. and Mrs. Swain and Mr. and Mrs. Munson, consistently testified with respect to the mandates and requirements of their religious beliefs, and the direct scriptural origin of those beliefs. Furthermore, each parent testified that they are very pleased with the education their children are receiving, including the level of academic achievement they have demonstrated objectively through performance on standardized achievement tests.

gious belief in total independence and separation is also substantiated by their refusal to accept any form of available public aid.[42]

The state does not contest plaintiffs' claims with regard to the bona fide "religious" nature, or sincerity, of their beliefs within the meaning of the First Amendment, but continues to assert that the certification requirement does not interfere with the free exercise of those beliefs. To the extent that the state's assertion requires a determination concerning the appropriate interpretation of plaintiffs' religious beliefs, it must be rejected. As the Supreme Court stated in *Thomas, supra,* 716:

> [I]t is not within "the judicial function and judicial competence . . . to inquire whether [plaintiffs or the Government has the proper interpretation of the plaintiffs'] faith. Courts are not arbiters of scriptural interpretation."

The state's argument in this regard, with which Chief Justice WILLIAMS and Justice BOYLE seem to be in agreement, is that plaintiffs do not object to employing a certificated teacher, and, therefore, the regulation does not interfere with the free exercise of their religious beliefs. That argument, however, reflects a misunderstanding of plaintiffs' religious objection and is a non sequitur; the statutory regulation from which plaintiffs seek exemption does not require employing *a* certificated teacher, it requires them to employ *only* certificat-

[42] Religious expert, Dr. Rushdoony, substantiated plaintiffs' assertion that their fundamentalist beliefs require strict separation, and explained the historical origin and relationships of those beliefs in both world and American historical contexts. The record reflects that plaintiffs have refused all forms of available state, local, or federal aid and that refusal substantiates the sincerity of plaintiffs' religious beliefs with respect to total separation and their religious concept of state sovereignty.

ed teachers. Moreover, plaintiffs stress that their teachers who have submitted to state certification did so before becoming members of their churches. Likewise, that regulation does not require employing only "academically qualified" or "competent" teachers. Nor has the state asserted that plaintiffs' teachers are in any way "incompetent" or "academically" unqualified. The regulation objected to requires employing only teachers who "hold a certificate such as would qualify him or her to teach in . . . the public schools of the state." Plaintiffs do not object to employing academically competent teachers. And, for example, the record reflects that all of the teachers employed by First Baptist Church of Bridgeport, teaching in grades one through twelve, hold college degrees.

The record in this case establishes that the interference with plaintiffs' free exercise of religion is both apparent and substantial. Plaintiffs, by religious conviction, consider their schools to be religious ministries, and assert that the requirement that no one may carry out a teaching ministry in their schools without a government license to do so, is in direct conflict with their religious beliefs. Plaintiffs consider their obligation to determine whom they shall employ a religious matter, and that the criterion by which to discern who to hire is likewise pervasively religious.[43] On religious grounds, plaintiffs are prohibited from submitting

[43] See ns 35-42. The plaintiffs' religious objection to compliance with the certification regulation was articulated by all of plaintiffs' witnesses. The religious conflict posed was articulated by Reverend Fluegge, principal, administrator of the school operated by Sheridan Road Baptist Church:

> Certification in the manuals from the State that I have read concerning certification refers to it as a license oftentimes. Licensing presupposes an agency or group or an entity that can designate what criteria by—it sets up the framework by which one must meet to be able to be licensed. Now I have a problem with that, because God has called our teachers to teach. He has

their teaching ministry to the prior restraint of state licensing, requirements that their teachers be trained in state-approved teaching institutions, and other requirements imposed by the Teacher Certification Code, 1979 AC, R 390.1101 *et seq.;* 1981 AACS, R 390.1101 *et seq.,* which present numerous other burdens and limitations upon the freedom of the plaintiffs' teaching ministry. In addition to the general religious conflict created by imposing the prior restraint of the state certification requirement, plaintiffs find several of the specific requirements of the Teacher Certification Code to be offensive to their religious practices and beliefs.[44]

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already certified them in eternity. He has given us the criteria whereby we discern who we hire. And to place another entity or body above the local testament church and who it hires is to place somebody above God, and we cannot do that.

Pastor Ouellette, articulated the religious conflict presented as follows:

> It's based upon, first of all, a scriptural conviction that we have an obligation as individuals to obey God even if others would differ with us. In the book of Acts, chapter five verses 27 and 28 and 29, Apostle Peter and others have been charged "not to teach in this name." That's a quote. "Peter and the other apostles answer and say, we ought to obey God rather than men."
>
> So if the state were permitted to certify and require certification of all of our teachers, the very first, very negative affect [sic] it would have on us is they would be put into a position of determining whether or not a person is obeying God's call for their life.
>
> The second thing we have a problem with is because all of our teachers are church employees and church staff, the state has stepped into the area of licensing church staff.
>
> We have a further problem because, as I understand the laws of the State of Michigan, to get a continuing certificate, a teacher must take 18 hours of postcollege work, postgraduate work at a state-approved institution. The Bible tells us in Proverbs 19 and 27, "[c]ease to hear, my son, the instruction that causes you to err from the word of knowledge."

[44] Plaintiffs find several of the numerous provisions of the Teacher

The record in this case also supports plaintiffs' assertion that, because of the special and strict religious requirements which they must observe in the selection of their teachers, the availability of teachers for their schools would be greatly reduced were they compelled to compromise their religious beliefs and comply with the certification requirement to employ only teachers who are licensed to teach in the public schools or be closed down.[45]

Certification Code offensive to their fundamentalist beliefs. See 1979 AC, R 390.1101 *et seq;* 1981 AACS, R 390.1101 *et seq.* Plaintiffs' objections in this regard stem, primarily, from their fundamentalist belief in strict adherence to literal biblical interpretation. Plaintiffs note that few people share their strict religious beliefs, and that the administrative rules with respect to teacher certification, teacher training programs at state-approved teacher training institutions, and modern education theory generally, reflect this divergence.

For example, rule 22(1) states:

> An applicant for a provisional certificate shall demonstrate that he has an acquaintance with the substance, concepts, and methods of the principal areas of human knowledge, and skills essential to communication and inquiry in modern society.

Rule 23(1)(c) requires an understanding of:

> The methods and materials of instruction appropriate to the elementary or secondary level.

Plaintiffs emphasize that their religiously required beliefs, with respect to education, are, necessarily, inconsistent with those of the state, and of the state-approved teacher training institutions within this state of which none are of the fundamentalist faith.

Likewise, the requirements imposed by Rule 15(2), and 25(1), that "[c]redits toward certification shall be completed through an approved teacher education institution," and that applicants "shall be recommended by a Michigan college or university" that has been so approved, present religiously based problems for plaintiffs.

The sincerity, and magnitude, of plaintiffs' religiously based objection to modern education theory is exemplified in Sheridan Road's *Parent-Student Handbook,* in which the fundamentalist theory of education is contrasted with that of "the world."

[45] The state has conceded that a direct effect of enforcing the regulation as applied to plaintiffs would be to limit the number of teachers qualified to teach at plaintiffs' schools. That enforcing the certification regulation would have a drastic and possibly prohibitive effect upon the ability of plaintiffs' schools to employ qualified teach-

Qualified education expert, Dr. Russell A. Kirk, testified that, as a practical matter, compelled compliance with the statutory regulation here in question would have a drastic effect upon the ability of independent church schools to employ teachers who meet their qualifications, and in many cases the effect would be prohibitive, forcing such schools to close.

That the state certification requirement interferes with the fundamental free exercise rights of William and Sharon Swain and Ronald and Janice Munson as parents, and of Susanne Kwaitkowski as a teacher, is also apparent.[46]

The teacher certification requirement compels plaintiffs to choose between compromising their religious beliefs and conforming to the state's administrative interests or being prohibited from maintaining and operating their schools and having their children compelled by law to attend a school against the wishes and religious beliefs of their parents. Plaintiffs' only other option would be to leave Michigan and seek another jurisdiction, the overwhelming majority of which do not impose state teacher certification requirements upon religious schools.[47] To the extent that the operation of plaintiffs' schools is religiously man-

ers was substantiated by the testimony of education expert, Dr. Russell A. Kirk.

[46] The parents believe they are fulfilling their religious obligations and that their children are receiving an education of excellent quality. Ms. Swain testified that if Bridgeport Baptist Academy were to be closed down for refusal to submit to the certification regulation, she would have no choice but to keep her children at home and teach them herself, even though taking the time to teach her children every day "would be a hardship on [her] family."

Ms. Kwaitkowski would be prohibited from fulfilling her religious obligation within this state.

[47] See n 58 for a list of the few states currently imposing state certification requirements. It has been noted that "[f]orced migration of religious minorities was an evil that lay at the heart of the Religion Clauses." *Yoder, supra,* 218, n 9.

dated, the certification statute directly regulates religious activity. Unlike the more indirect interferences with the free exercise of religion created by the legislation challenged in *Sherbert, supra, Thomas, supra,* and, more recently, in *Bowen, supra,* the state certification requirement does not confront plaintiffs with a choice between adhering to their religious beliefs and receiving a governmental benefit. Nor does it allow plaintiffs a choice between adhering to their religious beliefs and exercising a privilege. Cf. *Braunfeld v Brown,* 366 US 599; 81 S Ct 1144; 6 L Ed 2d 563 (1961). Unlike the legislation challenged in *Bob Jones Univ v United States,* 461 US 574; 103 S Ct 2017; 76 L Ed 2d 157 (1983), the state certification requirement "inescapably compels conduct that [plaintiffs] find objectionable for religious reasons." *Bowen, supra,* 90 L Ed 2d 749. It, in every sense, "affirmatively compel[s] [plaintiffs], by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons." *Id.,* 747. The interference, especially with respect to the rights of plaintiff parents, is certainly more substantial than the indirect burdens imposed upon the free exercise of religion by the legislation challenged in those cases.[48]

My colleagues' representations of plaintiffs' claims are distorted. Justice BOYLE's assertion, for example, that "certification itself is not opposed, but [only] the government compulsion to attain it," is misplaced, and does not relate to the challenged regulation. Plaintiff parents, churches, and pastors are not compelled to attain certification; the legislation challenged regulates whom they *must* em-

[48] The regulation "affirmatively compels [the plaintiffs] . . . to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Yoder, supra,* 218; *Sherbert, supra,* 402.

ploy to educate their children. Plaintiffs have specifically, and directly, challenged the enforcement of that legislation, and the factual record supports the trial court's findings that the challenged regulation does, in fact, substantially interfere with the free exercise of plaintiffs' *sincerely held* religious beliefs. See n 43.

B

That the legislation in question affirmatively interferes with religiously motivated activity does not, of course, end the analysis. The individual religious autonomy guaranteed by the First Amendment's Free Exercise Clause is not absolute, and the state may justify enforcing the regulation notwithstanding the interference with plaintiffs' religious freedom by showing that enforcement is essential to the fulfillment of a compelling state interest. The state agrees that the "compelling state interest" standard of review is applicable in the present case.[49] The state argues, however, that the certification requirement need only be "reasonably related" to furthering its "compelling" interest in compulsory education, in order to justify the infringement upon plaintiffs' First Amendment rights. My colleagues' opinions ultimately rely upon that misapplication of the applicable standard of review, as did the Court of Appeals in reaching its decision in the present case.[50]

Determining whether the state has established that enforcing the teacher certification statute, as

[49] The state conceded, in its brief and at oral argument, that it was in agreement with plaintiffs that the compelling state interest standard of review applied by the Court in *Sherbert* is applicable in the present case.

[50] See n 4. See also part VI. Although through completely different analyses, both of my colleagues' opinions for affirmance would uphold the enforceability of the certification statute, in effect, by applying the rational-basis standard of review.

applied to plaintiffs, is essential to the achievement of its "compelling" interest requires an inquiry concerning the nature of the state's legitimate interests in *compulsory* education and the necessity of enforcing the certification requirement as applied to plaintiffs. "[O]nly those interests of the highest order *and those not otherwise served* can overbalance legitimate claims to the free exercise of religion." *Yoder, supra,* 215. (Emphasis added.)

It has long been established that the governmental interest in compulsory education is not unlimited.[51] See *Yoder, supra,* 215, 232-234. The Supreme Court's decision in *Yoder* is particularly instructive because the governmental interest asserted by the State of Wisconsin in that case, like the interest implicated in the present case, was the public interest in compulsory education. While the governmental interest asserted in the instant case is indistinguishable from the interest asserted by the State of Wisconsin in *Yoder,* the religious exemption plaintiffs seek is readily distinguishable from that which was sought, and constitutionally mandated, in *Yoder:* Plaintiffs do not oppose conventional formal education, but only the statutory and administrative requirements that they employ only teachers who have complied with the state's certification rules.[52]

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[51] The governmental interest involved in this case, despite the rhetoric cited in the Chief Justice's opinion, is not the state's interest in providing the opportunity for all of its citizens to have access to good education. To the contrary, the governmental interest involved in this case is antithetical to educational freedom. The relationship of the private and parochial schools act of 1921 to the compulsory education act of 1905 is expressly conveyed in § 4 of the 1921 act. See text accompanying n 6. The societal interest involved in this case is identical to the governmental interest asserted by the State of Wisconsin in *Yoder.*

[52] Plaintiffs do not oppose formal scholastic education in any sense. Providing the opportunity for their children to obtain a high level of

In order to justify overriding plaintiffs' fundamental First and Fourteenth Amendment rights, the state must establish that enforcing the certification requirement, without exception, is essential to ensure the adequate "secular" education required by the compulsory education law. The state conceded at the outset of the procedings in this case, however, and the record supports the factual conclusion, that plaintiffs are providing a quality "secular" education for their children, without compliance with that statutory requirement.[53] The state's seemingly inconsistent position in this regard may stem from its misdirected focus, and, perhaps, misunderstanding of its burden of proof to justify overriding fundamental First Amendment rights. The religious freedom protections afforded by the Free Exercise Clause of the First Amendment are "individual" rights. Consideration of whether individuals whose free exercise of religion is substantially burdened by state legislation are entitled to exemption from that otherwise valid state law, accordingly, requires that the focus be directed to the rights of those individuals.

academic achievement is, indeed, a primary goal of plaintiffs' religious alternative to the state regulation in question, and the record reflects that plaintiffs' schools maintain strict academic discipline.

[53] The state conceded, when questioned by the trial court at the conclusion of its opening statement, that it was "not at all" asserting that plaintiffs were failing to adequately educate their children:

> *The Court:* Mr. Gartner [Defense Attorney], you are not coming before the Court claiming that the children at issue, relative to the plaintiffs, are receiving at this point in time inadequate education?
>
> *Mr. Gartner:* No, not at all.
>
> *The Court:* So we are talking primarily relative to the impact of the administrative rights here one way or another. It's not—there is no allegation on your part that the children are being deprived of an education or are being miseducated as a result of some factor which brings this before the Court?
>
> *Mr. Gartner:* No. No.

In establishing its burden of proof, in such cases, that enforcing the regulation is *essential* to the achievement of a compelling governmental interest, the state must show that granting an accommodation would "unduly interfere with [the] fulfillment of th[at] governmental interest." *Lee, supra,* 259.

In determining whether the governmental interest in compulsory education justifies overriding plaintiffs' individual rights protected by the Free Exercise Clause, therefore, the focus must be directed upon the effect accommodation would have upon the achievement of that interest. Nothing in the record in this case suggests that granting plaintiffs an exemption from the certification requirements would interfere with the state's legitimate interests in compulsory education. To the contrary, the uncontested evidence in this case supports the conclusion that plaintiffs are providing a more than adequate "secular" education for their children, to the legitimate extent required by the compulsory public education statute.[54]

Nothing in the record in this case intimates that granting religious exemptions from the certification requirement would present "grave and immediate" danger to the state's legitimate interests in compulsory education. *West Virginia Bd of Ed v Barnette,* 319 US 624, 639; 63 S Ct 1178; 87 L Ed 1628 (1943). While the state has continuously asserted that the governmental interest in compulsory education is "compelling," it has presented no evidence that granting religious exemptions would have any adverse effect whatsoever upon the

[54] All of plaintiffs' witnesses testified with respect to the quality and quantity of "education" provided the children attending plaintiffs' schools. That the children attending each school are progressing at acceptable and, indeed, above average levels of scholastic achievement is documented by the standardized academic achievement test results presented and made a part of the record in this case.

achievement of that interest, and the record supports a contrary conclusion. The ability of religious schools, similar to plaintiffs', to achieve and maintain excellence in education, without employing only teachers who are certified to teach in the public schools, was substantiated by uncontroverted expert testimony.[55]

The state's interest in *compulsory* education is

[55] Education expert, Dr. Russell A. Kirk, for example, testified with respect to some of the variables which influence the success of religious schools and distinguished their methodology from that of the public schools. Dr. Kirk noted the superior discipline generally found in religiously related schools and the elevated level of teacher motivation, and accountability, in such schools as two factors contributing to their general success. Dr. Kirk described the attributes of a "good" teacher in the following order:

(1) the ability to understand children and the yearning to teach them;

(2) earnestness; taking education seriously and children seriously;

(3) formal study of methods and tests.

Dr. Kirk concluded by opining that the state's interests in promoting quality education is best served by encouraging diversity and variety, competition, and freedom of choice, and, thus, that accommodating plaintiffs' religious conflict regarding complying with the certification regulation, rather than "wiping [them] out," would actually further the state's broad interest in education.

The testimony of education expert, Dr. Donald A. Erickson, also supports the conclusion that plaintiffs can achieve excellence in education without compliance with the certification requirement. Dr. Erickson testified with respect to the factors or conditions which influence the success of "good" schools, with reference to empirical and scholarly research. He testified that the most important factor is the social climate of the school, "a climate of stable discipline," and "a focus on student learning" on the part of the students and their parents. Dr. Erickson testified with respect to the learning environment found in religious schools, as contrasted with the public schools, and discussed the results of empirical studies on the topic. Finally, Dr. Erickson emphasized that the commitment of teachers and involvement of parents in the educational process are positive factors, and commented with respect to data evidencing the existence of such involvement in religious schools. He further emphasized and explained that, unlike other professions (e.g., law, medicine, architecture), teaching is founded upon no clearly established knowledge base; it is in no sense comparable to professions which possess "a body of clinical knowledge," or a "body of accumulated wisdom," or "specific prescriptions for practice." He referred to empirical data in supporting his opinion that the governmental interest in compulsory education would not be threatened by granting religious exemptions for compliance with the certification regulation.

important, and identifiable; the state may require all of its citizens to achieve a given level of academic achievement to "prepare [them] to participate effectively and intelligently in our" democratic process, and to "prepare[ ] individuals to be self-reliant and self-sufficient participants in society." *Yoder,* 221. The uncontested evidence in this case, however, reflects that plaintiffs "are . . . fulfilling the social and political responsibilities of citizenship," legitimately imposed by the compulsory public education statute, without compelled compliance with the state's certification requirement "at the price of [compromising] their free exercise of religious belief." *Yoder,* 225. There is no indication that plaintiffs are failing to provide their children with the academic competence needed for political literacy and economic self-sufficiency. The state has conceded, moreover, that such is not the case.[56]

Any argument by the state that its legitimate authority as *parens patriae* requires upholding the enforcement of the certification requirement, as applied, to protect these children from their parents, must fail. The state has not even suggested that the "decisions [of plaintiffs-parents have] jeopardize[d] the health or safety of the child[ren], or have a potential for significant social burdens." *Yoder,* 234. The record abundantly supports the conclusion that plaintiffs are actively pursuing and fulfilling the legitimate and important academic achievement and socialization interests underlying the compulsory education law.

The state has failed to show, in this case, that enforcing the certification requirement, as applied to plaintiffs, is essential to the fulfillment of its interest in compulsory education; establishing the mere "rational-basis" of enforcing the regulation

[56] See n 53.

to further the achievement of that public interest is, of course, insufficient.[57] On the other hand, a careful review of the record in this case, including the testimony of qualified experts and the documented record of student achievement, supports the conclusion that enforcing the certification requirement is not essential to the fulfillment of the state's asserted interest. The record abundantly supports the conclusion that accommodating plaintiffs' religious conflict to the state teacher certification requirement poses no threat to the state's interest in compulsory education.

In this regard, plaintiffs' uncontested assertion that the overwhelming majority of the states (forty-four) do not currently impose such a requirement upon the employment practices of nonpublic schools, without exception, should not be overlooked by this Court.[58] Unless we are to assume that those states are failing to achieve the adequate education of their citizens (a proposition that has not been suggested), that evidence is relevant and should be considered. Moreover, it should be noted that the clear trend among those few states which have imposed such a requirement has been to abrogate teacher certification requirements for religious schools, or to provide exemptions for individuals who raise sincere religious objections to compliance.[59] Additionally, that the

[57] The state was unable to establish any relationship in fact between compliance with the administrative teacher certification rules and increased quality in teacher competence and student learning. Dr. Donald A. Erickson testified with respect to the existence of extensive empirical evidence that no such relationship has been found.

[58] The few states currently imposing such regulations, other than Michigan, are: Hawaii (Hawaii Rev Stat, § 297-2), Idaho (Idaho Code 33-1201), South Dakota (SD Codified Laws Ann 13-4-2), Iowa (Iowa Code Ann, § 299.1), and Washington (Wash Rev Code Ann 28A.02.201.

[59] Alaska, North Carolina, West Virginia, and Vermont have recently repealed school approval or teacher certification requirements for church schools. See former Alas Stat, § 14.45.010, NC Gen Stat,

Legislature is currently considering legislation that would dramatically alter this state's teacher certification program,[60] and the current national interest concerning the quality of student achievement in the public school systems and the effectiveness of teacher training programs is relevant and should be considered.[61]

The record in this case reflects the lack of any evidence whatsoever that accommodating plaintiffs' religiously based conflict with the teacher certification requirement would interfere with the state's asserted interest in "assuring that an education is being provided for all of its youth." Additionally, I am convinced that less burdensome alternative means exist by which the state can supervise and ensure the future fulfillment of that important interest.

The record in this case firmly supports the con-

115C-547 *et seq.*, Ala Code, § 16-28-1 *et seq.*, W Va Code, § 18-8-1, as amended, and Vt Stat Ann, tit 16, § 165a. Ohio has recently exempted religious schools from the requirement, Ohio Administrative Code, § 3301-35-08. Nebraska recently amended its statutory requirement that parents have their children taught only by certified teachers, allowing religious exemptions. Uncertified teachers must either take a nationally recognized teacher competency examination or offer other evidence of teacher competence. Nebraska Legislative Bill 928, amending Neb Rev Stat, §§ 79-201, 79-328, and 79-1701. Iowa is currently considering abrogating the certification requirement it had formerly imposed upon the recommendation of a specially assembled Governor's task force report. See Detroit News, December 2, 1985, *postscript.*

[60] The State Senate introduced a bill, which recently received unanimous approval by the House Education Committee (SB 447). The bill was sent to the House Appropriations Committee for an examination of the potential costs, estimated to be $4.5 million, to develop and implement the program. The bill would institute radical changes in the certification program in that it would require the Board of Education to develop and administer basic literacy tests beginning in 1991, and teacher competency tests beginning in 1993. See Michigan Report, March 11, 1986, Report No 47, Vol 25, pp 2-3.

[61] See, e.g., Report of National Commission on Excellence in Education, *A nation at risk,* p 5 (April 26, 1983), in which the National Commission on Excellence in Education reported its stark and dismal conclusions concerning the quality of public education throughout our nation.

clusion that the state can adequately supervise the fulfillment of its asserted interest by reviewing the academic achievement of plaintiffs' students, measured by their performance on national standardized academic achievement tests. Plaintiffs agree that such supervision is a substantially less burdensome form of regulation, and that no religiously based conflict would be created. Plaintiffs currently administer national standardized achievement tests beginning at the prekindergarten and kindergarten level, and such testing is pursued throughout the entire educational experience of the children attending plaintiffs' schools.[62]

Any assertion by the state that this alternative means is inadequate because the validity of such standardized achievement tests is questionable must be rejected. The record in this case, including the testimony of the state's own education expert, supports the conclusion that the validity of such tests is well-established and, indeed, that this alternative is a superior method of measuring student learning and good teaching.[63] The record supports the conclusion that a higher, and more objectively identifiable, correlative relationship exists between standardized achievement test results and student learning, than between state teacher certification and student learning.[64] The State

[62] Plaintiffs administer the tests early to diagnose any possible learning deficiencies, or to determine placement, and continue testing to monitor scholastic achievement throughout the student's entire educational experience.

[63] The state's education expert, Dr. Judith Lanier, testified that testing was "at the top" of her list of methods for measuring good teaching. Education expert, Donald A. Erickson, also testified with respect to the acceptability and objective accuracy of testing as a method of measuring adequate teaching and student learning.

[64] Dr. Lanier testified that she was unaware of any empirical evidence establishing any correlation between compliance with the administrative certification rules and teacher competence or student learning. She testified that such evidence does exist, on the other

Board of Education, moreover, has published its endorsement and approval of the use of such testing to measure and improve student achievement.[65]

Finally, any assertion by the state that reviewing achievement test performance, as an alternative means, is actually more intrusive upon plaintiffs' free exercise of their religious beliefs than enforcing the state certification requirement, must also be rejected. To accept that proposition would require holding that the state, rather than plaintiffs, has correctly interpreted the mandates and restrictions of plaintiffs' religious convictions. The unwarranted implications of such a holding are obvious.[66]

The use of standardized achievement test results is an adequate, and perhaps even superior, alternative means by which the state can ensure that an "education is being provided to all of its youth," without infringing upon plaintiffs' fundamental First and Fourteenth Amendment freedoms. The state could request achievement test results along with the other information concerning the enrollment of students and courses of study to which plaintiffs are in agreement.

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hand, establishing the accuracy and appropriateness of testing, and stated that testing is a superior method of determining good teaching and student learning. See n 63. Dr. Erickson testified that extensive research has established that no significant correlation exists between certification and competence or student learning, and that testing is an established and far superior method to determine student learning and teacher effectiveness.

[65] E.g., Michigan Educational Assessment Program, 1983-84, p 7:

> "Much is known about the use of testing results to improve student achievement."

The Superintendent of the Bridgeport Spalding Community School District testified that nationally standardized tests are employed in the public schools within that district.

[66] See *Lee, supra,* 257; *Thomas, supra,* 716.

While the existence of other permissible means by which the state can adequately ensure its interest in compulsory education is not foreclosed, the record and constitutional considerations presented render clear the conclusion that enforcement of the teacher certification requirement, as applied, is not essential to achieve that objective. Unless and until the state can show otherwise, the enforcement of the statutory teacher certification requirement, as applied, would be violative of the First and Fourteenth Amendments. Accordingly, I would reverse the decision of the Court of Appeals, and reinstate the trial court's order enjoining the enforcement of § 3 of the private and parochial schools act as applied to plaintiffs. The state would still be able to enforce the teacher certification requirement to regulate the employment practices of nonreligious schools and religious institutions except where bona fide religious claims to exemption are implicated.

The accommodation required by the First Amendment's Free Exercise Clause would not, in the present case, run afoul of the Establishment Clause; the accommodation required by the Free Exercise Clause reflects the neutrality that the Establishment Clause compels. *Yoder,* 234-235, n 22; *Sherbert, supra,* 409. While the Court has recognized the Establishment Clause concerns in light of the values protected by the Free Exercise Clause, exemptions necessary to vindicate free exercise rights have consistently been upheld.[67] *Id.* The First Amendment "mandates accommodation, not merely tolerance." *Lynch v Donnelly,* 465 US 668, 673; 104 S Ct 1355; 79 L Ed 2d 604 (1984).

[67] See Marcus, *The forum of conscience: Applying standards under the Free Exercise Clause,* 1973 Duke L J 1217, 1235-1238; Giannella, *Religious liberty, nonestablishment, and doctrinal development: Part II, the nonestablishment principle,* 81 Harv L R 513 (1968).

VI

While my disagreement with the analyses of my colleagues is evident, I am compelled to express additional criticism because I am convinced that they, like the Court of Appeals in reaching its decision in the present case, have misapplied the standard of review mandated by the First Amendment for determining whether legitimate claims to the free exercise of religion may be overridden. I disagree with Chief Justice WILLIAMS' analysis in several respects, including his identification, and discussion, of the state's asserted "compelling" interest involved in this case, and the state's burden of proof to justify the overriding of plaintiffs' First Amendment rights. I am equally persuaded that Justice BOYLE's opinion is internally inconsistent and, with all respect, does not support her ultimate conclusion that the state is not required, in this case, to justify the interference with plaintiffs' fundamental First and Fourteenth Amendment rights.

A

Chief Justice WILLIAMS identifies the state's interest as "ensuring that *all* teachers have met certain minimum requirements . . . ." *Ante,* p 467. The Chief Justice, however, in his subsequent discussion, refers to the state's interest in the "education of its citizens" as the compelling interest involved. *Ante,* p 478. Finally, the Chief Justice reaches his analytical conclusion in reconciling the inconsistent identification of the "compelling" interest involved:

> Therefore, to the extent that certification of teachers furthers education, it can be considered a compelling state interest. [*Ante,* p 481.]

Hence, Chief Justice WILLIAMS' identification of the "compelling" state interest involved culminates in narrowly construing that interest until it is actually identical to the means chosen to further it: How else could the state achieve its "compelling" interest in "certification of teachers" but to require "certification of teachers"? In considering whether a "less intrusive method" is available to the state, however, the Chief Justice returns to his identification of the governmental interest involved as "the education of . . . citizens." *Ante,* p 484.[68]

While the Chief Justice's failure to consistently identify the "compelling" state interest involved is confusing, the ultimate utility to his analysis is obvious. In considering the free exercise issue presented, the Chief Justice ignores the second aspect of the constitutionally mandated heightened standard of review: whether enforcing the certification requirement, as applied to plaintiffs, is essential to the fulfillment of the asserted "compelling" governmental interest. Chief Justice WILLIAMS avoids this crucial determination and concludes, as did the Court of Appeals, that as long as the state's interest in the "education of its citizens" is a "compelling" interest the state need only show that the certification requirement is theoretically rationally related to the furtherance of that interest to justify the infringement of plaintiffs' First Amendment rights. While the

[68] Likewise, Justice BOYLE's opinion fails to consistently identify the governmental interest involved (see, e.g., *ante,* pp 497-498, 507-508, 510-511), ultimately concluding that "[t]he teacher certification requirement[ ] [is] a compelling state interest of [its] own right [as well as] a state regulation . . . to achieve the broader goal of quality education." *Ante,* p 511. Directly preceding that conclusion, however, Justice BOYLE refers to the state's "compelling interest in *compulsory education,*" (*ante,* p 511), and earlier in the opinion as "the state's interest in assuring that every child receive at least a minimal education." *Ante,* 497.

Chief Justice may, as the Court of Appeals did, find support for that standard of review in some of the decisions of the state courts of other jurisdictions,[69] that standard has been expressly rejected in the controlling decisions of the United States Supreme Court. *Sherbert, supra,* 406; *Yoder, supra,* 215.[70] Furthermore, that standard of review would render the fundamental protections afforded by the Free Exercise Clause meaningless; the First Amendment is not needed to protect individuals from "unreasonable" or "irrational" legislation.

In addition to applying what is, in my opinion, an incorrect standard of review, the Chief Justice obscures the nature of the governmental interest involved in this case. The governmental interest involved in this case is not the state's interest in providing "the opportunity of an education"[71] to its citizens. Whether the state is achieving that com-

[69] See *Nebraska ex rel Douglas v Faith Baptist Church,* 207 Neb 802; 301 NW2d 571 (1981), app dis 454 US 803 (1981), and *State v Shaver,* 294 NW2d 883 (ND, 1980) (to justify suppressing the free exercise of minority religious beliefs it is sufficient that the regulation in question is reasonably related to the state's interest in furthering quality in education).

[70] Likewise, the better-reasoned decisions of other state courts have followed the controlling cases and rejected that standard of review. See *State v Whisner,* 47 Ohio St 2d 181; 351 NE2d 750 (1976); *Kentucky State Bd for Elementary & Secondary Ed v Rudasill,* 589 SW2d 877 (Ky, 1979), cert den 446 US 938 (1980). See also *State v Yoder,* 49 Wis 2d 430; 182 NW2d 539 (1971), aff'd, *Wisconsin v Yoder, supra; Parker Collegiate Institute v Univ of New York,* 298 NY 184; 81 NE2d 80 (1948); *Bangor Baptist Church v Maine Dep't of Ed,* 576 F Supp 1299 (D Me, 1983).

[71] My colleague's reference to *Brown v Topeka Bd of Ed,* 347 US 483; 74 S Ct 686; 98 L Ed 873 (1954), is misplaced. The governmental interest involved in the present case does not concern providing access to education. The state's interest in the present case does not involve the protection of educational freedom, but, rather, the restriction of educational freedom.

The plurality's attempt to characterize the religious exemption sought by plaintiffs as contrary to the state's goal of furthering educational freedom is perplexing. Accommodating plaintiffs' religious conflict in this case would have no effect whatsoever upon the state's interest in providing educational opportunities to all of its citizens.

pelling interest by providing access to "quality" in education through its public schools, while perhaps indirectly related to the issues raised in this case,[72] is quite distinguishable from the state's legitimate interests in *compulsory* education. The Chief Justice's emphasis on the importance of the state's interest in providing the opportunity of an education tends to obscure the nature of the state's interest in *compulsory* education which involves the state's legitimate interests in *compelling* its citizens to achieve "an education" and the extent to which the state may standardize, regulate, and compel the manner in which its citizens achieve "an education." Like *Yoder,* this case involves "the fundamental interests of parents, as contrasted with that of the State, to guide the religious future and education of their children." *Yoder, supra,* 232. The Court in *Yoder* said, referring to the legitimate, but constitutionally limited, governmental interest in *compulsory* education:

> [W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment. [*Id.,* 233.]

B

Justice BOYLE's discussion and application of the required standard of review and the factual record in this case is perplexing. Justice BOYLE acknowledges that plaintiffs' First Amendment claims re-

[72] The record reflects that the public school district officials who initiated the proceedings against plaintiffs' schools have published their economic interest in "prevent[ing] loss of students to nonpublic schools." See n 9.

quire reviewing the challenged legislation "under a strict scrutiny or compelling state interest standard." *Ante,* pp 487-488. She articulates that standard of review in the free exercise context as follows:

> "First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated 'compelling,' 'of the highest order,' or 'overriding.' Second, *the government must show that granting the requested exemption will do substantial harm to that interest . . . .*" [Emphasis added. *Ante,* p 489, quoting *Goldman v Weinberger,* 475 US —, —; 106 S Ct 1310, 1325; 89 L Ed 2d 478, 498 (1986) (O'Connor, J., dissenting).]

Justice BOYLE declines applying that standard of review in this case, however, ultimately concluding that she "do[es] not find it necessary to require the state in this case to show with more particularity how its compelling interest in compulsory education will be adversely affected by granting an exemption to plaintiffs."[73] *Ante,* p 511. While the rationale asserted in reaching that conclusion is unclear, it seems to be based upon a "belief/action and direct/indirect" interference analysis (*ante,* p 490), the Court's recent decision in *Goldman, supra,* and interpreting *Yoder, supra,* for the proposition that plaintiffs, in free exercise cases, have the burden to "clearly and convincingly" establish the existence of a lesser restrictive alternative to the challenged regulations. *Ante,* p 501. I am persuaded that Justice BOYLE's analysis does not sup-

[73] Justice BOYLE's opinion does not conclude that granting the requested exemption in this case would adversely affect the state's interest in compulsory education to any extent whatsoever. The state has never made such an assertion, and the extensive record in this case, including the testimony of the state's expert witness, would not support such a conclusion.

port the ultimate and dispositive conclusion that the state may justify the interference with plaintiffs' constitutionally protected rights, in this case, without even attempting to show, indeed without even asserting, that an exemption would adversely affect, to any extent, the achievement of the state's interest.

The "belief/action and direct/indirect" dichotomies, discussed but not relied upon in Justice BOYLE's opinion, have long been abandoned in the controlling decisions of the United States Supreme Court, inasmuch as either would be applicable in the present case.[74] The argument that the Free Exercise Clause protects only religious "belief" and, therefore, that religiously grounded "actions" are outside the protections of the First Amendment, accepted in *Reynolds v United States,* 98 US 145; 25 L Ed 244 (1878), was expressly rejected in *Cantwell v Connecticut,* 310 US 296; 60 S Ct 900; 84 L Ed 1213 (1940), and again more recently in *Yoder, supra,* 219-220, in which the Court noted that several state courts were continuing to rely upon that rejected dichotomy. *Id.,* 219, n 10. See also *id.,* 247 (Douglas, J., dissenting in part).

Whether state action based on one's religious belief is, under any circumstances and in all cases, *absolutely* prohibited by the First Amendment is an issue not implicated in the present case. Plaintiffs have certainly not argued that their free exercise rights are absolute; their argument is that enforcing the constitutionally suspect legislation in question is not essential to vindicate a compelling state interest. Justice BOYLE's statement that "this Court 'should be cautious in expanding the *scope*

[74] The applicability of Justice BOYLE's discussion in this regard to her analysis in this case is unclear. Her opinion states that it is not relevant to the appropriate "level of judicial scrutiny," *ante,* p 492, n 9, but that it is relevant to the "kind and quantity of proofs required by the government to satisfy the strict scrutiny test." *Ante,* p 492.

of [the absolute protections afforded belief . . .] since to do so might leave government powerless to vindicate compelling state interests,' " (*ante,* p 495), is, thus, misplaced, and her entire discussion in this regard, taken largely from *McDaniel v Paty,* 435 US 618, 626; 98 S Ct 1322; 55 L Ed 2d 593 (1978), is irrelevant to the issue presented in the instant case.

Likewise, the argument that legislation which imposes only indirect burdens upon the free exercise of religion (i.e., coerces individuals to choose between receiving a governmental benefit or privilege and adhering to religious belief) is outside the protections afforded by the Free Exercise Clause, or that such legislation mandates a lower level of judicial scrutiny, has consistently been rejected. See, e.g., *Bob Jones Univ, Lee, Thomas, Yoder, Sherbert,* and *Braunfeld, supra.*

Like the discussion and application of the belief/action and direct/indirect analyses, Justice BOYLE's discussion of the recent decision in *Goldman, supra,* is analytically unrelated to the ultimate premise which supports the basis of her opinion. Nevertheless, I am compelled to express my disagreement with the implication in that opinion that *Goldman* has effected the standard of review applicable in free exercise cases which arise outside of the military setting.

Goldman is offered for the proposition that in free exercise cases "the higher in rank the governmental interest, the less the need for necessity to support the means chosen to achieve it even where paramount personal rights are directly burdened." *Ante,* p 505. That proposition seems to relate to the unsupported statement that "the Supreme Court has acknowledged that certain government interests are so compelling that the state need not show that the means chosen is absolutely essential

to further that interest, and that no lesser restrictive alternative could be substituted." *Id.,* p 500.

That *Goldman* is *sui generis* because it concerned a military regulation is unquestionable. In deciding "the appropriate level of scrutiny of a military regulation that clashes with a constitutional right," the five-member majority, per then Justice Rehnquist, said, relying upon a long line of cases:

> "[T]he military is, by necessity, a specialized society separate from civilian society."
>
> * * *
>
> The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."
>
> * * *
>
> "[W]ithin the military community there is simply not the same [individual] autonomy as there is in the larger civilian community."
>
> * * *
>
> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.
>
> * * *
>
> "Judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." [*Goldman, supra,* 89 L Ed 2d 483-484. Citations omitted.]

The *Goldman* majority appears to have applied a rational-basis standard of review to the military regulation challenged in that case, although Justice Brennan, dissenting, described it as "a subrational-basis standard—absolute, uncritical 'deference to the professional judgment of military

authorities.' " *Id.,* 489. (Brennan, J., dissenting, quoting the majority opinion, 484.) The four dissenters in *Goldman* were unpersuaded that a special exception from the generally applicable standard of review should be applied to military regulations. See *id.,* 489, n 2 (Brennan, J., dissenting); *id.,* 495-496 (Blackmun, J., dissenting); *id.,* 497 (O'Connor, J., dissenting).

Justice BOYLE's ultimate analysis is based upon an interpretation of *Yoder, supra,* for the proposition that individuals asserting free exercise claims, in addition to having the burden of establishing that the regulation challenged interferes, in fact, with the free exercise of their sincerely held religious beliefs, also have the burden of establishing "the sufficiency of their alternative mode" of advancing the state's asserted interests. *Ante,* p 503. I am persuaded that that proposition is not only unsupported by *Yoder,* it is internally inconsistent. Justice BOYLE states that "once a plaintiff has established that a regulation burdens the exercise of religion, the state must establish that a 'compelling state interest' is at issue and *that the interest cannot otherwise be served."* (Emphasis added.) *Ante,* p 498. The second aspect of the state's burden of proof in this regard relates to the necessity of enforcing the regulation to fulfill the state's asserted interest. Because the remedy in free exercise cases is exemption, that analysis requires the state to show that granting the exemption would interfere with the state's asserted interest. If the state has not shown that granting the exemption would, to any extent, adversely affect the achievement of the asserted "compelling" interest, it has not shown, a fortiori, that the interest "cannot otherwise be served" or that "no less intrusive alternative means" is available. In such situations, an entirely nonintrusive alternative is available,

and the interest can otherwise be served because granting the exemption will not negatively interfere with the achievement of the asserted societal interest. In that situation, it is unnecessary to undertake an analysis of the extent of the burden upon the plaintiffs' religious beliefs, which necessarily entails the subjective interpretation of the centrality of those beliefs within plaintiffs' religion, to subjectively balance the degree of that burden against the extent an exemption would interfere with the state's interest. If the state cannot establish that granting an exemption would harm the state's interest to any extent, there is nothing against which to subjectively balance the restriction of plaintiffs' rights.

Justice BOYLE's application of *Yoder* in the present case is inapposite. In *Yoder,* the Court implicitly conceded that the Amish children who failed to attend high school would not receive the same level of intellectual learning and, thus, that the state's objective would not be as fully realized if an exemption were given. The Court went further, however, and held that the resulting adverse effect upon the achievement of the state's interest did not *unduly* interfere with the fulfillment of that interest. Thus, the Court implicitly held that it was not quite sufficient for the state to show that an exemption would impair its ability to fully achieve its goals; an exemption was required even at some slight sacrifice to the state's objectives. *Yoder,* thus, stands for the proposition that the state's interest must be read broadly and flexibly in determining whether that interest could still be fulfilled if an exemption were granted.[75]

[75] See, e.g., Pfeffer, *The supremacy of free exercise,* 61 Geo L J 1115 (1973); Marcus, n 67 *supra;* Kurland, *The Supreme Court, compulsory education and the First Amendment's religion clauses,* 75 W Va L R 213 (1973). See also, e.g., Tribe, Constitutional Law, § 14-10; Nowak, Rotunda & Young, Constitutional Law, Ch 19, § III.

Justice BOYLE would apply *Yoder* in the present case to uphold the enforcement of the challenged legislation even though the state has not even shown that an exemption would impair its ability to *fully* achieve the societal goals of compulsory education. I emphasize that I have no quarrel with the *Yoder* Court's analysis. Rather, my quarrel is with what I believe to be Justice BOYLE's mischaracterization of the *Yoder* Court's holding. See *ante,* p 501, n 25.

Contrary to Justice BOYLE's assertions, the standard of review I would apply would not require the state to prove that "granting [an] exemption would effectively destroy the government's ability to achieve its purpose." *Ante,* p 506. Nor have I intended to imply that "the claim of religious practice as well as the burden thereon is defined by the claimant and that scrutiny of the claim is perhaps beyond the competence of the judiciary." *Id.* Whether a plaintiff's objection to a regulation is based upon sincerely held religious beliefs is, of course, a factual question and, as such, is reviewable accordingly. If that question is determined in the negative, the court need not proceed to determining whether the state has established its burden to justify the enforcement of that regulation, as applied, because no bona fide religious objection had been established.

In the present case, Justice BOYLE seems to determine "that compliance with the state teacher certification program will [not] endanger or restrict the free exercise of [plaintiffs'] religious beliefs" (*ante,* p 508), although she does not expressly reverse the trial court's contrary factual determination. Nevertheless, she then proceeds to apply the "strict scrutiny" standard of review. See *ante,* pp 498-499, n 21. In applying that standard of review, however, she shifts the state's burden to

justify the necessity of enforcing the challenged regulation upon plaintiffs to establish that its enforcement is unnecessary. The ultimate result is to avoid applying any degree of heightened scrutiny to the legislation in question and, instead, to uphold it, applying "closer scrutiny [to] plaintiffs' claims," *ante,* p 511, because "logic . . . indicate[s] that it furthers [the goals of compulsory education]." *Ante,* p 513.

Justice BOYLE's analysis exemplifies the inappropriateness of the "balancing test" she asserts in construing the individual rights and concomitant limitations upon governmental authority embodied in the First and Fourteenth Amendments. While the methodology expressed concerning the applicable factors in applying that "balancing test" (*ante,* pp 505-508) is sociologically interesting, such a discretionary nondefinitional standard provides no guidance to the judiciary in deciding free exercise cases and no ascertainable standard of appellate review. The constitutional principles consistently applied in the controlling decisions of the United States Supreme Court, to be sure, have resulted in striking a necessary balance between the rights of the individual and the interests of government. That balance, however, is a necessary end and not a means to avoid enforcing the limitations upon majoritarian authority inherently required to safeguard the fundamental individual rights which, by our form of government, have been withheld from governmental restriction. It is beyond question that the state must justify restricting First Amendment rights; the individual need not justify nonrestriction.

C

Chief Justice WILLIAMS and Justice BOYLE would

uphold the enforcement of the teacher certification requirement as applied to plaintiffs (bona fide religious objectors) without adequately considering the fundamental individual rights at issue or the effect that accommodating plaintiffs' free exercise of those rights would have upon the achievement of the governmental interest involved. They reach their decision in this case, not by finding that enforcing the certification requirement is essential to the state's interest in education, but by dismissing plaintiffs' religious beliefs and practices as unimportant and characterizing the burdening of plaintiffs' free exercise of those beliefs as "minimal." Their insensitivity in this regard does not comport with this Court's constitutionally mandated responsibility to safeguard the individual freedoms guaranteed by the First and Fourteenth Amendments, and to enforce the limitations upon governmental authority commensurate therewith.

VII

Plaintiffs also contend that the intrusive and broadly expressed continuous regulatory authority over the existence and operation of their religious schools imposed by the private and parochial schools act of 1921 violates the Establishment Clause. Having expressly adopted the limiting constructions of the curriculum, licensing, supervision, and enforcement provisions of the act, discussed in part III, I would be persuaded that the teacher certification requirement alone would not create the excessive entanglement that the constitution forbids. I would emphasize, however, that my conclusion in this regard would be premised upon the limiting constructions adopted.

I would note that plaintiffs' independent fundamentalist Christian schools are pervasively religious institutions, and that the burden imposed upon them by the state teacher certification requirement is substantial, because the criteria applied by plaintiffs in hiring faculty is necessarily religious. The regulation of plaintiffs' teacher employment practices as an integral aspect of their church-teacher employment relationship, therefore, necessarily implicates religious concerns. See *Tilton v Richardson,* 403 US 672; 91 S Ct 2091; 29 L Ed 2d 790 (1971); *Lemon v Kurtzman,* 403 US 602; 91 S Ct 2105; 29 L Ed 2d 745 (1971). Intrusions into the teaching function of religious schools may cause excessive entanglement. *New York v Cathedral Academy,* 434 US 125; 98 S Ct 340; 54 L Ed 2d 346 (1977); *Meek v Pittenger,* 421 US 349; 95 S Ct 1753; 44 L Ed 2d 217 (1975); *Catholic Bishop, supra.* See also *Dayton Christian Schools v Ohio Civil Rights Comm,* 766 F2d 932 (CA 6, 1985); *NLRB v Bishop Ford Central Catholic High School,* 623 F2d 818 (CA 2, 1980).

Nevertheless, I would be unable to conclude that the teacher certification employment regulation alone results in creating excessive church-state entanglement to an extent violative of the Establishment Clause.

VIII

In summary, I would resolve several of the constitutional issues originally adjudicated on nonconstitutional grounds by expressly adopting a limiting construction of the curriculum, licensing, and supervision provisions of the act, and reverse

the decision of the Court of Appeals to the extent that it is inconsistent with the limiting constructions adopted.

Further, I would reverse the decision of the Court of Appeals with regard to plaintiffs' free exercise challenge to the enforcement of the teacher certification regulation and reinstate the trial court's decision enjoining the enforcement of that statutory requirement as applied. The enforcement of the teacher certification statute, which would allow closing down plaintiffs' schools and compelling the children attending those schools to attend the public schools or an "approved" nonpublic school against the wishes of the children's parents, would be violative of the First Amendment's Free Exercise Clause. The state has not established, to the extent required by the constitution, the necessity of overriding plaintiffs' First Amendment rights; establishing that the teacher certification regulation is *rationally related* to the governmental interest in compulsory education, however strong that interest may be, is insufficient. Until the state can show otherwise, plaintiffs, who have established a bona fide religious conflict to compliance with that statutory regulation, are constitutionally entitled to exemption.

Finally, I would hold that the teacher certification provision of the act does not violate the Establishment Clause.

LEVIN and CAVANAGH, JJ., concurred with RILEY, J.

ARCHER, J., took no part in the decision of this case.

HACKLEY v HACKLEY

Docket No. 75389. Argued March 5, 1986 (Calendar No. 12). Decided November 24, 1986.

Travis L. Hackley was granted a judgment of divorce in 1974 in the Kalamazoo Circuit Court, Donald T. Anderson, J., from Lynel Hackley following a pro confesso hearing. The judgment stated that two children were born of the marriage, Laura Elisa and Antoine O'Neal, who was born fifteen days before the pro confesso hearing and two and one-half years after the complaint for divorce had been filed. At the hearing, the plaintiff was not permitted to present testimony that he was not the father of Antoine. The plaintiff was ordered to pay support and maintenance for both children. In 1983, Lynel Hackley sought modification of the judgment to increase the amount of support. The plaintiff again alleged that he was not the father of Antoine and sought blood tests to determine the paternity of Antoine. The court, Richard Ryan Lamb, J., ordered blood tests, which indicated that the plaintiff was not the father of Antoine. The Court of Appeals, V. J. BRENNAN, P.J., and R. M. MAHER and HOOD, JJ., ordered the circuit court's order requiring blood tests vacated and dismissed the plaintiff's petition for determination of paternity, holding that because the plaintiff was not permitted to present evidence at the pro confesso hearing that he was not the father of Antoine and that ruling was not appealed, res judicata applied, barring his petition (Docket No. 78402). The trial court thereafter increased total support for both children. The plaintiff appeals.

In opinions by Justice BOYLE, joined by Justices CAVANAGH and RILEY and by Justice BRICKLEY, the Supreme Court *held:*

The plaintiff's petition challenging his paternity is barred.

Justice BOYLE, joined by Justices CAVANAGH and RILEY, stated that a finding of fact in a divorce decree that a child was born of the marriage of the parties establishes the child's paternity. Such a determination, if unappealed, should be given conclusive effect and should hold true even where the rules of evidence have changed between prior and subsequent suits so as to allow the admission of testimony which could conclusively establish that the issue of paternity should have been decided otherwise. Whether an issue was conceded during the trial of

an action should not be a factor in determining the res judicata effect of a prior decision. The rationale in requiring finality in paternity determinations is compelling. In this case, the issue is one of fact. Thus, adoption of the exception to the general rule of preclusion would be inappropriate. The best interests of the child should prevail over any unfairness to the plaintiff that may result by denying his challenge of paternity, raised nine years after entry of the judgment of divorce. The doctrine of res judicata should be applied to bar the plaintiff's attempt to disestablish his paternity.

Justice BRICKLEY, concurring with Justice BOYLE, stated that in this case not only did the plaintiff have an opportunity in the original action to offer proofs regarding his paternity, but he was not precluded at that time from utilizing the same evidence he now wishes to employ. However, whether the issue the plaintiff seeks to relitigate is one of law or fact, the policy considerations articulated by Justice BOYLE are not necessary to the conclusion that the plaintiff cannot prevail.

Affirmed.

Justice LEVIN, joined by Chief Justice WILLIAMS and Justice ARCHER, stated that the doctrine of res judicata does not bar a husband, following a petition for modification of child support provisions in a decree of divorce, from seeking the elimination of support payments that otherwise would become due under the decree for time periods subsequent to filing a petition seeking modification on the ground that he was not the father of the child, where, before entry of the decree, he maintained that he was not the father of the child and was prevented from offering testimony of nonaccess.

Daudert & Basch (by *Martin C. Basch*) for the plaintiff.

Frank J. Kelley, Attorney General, *Louis J. Caruso,* Solicitor General, *James J. Gregart,* Prosecuting Attorney, and *Richard A. Santoni,* Assistant Prosecuting Attorney, for Antoine O'Neal Hackley.

BOYLE, J. The opinion for reversal excepting this case from the application of res judicata appears to have two bases: (1) the doctrine of res judicata should not preclude the relitigation of Antoine's

paternity because Travis did not concede the issue at the original divorce proceedings; and (2) the doctrine should not apply because of subsequent changes in the legal climate affecting the evidence admissible on the issue of paternity.

Ordinarily, preclusion is appropriate as to issues defined by application of legal rules to historic facts that were completed by the time of the initial decision, 18 Wright, Miller & Cooper, Federal Practice & Procedure, § 4425, pp 242-264. Even if it is conceded, as the opinion for reversal suggests, that application of the doctrine of res judicata depends upon a weighing of the competing public policy concerns involved, we would conclude that the need for finality as to the paternity determination is compelling and that the doctrine of res judicata bars Travis' attempt to disestablish his paternity of Antoine. Therefore, we would affirm the decision of the Court of Appeals.

I

"The doctrine of res judicata operates to prevent the relitigation of facts and law between the same parties or their privies." *Socialist Workers Party v Secretary of State,* 412 Mich 571, 583; 317 NW2d 1 (1982), citing *Gose v Monroe Auto Equipment Co,* 409 Mich 147, 161; 294 NW2d 165 (1980).

The doctrine of res judicata was judicially created in order to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v McCurry,* 449 US 90, 94; 101 S Ct 411; 66 L Ed 2d 308 (1980). The central goal of the doctrine's application is to "free people from the uncertain prospect of litigation, with all its costs to emotional peace and the ordering of future affairs." 18 Wright, Miller & Cooper, *supra,* § 4403, p 15.

In Michigan, the doctrine of res judicata applies, except in special cases, in a subsequent action between the same parties and " 'not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' " *Curry v Detroit,* 394 Mich 327, 332; 231 NW2d 57 (1975), quoting *Gursten v Kenney,* 375 Mich 330; 134 NW2d 764 (1965).

A support order arising from a divorce decree constitutes an adjudication of paternity and establishes the defendant's duty of support. *Baum v Baum,* 20 Mich App 68, 74; 173 NW2d 744 (1969). A party cannot withhold a defense to be used in the retrial of a paternity dispute when that defense could have been brought in the prior suit. *Baum, supra;* see *Jacobson v Miller,* 41 Mich 90, 96; 1 NW 1013 (1879). The doctrine of res judicata precludes this from happening. *Baum, supra; Stewart v Stewart,* 91 Mich App 602, 605; 283 NW2d 809 (1979); see also Anno: *Effect, in subsequent proceedings, of paternity findings or implications in divorce or annulment decree or in support or custody order made incidental thereto,* 78 ALR3d 846.

The opinion for reversal excepts the instant case from the general application of res judicata because of the operation of Lord Mansfield's Rule[1] in the trial court. Lord Mansfield's Rule precluded testimony concerning nonaccess by either a husband or wife which would tend to bastardize a child born of the marriage. The presumption that a child born during wedlock is a legitimate issue

[1] *Goodright v Moss,* 2 Cowp 591; 98 Eng Rep 1257 (1777).

could be rebutted, however, by testimony from third persons indicating nonaccess. *Yanoff v Yanoff,* 237 Mich 383; 211 NW 735 (1927); *Yager v Yager,* 313 Mich 300; 21 NW2d 138 (1946). In 1977, the rule was abrogated by this Court's decision in *Serafin v Serafin,* 401 Mich 629; 258 NW2d 461 (1977).

The opinion for reversal concludes that Travis did not concede the issue of paternity in the court below and intimates that the operation of Lord Mansfield's Rule precluded Travis from litigating the issue:

> Travis did not concede the issue of paternity. He sought to offer testimony on that issue at the pro confesso hearing, but the court refused to allow him to do so. While his failure to appeal made the decree final and, under the general rule of issue preclusion, the determination of paternity was "conclusive in a subsequent action between the parties," he had not conceded the issue. [*Post,* pp 602-603.]

We agree with our colleagues that Travis did not concede the issue of paternity. They have, however, failed to explain why that fact makes the determination of paternity and support any less final. Lord Mansfield's Rule precluded testimony of the husband and wife as to nonaccess to prove a husband's lack of paternity. It did not preclude *litigation* of the paternity issue. As indicated above, Travis could have offered testimony of third persons as to nonaccess if such testimony were available. See *Yanoff, supra.*

Another reason why our colleagues arrive at this conclusion is to distinguish this case from *Hlady v Wolverine Bolt Co,* 393 Mich 368, 380; 224 NW2d 856 (1975), in which this Court held:

> Plaintiff may not concede an issue, necessarily

> determinative of and included in the judgment of this Court, and then, after another has successfully raised the issue she did not wish to contest, ask the Court again for relief. The doctrine of res judicata bars this from happening.

A review of *Hlady,* however, indicates that Hlady's earlier concession of the issue was not the basis for precluding relitigation of the issue in that case. Indeed, the majority decision in *Gose v Monroe Auto Equipment, supra,* 161-162, teaches that the true rationale behind *Hlady*'s holding is the public policy concern requiring finality in workers' compensation adjudications:

> A compensation award represents " 'an adjudication as to the condition of the injured workman at the time it is entered.' " *Theodore v Packing Materials, Inc,* 396 Mich 152, 158; 240 NW2d 255 (1976), citing 58 Am Jur [Workmen's Compensation, § 508]. Disability benefits "are a form of income maintenance for persons whose wage-earning capacity has been suspended or terminated. A claimant's entitlement to such benefits depends on the circumstances at the time of application and payment." *Hlady, supra,* 391 (LEVIN, J., concurring).
>
> The requirement that he present all of his available claims in a single proceeding is consistent with this purpose of adjudicating the worker's needs. The remedial character of the legislation, if affected at all by this rubric, would scarcely be enhanced by a construction which would authorize piecemeal compensation for an injury.

Surely, neither *Hlady* nor any other authority resolves the issue of res judicata on whether a party litigated or conceded the issue.

The opinion for reversal, in footnote 6, attempts at great length to clarify that its decision was not based on the fact that Travis never conceded the

paternity issue.[2] In so doing, it actually opens the door for consideration of concession of an issue as a factor in determining whether res judicata applies. Our colleagues state that

> [w]hether or not as stated in the opinion for affirmance, "Hlady's earlier concession of the issue was not the basis for precluding relitigation of the issue in that case," . . . *Hlady* made a point out of Hlady's concession of the issue. Because *Hlady* emphasized Hlady's concession of the issue, we have noted in the accompanying text that Travis did not concede the issue of paternity. We do not wish to be understood as saying that a person may relitigate an issue that he had an opportunity to contest on the basis that he did not concede the issue. [*Post,* p 603, n 6.]

This creates the impression that nonconcession of the issue may have been a factor in determining the applicability of res judicata. Concession or nonconcession of an issue has never been, and should not now be, a factor in determining the res judicata effect of a prior decision. If our colleagues do not base their decision on plaintiff's nonconcession of paternity, the discussion in footnote 6 and

[2] Even if plaintiff's concession or nonconcession of paternity was an issue, we believe that a strong argument can be made that plaintiff did constructively concede the question.

We note that plaintiff was represented by counsel throughout these proceedings and took the judgment of divorce awarded by the court. The record also indicates that, while plaintiff was precluded from testifying regarding paternity of Antoine, he was not precluded from offering other testimony and evidence such as blood tests. See *People v Wiseman,* 63 Mich App 137, 140; 234 NW2d 429 (1975); *Serafin v Serafin,* 67 Mich App 517; 241 NW2d 272 (1976), aff'd 401 Mich 629; 258 NW2d 461 (1977). Yet he made no attempt to do so. The record clearly establishes that, in the face of the court advising that Antoine had to be named in the judgment as a child of the marriage and that the weekly support order for Antoine would be $30, an amount more than twice that for Laura ($13.50), the plaintiff did not offer any other testimony or evidence or request blood tests or a continuance which would allow him time to bring forward testimony and evidence supporting his denial of paternity.

the accompanying text is superfluous at best, as well as obfuscating.

Further, after discussing Hlady's concession, the opinion for reversal does nothing more to distinguish *Hlady.* The reason for that omission is that *Hlady* cannot be distinguished from this case. Both involve a factual determination accompanied by a subsequent change in law. Both involve a party to the prior determination seeking to change the earlier factual conclusion. In both cases, the plaintiff, aggrieved by the factual determination, could have appealed, but did not. The plaintiff in *Hlady* was precluded from relitigating the issue, as should be plaintiff here.

As pointed out earlier, the rationale behind *Hlady* is the public policy of requiring finality in workers' compensation cases. That rationale is as compelling, if not more so, in the highly emotion-charged area of paternity determinations. One contested paternity proceeding is disturbing in itself. To force the party contesting the redetermination to go through that unpleasantness again is unfair, as well as an unnecessary burden on the courts.

The question for present purposes is whether the party seeking to relitigate had the *opportunity* to litigate the issue. The opinion for reversal appears to conclude that Travis did not have an adequate opportunity to litigate the issue of paternity because of the operation of Lord Mansfield's Rule. This conclusion disregards the fact that the only evidence of nonaccess he could not offer was his or Lynel's testimony. Every other manner of proof was available to him. The operation of Lord Mansfield's Rule does not affect the finality of the paternity adjudication because its operation did not preclude the litigation of the paternity issue. See *Thompson v Thompson,* 572 SW2d 761, 763-

764 (Tex Civ App, 1978). To argue that fairness somehow requires relitigation of the paternity question totally overlooks the fact that plaintiff did have a chance to contest the issue but did not, choosing instead to take the divorce decree knowing that Antoine was listed as a child of the marriage, and that he would be required to support the child. It also overlooks the unfairness that would occur to Antoine if the paternity issue were allowed to be relitigated.[3]

II

The scope of the doctrine of res judicata depends upon whether the question arises in a subsequent action between the same parties and upon the same claim or upon a different claim:

> In the former case a judgment upon the merits constitutes an absolute bar to the subsequent action. In the latter case the inquiry is whether the point or question presented for determination in the subsequent action is the same as that litigated and determined in the original action. . . .
>
> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." [*United States v Moser,* 266 US 236, 241; 45 S Ct 66; 69 L Ed 262 (1924). See also 46 Am Jur 2d,

[3] See n 10. The cases cited by our colleagues apparently in support of their conclusion that fairness dictates that the paternity issue be relitigated are not applicable to the case at bar. See n 8.

Judgments, § 404, pp 571-573; *Jacobson v Miller, supra,* 93.]

The latter prong of the doctrine of res judicata has been referred to in this Court also as "collateral estoppel." *Jones v Chambers,* 353 Mich 674, 680-681; 91 NW2d 889 (1958), quoting *Partmar Corp v Paramount Pictures Theatres Corp,* 347 US 89, 90-91; 74 S Ct 414; 98 L Ed 532 (1954); *Senior Accountants, Analysts & Appraisers Ass'n v Detroit,* 399 Mich 449; 249 NW2d 121 (1976). In this case, it is denominated as the general rule of issue preclusion.

The present proceeding to cancel child support and determine paternity involves the same parties and the same issue as in the prior divorce proceeding. Because this issue was adjudicated, the general principle of issue preclusion applies.[4] See *Woolf v Woolf,* 10 Mich App 109; 158 NW2d 820 (1968); *Baum, supra.*

Our colleagues would skirt the application of this general rule on the authority of subsections 2(b) and 5(c) of § 28 of the Restatement of Judgments. Initially we note that subsection 5(c) is totally inapplicable to the case at bar. Subsection 5(c) provides in pertinent part:

> 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:
>
> * * *
>
> (5) There is a clear and convincing need for a

[4] In *Thompson, supra,* the only case located on point, the Texas Court of Civil Appeals reached the same conclusion on the basis of collateral estoppel, the issue-preclusion prong of res judicata which is applied here.

> new determination of the issue . . . (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. [Restatement Judgments, 2d, § 28(5)(c), pp 273-274.]

According to the commentary, this section should be applied only where there exists a compelling showing of unfairness, and it should *not* be applied simply on the basis that the first determination was patently erroneous. *Id.,* p 284. In this case, that an erroneous determination was reached in the first litigation alone is an insufficient basis for applying the section. Nor has Travis established a compelling showing of unfairness. The facts indicate that Travis had an adequate opportunity to obtain a full and fair adjudication of the paternity issue in the original action, but that he failed to avail himself of that opportunity. Nor is it apparent why the incentive of Travis to litigate the issue should be any greater now by reason of special circumstances than it was at the time of the original divorce action.[5] While we concede that Lynel's request for increased child support may have rekindled Travis' interest in contesting the paternity finding, we also note that an increase in child support is not an unforeseeable request. Under these circumstances we are not compelled to find that Travis was a victim of unfairness.

We further note that illustration 11 offered by the opinion for reversal is not germane to this case. That illustration is in reference to subsection (4) of § 28, which would except from the general rule of preclusion those situations where there has been an intervening change in the party's burden

[5] See n 2.

of persuasion. This case does not concern a change in the burden of persuasion. Travis has now the same burden that he had at the time of the original divorce, that is, to rebut the presumption of paternity by clear and convincing evidence to the contrary. *Serafin, supra.*

We also find that subsection 2(b) is inapplicable to this case. Subsection 2(b) of § 28 of the Restatement of Judgments provides in pertinent part:

> 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:
>
> * * *
>
> (2) The issue is one of law and . . . (b) 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 . . . . [Restatement Judgments, 2d, § 28(2)(b), p 273.][6]

[6] There is considerable controversy concerning the appropriate cases for application of this exception. See, e.g., 18 Wright, Miller & Cooper, *supra,* § 4425; Restatement Judgments, 2d, § 28, Commentary, pp 285-287. It is reasonably clear from the Restatement that the exception should apply to principles of law formulated in abstract terms which are capable of application to completely separate factual situations. It is also clear that the exception should not apply where two cases present identical issues governed by the same general legal rules and present facts which are indistinguishable as measured by these rules.

Determining whether the exception should apply becomes more difficult where there has been a change in the facts or the rules of law governing the facts. Special reasons may exist making the issue-preclusion aspect of res judicata inappropriate in a particular area of the law or substantial changes may have occurred in the legal climate suggesting a new understanding of the governing legal rules which require a different application.

Tax litigation presents a strong example of an area of law requiring flexibility in the application of issue preclusion where the governing laws have changed and separable facts are at issue. One argument advanced for limiting preclusion in this area is that preclusion might

As explained in the opinion for reversal, the rationale for this exception is that

> [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. [Restatement Judgments, 2d, § 28, comment b, pp 275-276.]

Aside from the earlier expressed reservations regarding our colleagues' decision, we are convinced that they have misapplied this exception to

enable some taxpayers to secure discriminatory advantages. This argument has been advanced also in the area of customs litigation. Another reason justifying the limitation of issue preclusion is the feeling that tax law is so changeable that repose and reliance are impossible, regardless of the application of issue preclusion.

Changes in the legal climate may justify relitigation in other areas of the law, such as civil rights, because of the greater concerns of public interest. However, "[j]ust as broad public interests may ease the way to reconsideration, so important private interests of repose or reliance may require that preclusion apply despite the clearest changes of the legal climate. 18 Wright, Miller & Cooper, *supra,* § 4425, p 263. A good illustration is the case of *United States v Moser, supra,* 242, concerning the status of a retired naval officer to receive certain retirement pay:

> Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based. *A determination in respect of the status of an individual upon which his right to recover depends is as conclusive as a decision upon any other matter.* [Citations omitted, emphasis supplied.]

the general rule of preclusion.[7] By the express language of § 28(2)(b), the issue sought to be relitigated must be one of law. This Court has applied the exception only to unmixed questions of law. See *Socialist Workers Party, supra,* 584-585; *Young v Detroit City Clerk,* 389 Mich 333; 207 NW2d 126 (1973). The issue of paternity cannot be described as a question of law. Recognizing this shortcoming in its analysis, the opinion for reversal has attempted to blur the requirement that the issue be one of law by claiming that, "[a]s stated in *Socialist Workers Party*[, *supra*] and *Young,* [*supra,*] a change in law as well as a change in fact may justify reconsideration of a prior adjudication claimed to have continuing operative effect and to govern rights in respect to periods of time commencing after the adjudication."[8] *Post,* p 606.

[7] While we find that our colleagues' application of the exception is incorrect in this case, our opinion should be read only as declining to adopt the exception on the facts and posture presented here. We express no opinion on the validity of the exception as applied to different circumstances.

[8] The opinion for reversal cites two examples gleaned from the Restatement of Judgments which "indicate that the exception to the general rule of preclusion applies although the change of law concerns a factual question, the actor's conduct . . ., or his status . . . ." *Post,* 607, n 11. Neither example supports their position.

The first involves an agency bringing an action against a liquor wholesaler on the ground that the wholesaler violated a statute by selling only to himself. The court dismisses the action, holding that such conduct does not violate the statute. A higher court later determines that such conduct does violate the law. The agency is not precluded from once again bringing an action against the wholesaler.

The second example is similar. A nonprofit organization is denied a tax refund on the basis that it is not exempt as a charity. A higher court later grants a similar organization a charitable exemption. The first organization is not precluded from seeking a charitable exemption.

While illuminating, both examples are distinguishable from this case. Both illustrations involve institutional litigation where application of the change in the law exception is compelled by the need to promote consistency of law application by the institution. Moreover, neither illustration involves a factual determination sought to be relitigated. The parties are not attempting to change facts previously

While that may or may not be true, the fact remains that *Socialist Workers Party* and *Young* both involved reconsideration of *legal* conclusions. The issues in both cases involved questions of access to the political process. Neither case relitigated or changed factual determinations made previously. The former case involved relitigation of the constitutionality of a statute; the latter reconsidered a candidate's placement on the ballot in a mayoral election. In this case, plaintiff seeks to relitigate a basic factual determination decided in the prior case. By allowing him to do so, our colleagues would greatly extend the exception to the general rule of preclusion from that which was permitted in *Socialist Workers Party* and *Young*. Further, our colleagues would implement the Restatement of Judgments, § 28(2)(b), in a manner clearly not intended by its drafters. By its express language, § 28(2)(b) requires the issue to be one of law, not fact.[9]

At issue is Travis' status in relation to Antoine and the rights and obligations that flow therefrom. A finding of fact in a divorce decree that a child was born of the marriage of the parties establishes the child's paternity. Such a determination, if unappealed, is to be given conclusive effect. This rule must hold true even where the rules of evidence have changed between the prior and subsequent suits so as to allow the admission of testi-

determined. The examples involve the interpretation of the changed law to the previously determined facts. That is not the posture of this case. Here plaintiff is attempting to redetermine a fact which he previously had an opportunity to contest.

[9] We recognize that the distinction between questions of law and questions of fact is often hazy. Some issues cannot be clearly delineated as straight factual issues or legal issues. Often a question presented to a court is a mixed question of fact and law. With that in mind, however, the issue of paternity does not fall on the scale in the grey area of a mixed question of fact and law, but is clearly a factual determination. A man either is or is not the father of a child.

mony which could conclusively establish that the issue of paternity should have been decided otherwise. See *Thompson, supra; Johnson v Johnson,* 395 So 2d 640, 641 (Fla App, 1981); cf. *United States v Moser, supra.* See also 50 CJS, Judgments, § 734, p 224; *Ashley v Ashley,* 118 Ohio App 155; 193 NE2d 535 (1962).[10]

Finally, even if we were inclined to adopt the position of the opinion for reversal that res judicata sometimes does not bar relitigation of a factual determination decided in a prior case, we would not adopt the exception here. We believe that the best interests of this child, and all children whose rights will be implicated by the Court's decision today, must prevail over any unfairness that may result to this plaintiff by denying his challenge of paternity raised nine years after entry of his judgment of divorce. Our colleagues are

[10] The opinion for reversal cites three cases, *Settle v Beasley,* 309 NC 616; 308 SE2d 288 (1983), *Estate of DeRoy,* 481 Pa 403; 392 A2d 1355 (1978), and *In re Biddle Estate,* 487 Pa 616; 410 A2d 782 (1980), in an effort to support its position. All of these cases are significantly distinguishable from the case at bar.

In *Settle,* the prior litigation was between the county child support enforcement agency and the putative father. In a different action on behalf of the child the issue of paternity was not precluded from litigation because the child, due to differing interests and incentives, was held not to be in privity with the county in the original action.

It is well-established in Michigan that a prerequisite for issue preclusion is that the former adjudication must have been between the same parties or their privies. *In re Kozak,* 92 Mich App 579, 581; 285 NW2d 378 (1979); *Curry v Detroit,* 394 Mich 327, 331; 231 NW2d 57 (1975). In the case at bar, this prerequisite is not in dispute. Travis is the same party that litigated the paternity issue in the prior divorce action.

In *Biddle, supra,* 621, and *DeRoy, supra,* 410, the courts allowed the adopted child to relitigate the issue of heirship on the basis of the well-established rule in Pennsylvania that "a rule of law made in the distribution of a portion of an estate is not binding upon a court in a subsequent adjudication relating to another portion." While the predecessor to § 28 of the Restatement of Judgments was also used in both cases to justify reopening of the litigation, we note that the courts used the exception to fulfill the presumed intent of the testator not to exclude adopted children and to establish a legal relationship, not defeat it, as in the case at bar.

of the opinion that Antoine will not be adversely affected by its decision since plaintiff has never exercised visitation rights and blood tests appear to show he is not the father. *Post,* p 610. They state that plaintiff's child support payments do no more than "preserve a facade of legitimacy." *Id.* By this statement, they ignore the very real possibility that the child will suffer both financially and psychologically.[11]

There is no area of law requiring more finality and stability than family law: "Public policy demands finality of litigation in this area to preserve surviving family structure." *Ex parte Hovermale,* 636 SW2d 828, 836 (Tex Civ App, 1982); *McGinn v McGinn,* 126 Mich App 689, 693; 337 NW2d 632 (1983).

> Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights

[11] Our colleagues note the enactment of 1986 PA 107, MCL 722.714; MSA 25.494, which extends the statute of limitations for paternity proceedings until the child reached eighteen years of age. The implication of this, of course, being that Lynel Hackley has an avenue available to her to obtain financial support from Antoine's biological father. Taking plaintiff's allegations as true, that the biological father is known and participating somewhat in Antoine's upbringing, we still reject our colleagues' contention that Antoine will not be adversely affected by its decision. A paternity action against the biological father is likely to be costly and a drain on Lynel Hackley's resources. Further, in a vast majority of cases, the biological father or his whereabouts may be unknown. The new paternity statute of limitations would be unavailing in those cases.

Finally, we disagree with our colleagues that their decision will not adversely affect Antoine because plaintiff has never acknowledged paternity or exercised visitation rights. They, while viewing their decision as merely piercing the "facade of legitimacy," neglect to take into account the potential for embarrassment and humiliation that a determination of paternity may have on the delicate psyche of a child. Even in this case, such a proceeding is bound to have some effect on the child as well as the household in which she lives. Further, the possibility for an adverse effect in other cases is quite large. Where a man who has participated in the child's upbringing and, generally, comported as the father, seeks to redetermine his paternity, the result is potentially devastating to a child who had considered the man to be the father.

> of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises. [*Williams v North Carolina,* 325 US 226, 230; 65 S Ct 1092; 89 L Ed 1577 (1945).]

There is no more forceful example of the rationale underlying the requirement of finality of judgments than the chaos and humiliation which would follow from allowing former husbands to challenge, long after a final judgment has been entered, the legitimacy of children born during their marriages.

We would affirm the decision of the Court of Appeals.

CAVANAGH and RILEY, JJ., concurred with BOYLE, J.

BRICKLEY, J. (*concurring*). I concur with the result reached in Justice BOYLE's opinion because I agree that the test to be applied is whether the plaintiff father had the "opportunity" to prove paternity in the pre-Lord Mansfield's Rule action. He had not only the opportunity but also was not precluded from utilizing the same evidence that he wishes to now employ.

I write separately because I am not prepared to accede to the analysis of whether the issue to be relitigated is one of law or fact—also, it is not necessary to my conclusion that the plaintiff cannot prevail.

Additionally, I do not necessarily agree with the policy considerations articulated in Justice BOYLE's opinion.

LEVIN, J. The question presented is whether the

doctrine of res judicata precludes a court from reconsidering and changing, following this Court's decision in *Serafin v Serafin,* 401 Mich 629; 258 NW2d 461 (1977), abrogating "Lord Mansfield's Rule," a determination in a decree of divorce that the husband was the father of a child conceived during the marriage and a provision requiring him to pay child support. We would hold that reconsideration and change is not precluded.

I

Travis Leroy Hackley filed a complaint for divorce against Lynel Hackley in November, 1971. A pro confesso hearing was held over two and one-half years later on August 15, 1974, and a judgment of divorce was entered on August 26, 1974. The judgment of divorce stated that there were two children of the marriage, Laura Elisa Hackley, born February 1, 1970, and Antoine O'Neal Hackley, born August 1, 1974, fifteen days before the pro confesso hearing and over two and one-half years after the complaint for divorce had been filed.

At the pro confesso hearing, Travis stated that Antoine was not his child. The court responded that he was "not permitted to give testimony along those lines."

The judgment of divorce directed Travis to pay $30 for the support and maintenance of Antoine and $13.50 for Laura Elisa, for a total of $43.50, each week.

Lynel filed a petition for modification of the judgment of divorce to increase the amount of support in February, 1983. Travis answered in March, 1983, alleging that he is not the father of Antoine, that Antoine was conceived while the proceedings for divorce were pending and the par-

ties were separated, and that Lynel had acknowledged to him on a number of occasions that he is not the father of Antoine. In April, 1983, Travis filed a petition to determine whether he was the father of Antoine and for blood tests that referred to this Court's decision in *Serafin.*

In *Serafin,* this Court reconsidered Lord Mansfield's Rule[1] which barred testimony concerning nonaccess by either a husband or wife, and concluded that the "veil of incompetency imposed upon a husband and wife by the rule" was lifted and either could testify on the issue of legitimacy of a child conceived during the marriage. The Court added that the child would still be protected by a "strong, though rebuttable, presumption of legitimacy" and that "clear and convincing evidence must be given" to rebut the presumption.[2]

Subsequent decisions of the Court of Appeals have differed on whether *Serafin* precludes reconsideration or modification of a provision for child support in a decree of divorce entered before *Serafin* was decided.[3]

The circuit court in September, 1983, ordered blood tests which indicated quite conclusively that Travis was not Antoine's father. After the test results were made known, the Court of Appeals granted Antoine's application for leave to appeal from the order requiring the blood tests, peremptorily vacated that order, and dismissed Travis' petition for determination of paternity. The Court explained that the concise statement of facts submitted in conjunction with the application stated that Travis was not allowed at the pro confesso hearing on August 15, 1974, to present testimony

[1] *Goodright v Moss,* 2 Cowp 591; 98 Eng Rep 1257 (1777).

[2] *Serafin, supra* at 635-636.

[3] See *Thompson v Thompson,* 112 Mich App 116; 315 NW2d 555 (1982); *Stewart v Stewart,* 91 Mich App 602; 283 NW2d 809 (1979).

that he was not the father of Antoine. "No appeal having been taken from that ruling, res judicata applies and therefore bars plaintiff's petition of April 1, 1983, for determination of paternity." *Hlady v Wolverine Bolt Co,* 393 Mich 368, 380; 224 NW2d 856 (1975).

Following receipt of the order of the Court of Appeals, the circuit court increased the total support for both minor children to $108 per week, retroactive to February 11, 1983.

This Court granted leave to appeal from the order of the Court of Appeals dismissing the petition for determination of paternity. Travis' separate appeal from the circuit court order increasing the child support is pending in the Court of Appeals.

II

In *Hlady,* this Court ruled that a worker who had received specific loss benefits for amputation of four fingers, and who this Court had ruled had not suffered the loss of the industrial use of her hand, could not, eighteen years later, after a change by judicial decision in the construction of the statute, apply for general disability benefits. In so ruling, this Court said that Hlady could not "concede an issue, necessarily determinative of and included in the judgment of this Court, and then, after another has successfully raised the issue she did not wish to contest, ask the Court again for relief. The doctrine of res judicata bars this from happening."[4] The Court added that apart from the doctrine of res judicata the one-year-back rule of the workers' compensation act barred an award of further benefits to Hlady.

[4] *Hlady, supra* at 380.

Travis did not concede the issue of paternity. He sought to offer testimony on that issue at the pro confesso hearing, but the court refused to allow him to do so. While his failure to appeal made the decree final and, under the general rule of issue preclusion, the determination of paternity was "conclusive in a subsequent action between the parties,"[5] he had not conceded the issue.[6]

The general rule of issue preclusion is subject to exceptions as was recognized by this Court in *Socialist Workers Party v Secretary of State,* 412 Mich 571, 584; 317 NW2d 1 (1982). There, this Court held that, although the Socialist Workers Party had unsuccessfully challenged in the federal court the constitutionality of a Michigan statute which denied it access to the ballot, because of a subsequent decision of the United States Supreme Court changing the applicable legal context for decision, relitigation of the constitutionality of the statute was not precluded. In so holding, the Court

[5] Restatement Judgments, 2d, § 27, p 250.

[6] We agree with the opinion for affirmance, *ante,* p 586, that Travis' failure to concede the issue of paternity is not determinative of whether the circuit court may reconsider and change the provisions of the divorce decree that Travis was the father and requiring him to pay child support.

This Court in *Hlady, supra* at 380, said, however, that Hlady could not "*concede an issue,* necessarily determinative of and included in the judgment of this Court, and then, after another has successfully raised the issue she did not wish to contest, ask the Court again for relief." (Emphasis supplied.) Whether or not, as stated in the opinion for affirmance, "Hlady's earlier concession of the issue was not the basis for precluding relitigation of the issue in that case," *ante,* p 587, *Hlady* made a point out of Hlady's concession of the issue. Because *Hlady* emphasized Hlady's concession of the issue, we have noted in the accompanying text that Travis did not concede the issue of paternity. We do not wish to be understood as saying that a person may relitigate an issue that he had an opportunity to contest on the basis that he did not concede the issue.

Travis may seek reconsideration and a change of the determinations in the decree of divorce because of the change in law and the operative effect of the decree of divorce affects payments that would otherwise become due after the change in law, not because he did not concede the issue.

adopted the following text and explanation from the Restatement of Judgments:

> 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 . . . .[7]
>
> 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.[8]

The Court referred to its decision in *Young v Detroit City Clerk,* 389 Mich 333, 338; 207 NW2d 126 (1973), where the Court had similarly relied on this language in the Restatement in holding that Coleman A. Young was not precluded from running for the office of Mayor of the City of Detroit in 1973 by an earlier decision of this Court that had prevented him from running for mayor in 1969.

The general rule of issue preclusion does not apply, without regard to whether the issue is one

[7] *Socialist Workers Party* quoted from Restatement Judgments, 2d (Tentative Draft No 1, 1973), § 68.1, pp 170-171, which became Restatement Judgments, 2d, § 28, pp 273-274.

[8] Restatement Judgments, 2d, § 28, comment b, pp 275-276.

of law or fact, where, as set forth in the Restatement of Judgments, the party sought to be precluded, as a result of "special circumstances, did not have an adequate opportunity" "to obtain a full and fair adjudication in the instant action":

> 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:
>
> * * *
>
> (5) There is a clear and convincing need for a new determination of the issue . . . (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.[9]

Illustration 11 to the Restatement states that in a case where the law is changed to reduce the burden of persuasion on the issue of fraud from "clear and convincing" to a "preponderance of the" evidence, an adverse determination on the factual defense of fraud in an action on a "series of notes" governed by the higher standard, would not preclude relitigation of the fraud issue, after the change in the burden of persuasion, in an action "on another note in the series":

> A brings an action against B to recover on a promissory note. B defends on the ground that he was induced by A's fraud to give this and other notes in the series, but fails to establish fraud by clear and convincing evidence as required by law. After judgment for A, the law is changed to provide that in such cases fraud need be proved only

[9] Restatement Judgments, 2d, § 28, pp 273-274.

> by a preponderance of the evidence. In an action by A on another note in the series, B is not precluded from asserting the defense of fraud. [Restatement Judgments, 2d, § 28, p 282.][10]

What emerges is that where there has been a change of law ("an intervening change in the applicable legal context"), and the party sought to be precluded was deprived by the former rule of "an adequate opportunity" "to obtain a full and fair adjudication in the initial action," he is not precluded, in a later action respecting a subsequent time period, by the former adjudication.

III

A child support order operates prospectively. It is subject to modification because of changes in circumstances. In the instant case, Lynel sought an increase in child support, and a change has been ordered by the circuit court increasing the amount of child support. As stated in *Socialist Workers Party* and *Young,* a change in law as well as a change in fact may justify reconsideration of a prior adjudication claimed to have continuing operative effect and to govern rights in respect to periods of time commencing after the adjudication.[11]

The predicate of both the provision for child

[10] Although not stated, "another note in the series" presumably would be a note that became due after the action on the notes where the defense failed.

[11] The commentary to the Restatement Judgments, 2d, § 28, p 278, explains this exception to the general rule of issue preclusion with the following illustrations:

> 3. A, a state agency, brings an action against B to revoke B's wholesale liquor license on the ground that B has violated the law governing the license by selling only to himself as a retailer. The court grants B's motion to dismiss for failure to state a claim, holding that the conduct charged does not violate the law. In a subsequent action by A against C, a higher court

support in the decree of divorce and of the October, 1984, order of the circuit court modifying and increasing the amount of child support is that Travis is the father of Antoine. Travis was, before entry of the decree of divorce, prevented by Lord Mansfield's Rule from offering either his or Lynel's testimony that he was not Antoine's father. Subsequently Lord Mansfield's Rule was abrogated in *Serafin.*

On the same principle that the Socialist Workers Party and Coleman A. Young were not precluded by a prior adverse adjudication from relitigating in respect to another election the question whether they were entitled to a place on the ballot, Travis is not precluded by a prior adverse adjudication that had barred him from offering testimony of nonaccess and requiring him to pay child support from relitigating his obligation to pay child support for time periods subsequent to the filing of the petition to determine whether he was Antoine's father.

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holds that identical conduct by C is ground for the revocation of C's wholesale liquor license. In a second action against B for revocation of B's license, A is not precluded from asserting that since the first dismissal, B has continued, as before, to sell only to himself as a retailer.

4. A, a non-profit organization, brings an action against B, the tax commissioner, for a refund of property taxes on the ground that it is exempt as a charity. The court gives judgment for B, adopting a narrow definition of the charitable exemption. Shortly after, a higher court of the same jurisdiction grants a property tax refund to C, an organization quite similar to A, and in doing so formulates a much broader definition of the exemption. In a subsequent action by A against B for a refund of property taxes paid for the following year, A is not precluded from asserting that it is entitled to the charitable exemption. It does not matter that the nature of A's activities has not changed since the first action.

The foregoing illustrations indicate that the exception to the general rule of preclusion applies although the change of law concerns a factual question, the actor's conduct (Illustration 3), or his status (Illustration 4).

IV

In the instant case, the circuit court increased the child support allowance for Antoine, presumably because of a change in circumstances. To hold that the increased needs of Antoine or increased means of Travis constitute a change in circumstances that may justify a change in the prior determination or judgment but that a change in the rule of law known as Lord Mansfield's Rule does not constitute a change in circumstances that may justify a change in the prior determination or judgment would be to announce an empty distinction. Where a court's order operates prospectively, revision of the order may, in light of a change in law as well as a change in fact, be justified.

The Supreme Court of North Carolina ruled that where the law had been changed to allow the use of blood grouping tests to prove paternity as well as to disprove it and to allow both plaintiff's mother and presumed father to testify as to paternity, a prior determination adverse to the child did not preclude relitigation of the question in a different action in behalf of the child. *Settle v Beasley,* 309 NC 616; 308 SE2d 288 (1983). The Supreme Court of Pennsylvania ruled, forty-five years after it was decided that an adopted child was not a child or issue, that the question could be relitigated, after the death of the life tenant, where there had been a change in law regarding the status of adopted persons as children or issue, *Estate of DeRoy,* 481 Pa 403; 392 A2d 1355 (1978). See also *In re Biddle Estate,* 487 Pa 616; 410 A2d 782 (1980).

Travis is not seeking another opportunity to relitigate before another factfinder a question that he had an adequate opportunity to litigate; because of Lord Mansfield's Rule, Travis had no

opportunity on the initial determination to put in evidence his own or Lynel's testimony concerning access, and as a result there was no assessment by the judge or other factfinder of the merits. Nor is Travis seeking to recover amounts paid pursuant to the former adjudication, or to obtain cancellation of amounts that were required to be paid before he filed, after *Serafin* was decided, a petition for determination whether he was the father. He seeks as to future time periods only, revision in light of a change in circumstances, the "intervening change in the applicable legal context." Thus he seeks what was granted Lynel and Antoine when the child support allowance was revised as to future time periods in light of a change in circumstances.

Finality in litigation is a virtue, but there is no finality when a court order operates prospectively and is, by its implied in law terms, subject to change.

Income maintenance awards, whether for child support or pursuant to a social welfare program, are necessarily subject to change in light of a change in law or fact.[12]

The continued enforcement of an income maintenance award after the factual or legal justification therefor has plainly vanished cannot be justified on the basis of "financial"[13] or psychic[14] needs

[12] Cf. *Franks v White Pine Copper Div,* 422 Mich 636, 654, 683; 375 NW2d 715 (1985).

> An employer or its insurance carrier should not be required to continue to pay benefits after an intervening decision establishes that an erroneous rule of law was applied in making an award. Like a change in physical condition or status, such a decision should relieve the employer of the further obligation to pay benefits. [*Gose v Monroe Auto Equipment Co,* 409 Mich 147, 208; 294 NW2d 165 (1980) (LEVIN, J.).]

[13] *Ante,* p 598, and n 11.

[14] *Id.*

of the claimant (or even preservation of her mother's "resources"[15]) or the avoidance of "unfairness"[16] or "chaos and humiliation."[17]

In sum, the general principle of issue preclusion does not preclude reconsideration of a former determination or judgment that operates prospectively where there has been a change in circumstances (law or fact) justifying reconsideration of the future operative effect of the former determination or judgment.

V

We have considered the claim that Antoine would be adversely affected because permitting the question to be reopened might result in a determination that Antoine was not a legitimate child of the marriage. Travis, however, has steadfastly maintained he is not the father, and has refused to exercise his right of visitation with Antoine although he has regularly exercised that right with respect to the older child. Antoine, now fourteen years old, thus knows as well as Lynel that Travis is not her father. The blood tests are known, and it appears that the true father may have maintained some continuing relationship with Lynel and her children. It is questionable whether requiring Travis to continue to pay child support would do more than preserve a facade of legitimacy.

I am not aware that "paternity determinations" are a more "highly emotion-charged area"[18] than countless other litigation battlegrounds. What is at stake here is money, not Antoine's paternity.

[15] *Id.*
[16] *Ante,* p 590.
[17] *Ante,* p 599.
[18] *Ante,* p 589.

A recently enacted law permits paternity proceedings to be instituted at any time before a child reaches eighteen years of age.[19]

The "best interests of [the] child,"[20] "potential for embarrassment and humiliation that a determination of paternity may have on the delicate psyche of a child"[21] and preservation of "the legitimacy of children"[22] arguments are reminiscent of the defense of Lord Mansfield's Rule, which I had thought this Court rejected in *Serafin*.

VI

We would hold that the doctrine of res judicata does not bar a husband from seeking the elimination of child support payments that otherwise would become due under a decree of divorce for time periods subsequent to filing a petition seeking modification on the basis that he was not the father, where as here he maintained before entry of the decree of divorce that he was not the father and was prevented by reason of Lord Mansfield's Rule from offering testimony of nonaccess.

We would reverse and remand to the circuit court for further proceedings consistent with this opinion.

WILLIAMS, C.J., and ARCHER, J., concurred with LEVIN, J.

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[19] (2) Proceedings in pursuance of this act may be instituted during the pregnancy of the mother or at any time before the child reaches 18 years of age. This subsection shall apply regardless of whether the cause of action accrued before June 1, 1986 and regardless of whether the cause of action was barred under this subsection before June 1, 1986. [1986 PA 107, MCL 722.714; MSA 25.494.]

[20] *Ante*, p 597.

[21] *Ante*, p 598.

[22] *Ante*, p 599.

GACIOCH v THE STROH BREWERY COMPANY

Docket No. 75002. Argued January 15, 1986 (Calendar No. 13). Decided November 25, 1986.

Casimer A. Gacioch sought workers' compensation benefits, alleging disability because of chronic alcoholism which he contended arose out of and in the course of his employment with the Stroh Brewery Company because Stroh made free beer available to all employees during breaks as a result of a collectively bargained contract provision negotiated by the union. A hearing referee denied benefits, finding that the plaintiff's chronic alcoholism was not caused, aggravated, or accelerated by conditions characteristic of and peculiar to the business of the defendant. The Workers' Compensation Appeal Board reversed and ordered the defendant to pay compensation. While the appeal before the board was pending, the plaintiff died and Wanda Gacioch, his widow, was substituted as plaintiff. The Court of Appeals, T. M. BURNS and KAUFMAN, JJ. (J. H. GILLIS, P.J., dissenting), affirmed in an unpublished opinion per curiam (Docket No. 73810). The defendant and its workers' compensation insurer appeal.

The Supreme Court reversed the decision of the Court of Appeals and remanded the case to the Workers' Compensation Appeal Board for further findings of fact.

Justice ARCHER, joined by Chief Justice WILLIAMS, stated that on the basis of the record it is not possible to discern whether the board applied the appropriate legal standard and found as fact that the plaintiff's chronic alcoholism was not an ordinary disease of life to which brewery workers are no more prone than the general public, requiring reversal and remand to the board for further findings of fact.

Justices LEVIN and CAVANAGH concurred in the result only.

Justice BOYLE, joined by Justice RILEY, concurring, stated that because it has not convincingly been shown under statutory or case law controlling on the plaintiff's last day of employment with the defendant that alcoholism or a predisposition to alcoholism, whether or not aggravated or accelerated by conditions of employment, was contemplated as a compensa-

ble injury, the decision of the Court of Appeals should be reversed and the award of the WCAB vacated.

Reversed and remanded.

Justice BRICKLEY, dissenting, stated that the general rule allowing for compensation where a preexisting disease is aggravated by a job should not prevail where the aggravating condition is not required by the job and the disease is one from which recovery primarily depends upon personal motivation.

Miller, Cohen, Martens & Ice, P.C. (by *Norton J. Cohen, Paul A. Geary,* and *Peter A. Caplan*), for the plaintiff.

Charfoos & Krut, P.C. (by *Myron B. Charfoos*), for the defendants.

ARCHER, J. This case involves a claim for workers' compensation benefits for the chronic alcoholism suffered by plaintiff. We must determine whether, under the circumstances extant in this case, chronic alcoholism suffered by plaintiff who, during breaks drank beer provided free by Stroh Brewery pursuant to a collectively bargained contract provision negotiated by the union is compensable under the Workers' Disability Compensation Act[1] as a personal injury which arose out of and in the course of plaintiff's employment. This is a matter of first impression in the courts of this state.[2]

[1] MCL 418.301; MSA 17.237(301), which has been amended several times since the last day of plaintiff's work.

[2] We note that only one other case involving a workers' compensation claim for chronic alcoholism has ever been filed with the WCAB. In that case, the WCAB concluded that the record did not support the "notion that . . . alcoholism which occurs in all walks of life is more prevalent in the brewery industry than in any other occupation . . . ." The board declined to find that alcoholism is an occupational disease for purposes of Chapter 4. The board denied the plaintiff's workers' compensation claim, finding that the plaintiff had failed to sustain his burden of proof by a preponderance of the evidence. The plaintiff did not appeal the WCAB decision. See *Kuttney v Stroh Brewery,* unpublished opinion of the Workers' Compensation Appeal Board, No. 815, decided November 15, 1982.

On the basis of the record before us, we are unable to discern from the opinion of the WCAB whether it applied the appropriate legal standard and found as fact that plaintiff's chronic alcoholism was not an ordinary disease of life to which brewery workers are no more prone than the general public. Therefore, we reverse the decision of the Court of Appeals and remand this case to the board for further findings of fact. We retain no jurisdiction.

I

FACTS

Plaintiff Casimer Gacioch[3] began working for Stroh Brewery on February 24, 1947. At this time, Mr. Gacioch was predisposed to alcoholism, however, he had not become an uncontrolled alcoholic. Beer was provided free and was available to all employees on the job at "designated relief areas" at the Stroh Brewery plant. The beer was made available through a collectively bargained contract provision negotiated by the union. Employees could drink the beer during their breaks and lunch periods. There was no limit on how much beer an employee could drink during these breaks. Mr. Gacioch testified that at the time he was hired he drank three to four bottles of beer on the weekends. He did not drink alcohol during the week. Over the years of his employment at Stroh Brewery, Gacioch drank free beer during his breaks and at lunch until his consumption increased to nine to twelve bottles a day. Gacioch was not required to drink the beer. He was not, for example, a taster. Gacioch worked in production.

[3] Mr. Gacioch died on June 25, 1982, and his wife was substituted as party plaintiff under the WCAB's order dated November 10, 1982.

He was responsible for running a machine, feeding cases of beer to a "soaker" at a set speed.

Stroh Brewery became aware of Gacioch's drinking problem, and in 1973 plaintiff entered a written agreement with the company and the union which stated that he was no longer allowed to drink on the job. Gacioch breached the agreement and signed a second agreement some seven months later. Notwithstanding the written agreement, he continued to drink on the job and gradually became unable to perform his work. Gacioch was fired on August 30, 1974, because he was intoxicated on the job. Dr. Smith, one of plaintiff's experts, testified that at the time Mr. Gacioch was terminated he was drinking more off than on the job.

From April, 1976, until September, 1978, Mr. Gacioch worked part-time as a custodian for a parish church. He continued to drink while working at the church. During the time he was employed at the church, he was pursuing a workers' compensation claim against Stroh Brewery. On August 18, 1977, he filed a petition for hearing which alleged that he was disabled because of alcoholism.[4] Deposition testimony of three experts was received into evidence. Dr. Smith testified that the "[a]vailability of alcoholic beverages at work were [sic] not causative in Mr. Gacioch's disease but did shape its course." Dr. Tanay testified that the free availability of alcohol during working hours was a significant contributing factor to the development of Mr. Gacioch's alcoholism. Notwithstanding this testimony, the hearing referee found that "although free alcoholic beverages were provided by the defendant as a fringe benefit pursuant to a union contract, the plaintiff abused this

[4] Plaintiff's petition did not allege a Chapter 3 personal injury.

privilege on his own volition and said abuse was not condoned or tolerated by the employer." The hearing referee denied benefits, concluding that "the plaintiff's illness (chronic alcoholism) was not caused, aggravated or accelerated by conditions characteristic and peculiar to the business of the defendant-employer."

Plaintiff appealed to the Workers' Compensation Appeal Board. While that appeal was pending, Mr. Gacioch died, and his widow, Wanda Gacioch, was appointed personal representative and was substituted as party plaintiff. In a comprehensive twenty-three page opinion, the appeal board reversed the decision of the hearing referee. The appeal board found that alcoholism is a disease, and, therefore, plaintiff did not abuse the free-beer policy on his own volition. The board also found that the free-beer policy accelerated plaintiff's alcoholism. The board concluded that plaintiff was disabled due to alcoholism and ordered defendant to pay plaintiff compensation benefits. Defendant appealed to the Court of Appeals, and the award of compensation benefits was affirmed two to one in an unpublished per curiam opinion.

II

The statute in effect on the last day of plaintiff's employment at Stroh Brewery read:

> An employee, who receives a personal injury arising out of and in the course of his employment by an employer who is subject to the provisions of this act, at the time of such injury, shall be paid compensation in the manner and to the extent provided in this act, or in case of his death resulting from such injuries the compensation shall be paid to his dependents as defined in this act. Time of injury or date of injury as used in this act in

the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions resulting in disability or death. [1969 PA 317, MSA 418.301(1); MSA 17.237(301)(1).]

"Personal injury" shall include *a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment. Ordinary diseases of life to which the public is generally exposed outside of the employment shall not be compensable.* A hernia to be compensable must be clearly recent in origin and result from a strain arising out of and in the course of the employment and promptly reported to the employer. [1969 PA 317, MCL 418.401(c); MSA 17.237(401)(c). Emphasis supplied.][5]

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[5] Both of these provisions have been amended several times since plaintiff left work. MCL 418.301; MSA 17.237(301) presently provides:

> An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employee's dependents as provided in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death.

MCL 418.401(1)(b); MSA 17.237(401)(1)(b) provides:

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

Defendants contend that alcoholism is not a disease, but, rather, a "social aberration." All three experts testifying in this case, Drs. Smith and Tanay, plaintiff's experts, and Dr. Rauch, defendants' expert, referred to alcoholism as a disease. Dr. Smith described alcoholism as a "lifelong metabolic disease, much like diabetes." Dr. Tanay testified that alcoholism is associated with particular personality disorders which begin during a person's childhood. The WCAB treated plaintiff's chronic alcoholism as a disease. Our review of the professional literature on the subject indicates that various organizations representing health care professionals have officially pronounced alcoholism as a disease.[6] Hence, plaintiff's chronic alcoholism is a disease for purposes of the above statute.[7]

Plaintiff asserts that his chronic alcoholism was an occupational disease. We disagree. A review of the record indicates that the WCAB also did not conclude that plaintiff's alcoholic condition was an occupational disease. The board treated plaintiff's

> when arising out of actual events of employment, not unfounded perceptions thereof. A hernia to be compensable must be clearly recent in origin and result from a strain arising out of and in the course of the employment and be promptly reported to the employer.

[6] Organizations which have each officially pronounced alcoholism a disease include: The American Medical Association, American Psychiatric Association, American Public Health Association, American Hospital Association, American Psychological Association, National Association of Social Workers, World Health Organization, and the American College of Physicians. See Gitlow, "Alcoholism: A Disease," in *Alcoholism: Progress in Research and Treatment* (1973), and Jellinek, *The Disease Concept of Alcoholism* (New Haven, Conn.: College & University Press, 1960).

[7] We note that some experts contend that calling alcoholism a disease is merely a "semantic trick" to counter the lingering belief that it is a vice. These experts, as well as other members of our society, decline to recognize alcoholism as a disease and refer to it instead as a behavior disorder, social problem, or a symptom. See Vaillant, *The Natural History of Alcoholism* (1983).

alcoholism as an ordinary disease of life. The proper inquiry in this case, therefore, is whether plaintiff's chronic alcoholism was a disease or disability which was due to causes and conditions which are characteristic of and peculiar to the business of Stroh and which arose out of and in the course of employment. In reaching the question concerning whether chronic alcoholism is a disease which is due to causes and conditions which are characteristic of and peculiar to the business of Stroh and which arose out of and in the course of plaintiff's employment, we must be careful not to equate "circumstance" of employment with "out of and in the course of" employment. *McClure v General Motors (On Rehearing)*, 408 Mich 191; 289 NW2d 631 (1980). If chronic alcoholism can be categorized as an ordinary disease of life to which the public is generally exposed outside of the employment, plaintiff is not entitled to a workers' compensation award. See *Mills v Detroit Tuberculosis Sanitarium,* 323 Mich 200; 35 NW2d 239 (1948).[8] The pertinent question then is whether the board made specific findings as to whether brewery workers are more prone to develop chronic alcoholism than is the general public.

As the Court of Appeals stated in *McClary v*

[8] In *Mills,* we were confronted with a workers' compensation claim for tuberculosis. The plaintiff in *Mills* worked in the kitchen of the defendant's sanitarium, washing dishes used by patients. The evidence showed that the only opportunity that the plaintiff had to come into contact with a bacillus of tuberculosis, the cause of the disease, was from the kitchen dishes.

The statute involved in *Mills,* like the statute in the instant case, provided that ordinary diseases of life were not compensable. While we recognized tuberculosis as an ordinary disease of life, we held that that fact alone did not render the resulting disability noncompensable. Because "plaintiff was exposed in his employment to the risk of contracting tuberculosis in a far greater degree and in a wholly different manner than is the public generally," we found his disabling tuberculosis to be compensable. *Id.,* 209.

Wagoner, 16 Mich App 326, 328; 167 NW2d 800 (1969), in exercising our appellate function we must have more than conclusory statements to review. We must know how the board reached its conclusions. "The appeal board should indicate the testimony adopted, the standard followed and the reasoning it used in reaching its conclusion."

We are unable to discern from the opinion of the board whether it found as fact that brewery workers are more prone to suffer from chronic alcoholism (an ordinary disease of life) than is the general public. *Mills, supra.* We note that none of the experts testifying in this case stated that plaintiff's alcoholism was due to the inherent characteristics and peculiarities of his employment in the brewery industry as a production worker responsible for running a machine.[9] Dr. Smith, for example, testified that "Mr. Gacioch would have most likely become an alcoholic anyway and his drinking outside of work eventually [was] far greater than during work." Dr. Rauch opined that individuals who are predisposed to alcoholism, like plaintiff herein, are likely to become an alcoholic no matter where they work.

We are unable to determine from the opinion of the WCAB whether it understood the applicable legal standard and what facts it specifically relied upon in reaching its conclusion that plaintiff's alcoholism was compensable under the Workers' Disability Compensation Act.

We therefore remand this case to the WCAB for its statement of the law and the specific facts

[9] In 1975, the year after plaintiff's last day of work at Stroh Brewery, almost ten million American adults were estimated to be either alcoholic or problem drinkers. This represented seven percent of the population eighteen years or older. See United States Department of Health, Education and Welfare, Public Health Service Alcohol Drug Abuse and Mental Health Administration, *The Alcohol, Drug Abuse and Mental Health National Data Book* (January, 1980).

relied upon to support its conclusion. *McClary, supra.* We do not retain jurisdiction.

WILLIAMS, C.J., concurred with ARCHER, J.

LEVIN and CAVANAGH, JJ., concurred in the result only.

BOYLE, J. (*concurring*). I am not convinced that under either the statute or the case law[1] controlling at the time of plaintiff's last day of employment at Stroh Brewery Company, alcoholism or a predisposition thereto, whether or not aggravated or accelerated by the conditions of employment, was contemplated as a compensable injury. Because I am not persuaded that the Legislature intended to award workers' compensation benefits under the facts of this case, I would reverse the decision of the Court of Appeals and vacate the workers' compensation award.

RILEY, J., concurred with BOYLE, J.

BRICKLEY, J. (*dissenting*). I concur in the result reached by the majority, but write separately to express an analysis that I believe to be more responsive to the issues as framed by the parties and the lower tribunals.

The hearing referee found that the plaintiff brewery worker "has failed to sustain the burden of proof . . . that his disability was the result of any injury *or* occupational disease arising out of and in the course of his employment." (Emphasis supplied.) He also held that "[p]laintiff's illness was not caused, aggravated or accelerated by con-

[1] This case does not present an occasion to reconsider *Miklik v Michigan Special Machine Co,* 415 Mich 364; 329 NW2d 713 (1982), and *Kostamo v Marquette Iron Mining Co,* 405 Mich 105; 274 NW2d 411 (1979), which I perceive concerned conditions entirely distinguishable from the condition presented in this case.

ditions characteristic and peculiar to the business of the defendant-employer."

The WCAB reversed the referee's decision, finding that, although plaintiff was predisposed toward alcoholism, he was not an uncontrolled drinker when he was hired. It found that plaintiff's alcoholism was accelerated by the availability of free beer at the workplace. Plaintiff's witness, Dr. Smith, testified that, while free beer did not cause plaintiff's alcoholism, "[t]he availability of easily accesable [sic] alcoholic beverages no doubt contributed to the continuation of his alcoholism," that it "probably accelerated the speed of his disease process," and that the employment experience "probably contributed significantly to its course."

Thus the WCAB, citing *Miklik v Michigan Special Machine Co,* 415 Mich 364; 329 NW2d 713 (1982), and *Kostamo v Marquette Iron Mining Co,* 405 Mich 105; 274 NW2d 411 (1979) (heart disease cases), concluded that "it is beside the point that what would have happened anyway happened sooner because of exposure at work," because the availability of beer at Stroh's was also "responsible for the irreversible physical damage and personality disintegration testified about" and, finally, that, if "damage is done at work, compensation is in order."

The Court of Appeals found ample evidence to support the WCAB findings of fact and, citing *Deziel v Difco Laboratories, Inc (After Remand),* 403 Mich 1; 268 NW2d 1 (1978), posed the question, "Did the claimant's employment aggravate, accelerate, or combine with some internal weakness or disease to produce the personal injury?" It answered in the affirmative.

Judge GILLIS, in dissent, agreed with the hearing referee that "decedent did not receive a personal

injury arising out of or in the course of his employment."

All agree that the pertinent sections of the statute are as follows:

> An employee, who receives a personal injury arising out of and in the course of his employment by an employer who is subject to the provisions of this act, at the time of such injury shall be paid compensation in the manner and to the extent provided in this act, or in a case of his death resulting from such injuries the compensation shall be paid to his dependents as defined in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions resulting in disability or death. [MCL 418.301(1); MSA 17.237(301)(1).]

and

> (c) "Personal injury" shall include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment. Ordinary diseases of life to which the public is generally exposed outside of the employment shall not be compensable. [MCL 418.401(c); MSA 17.237(401)(c).]

The hearing referee said that the plaintiff suffered neither personal injury nor an occupational disease. The WCAB did not use the words "personal injury" in its conclusion, but did utilize a personal injury analysis and cited cases in which the decision rested on a personal injury analysis.

The Court of Appeals expressly found a personal injury. In view of the finding of a personal injury

by both the WCAB and the Court of Appeals, apparently neither tribunal found it necessary to pursue an occupational disease analysis. The arguments of the parties before this Court exclusively center on a personal injury analysis, although they differ as to the outcome.

The majority, on the other hand, in arriving at its decision, pursues an occupational disease analysis.

The statute makes it clear that "personal injury shall include . . . [an occupational] disease." Thus, occupational diseases are only one form of personal injury which, to be compensable, must be "due to causes and conditions which are characteristic of and peculiar to the business of the employer . . . ."

When the occupational disease concept was introduced into the scheme of workers' compensation in 1937, only an "accidental or fortuitous event" qualified for compensation under what the statute then described as "personal accident" or "accidental injury" under the predecessor of § 301. See, e.g., *Hagopian v Highland Park,* 313 Mich 608, 619; 22 NW2d 116 (1946).

> We have frequently held that under the compensation act, prior to the adoption of the occupational disease amendment, . . . one . . . cannot recover unless there is an accident or a fortuitous event causing the disability. It was for this reason that there was a special provision made in regard to hernia in the occupational disease amendment to the act.

In 1943, the statute was again amended to delete the limitation of only enumerated occupational diseases. 1943 PA 245. At the same time, "personal injury" was substituted for "personal accident" under the predecessor to § 301. Even

with the addition of "personal injury" as the catchall coverage of the act, this Court continued to limit the § 301 predecessor coverage.

The *Hagopian* Court, in a four-to-three opinion, held that "accident" was changed to "injury" only to accommodate the occupational disease provision, not to broaden the coverage of the main injury provision of the act.

> There was nothing whatsoever in the title to the act to indicate that the aggravation of a pre-existing sickness or disease without any accidental or fortuitous event was covered. [*Hagopian, supra,* p 620.]

Two years later, in interpreting the occupational disease provision, this Court said in a unanimous opinion, "we think it was the intention of the legislature to allow compensation for disability resulting from a disease contracted in the course of the employment and brought about by the nature of such employment and the conditions under which it was carried on." *Mills v Detroit Tuberculosis Sanitarium,* 323 Mich 200, 212; 35 NW2d 239 (1948).

This history shows that the term "personal injury" was originally intended to cover the traditional accident or occurrence that is work-connected, and it was not envisioned that it would include occupational diseases of any sort, let alone ordinary diseases of life which are aggravated by work.

Expansion of the term "personal injury" over the years has now resulted in that term's inclusion of not only occupational diseases, but ordinary diseases of life that need not be caused by employment, but only be "aggravated or accelerated" by employment. See *Zaremba v Chrysler Corp,* 377

Mich 226; 139 NW2d 745 (1966), and *Miklik, supra.* Included in this ambit are heart-related diseases and emotional and mental disorders. Even suicide can be a basis for compensation. *Hammons v Highland Park,* 421 Mich 1; 364 NW2d 575 (1984).

Since many of these diseases are progressive, ordinary activities of life will aggravate and accelerate them. Given that work fills the major portion of most persons' lives, a finding that an ordinary disease of life is aggravated and accelerated by employment is an unremarkable development.

All of this, of course, has atrophied the occupational disease section of the act, leaving it no more than a signpost of the more limited original intent of "personal injury."

The debates over the expansion of the concept of "personal injury" are adequately chronicled in the journals of this Court and the Legislature, and I do not intend to add to them. I do think, however, that we owe a candid analysis of this case, in keeping with the state of the law as we have enunciated it. We do not do that by ignoring the arguments and conclusions of the parties and the lower tribunals who know, as we must, that the term "personal injury" has eclipsed "occupational disease."

I am satisfied that, in accepting the prevailing view that alcoholism is a disease—that the disease, while not caused by plaintiff's employment, was nonetheless contributed to by the conditions of his employment—the WCAB and Court of Appeals have correctly applied the existing law of "personal injury arising out of and in the course of employment" to a disease that they found was contributed to by circumstances of the employment, even though unrelated to the plaintiff's duties. Cf. *Crilly v Ballou,* 353 Mich 303; 91 NW2d 493 (1958), and

Nemeth v Michigan Building Components, 390 Mich 734; 213 NW2d 144 (1973).

The net result of this finding, of course, is that an employee who cannot control his drinking, who declines opportunities of assistance to check the effects of his disease, and who ignores warnings of discipline for his substance abuse, will be compensated by the employer for a disease that was not caused by his employment, but rather, at most, was contributed to by a break-period program requested by company employees and was unrelated to the plaintiff's duties. While most of these conditions standing alone have not been found by this Court to stand in the way of a recovery for a personal injury, taken together, in this factual setting, I find such a result simply unacceptable.

I cannot think of a clearer distortion of the laudatory goals of a program which has, overall, contributed so much to the principle of social justice in the workplace than that that would be visited by such a result. I do not think that the opponents of workers' compensation could wish for a better weapon in their arsenal than this Court's endorsement of such a result.

This case, in my judgment brings home to roost the tenuous definition of "personal injury" that has so expanded the original intent of those words. The Legislature itself has been moved to tighten that definition in respect to "[m]ental disabilities and conditions of the aging process" by adding the requirement that such "injuries" are compensable only if contributed to "in a significant manner." Our adoption of the Court of Appeals result here would surely bring a similar response as to diseases of addiction. As Judge GILLIS said in dissent:

> To allow compensation in such a case such as this would be precedent for allowing compensation

in such situations as where an employee is disabled as a result of complications related to obesity where that worker regularly dined in a company cafeteria where the prices were artificially low due to subsidization by the employer. Is lung cancer compensable merely because an employee is allowed to smoke at his desk and is provided with an ashtray? The situations begin to border on the ridiculous.

Just as we have by case law contributed to the evolution of the standard of compensability for personal injuries, standards which the Court of Appeals understandably found it within its role to apply in this case, we should bring those standards to heel in a setting such as this. Although alcoholism is a devastating disease to those who are stricken by it, unlike many other diseases, it is interrelated with behavior. Personal motivation is an important element of recovery.[1] (See testimony of Dr. Smith, 1983 WCABO 691, 711-712.)

[1] See Hammond, ed, *Almost all you ever wanted to know about alcoholism* (Lansing, Michigan: Alcohol Research Information Service, 1986):

> With some diseases the doctor may put the patient in the hospital, prescribe certain drugs, leave his orders with the head nurse and the chances are nearly 100% that the patient will get well. In many such cases, the patient may understand little if anything about the disease, and with a minimum of the patient's cooperation, he is cured. Alcoholism isn't that kind of illness.
>
> * * *
>
> [S]o much depends on the cooperation of the patient, the alcoholic.
>
> * * *
>
> The successful treatment of the alcoholic requires a lifetime commitment to total sobriety.

Also see Bourne & Fox, eds, *Alcoholism: Progress in Research and Treatment* (New York: Academic Press, 1973), pp 291-293.

I also find the following authority to be persuasive:

> Assuming that we have made a reliable and valid diagnosis

Motivation, like culpability, generally has had no relevance in the workers' compensation scheme; but when the personal injury concept has been so broadened as to include nonfortuitous and nonaccidental progressive diseases such as alcoholism that are interrelated with behavior, to ignore motivation would lead to absurd results.

For these reasons, I would hold that the general rule allowing for compensability where there is work aggravation of preexisting diseases should not prevail where the aggravating conditions are not required by the job and the disease is one from which recovery primarily depends upon personal motivation.

I would conclude that the hearing referee was correct in finding no basis for an occupational disease and reverse the Court of Appeals regarding the finding of a personal injury.

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of alcoholism, we have yet another problem to deal with before any treatment can begin. We must, somehow, get the alcoholic to want treatment. It would be nice if everyone who needed therapy for alcohol problems would drop by their community alcohol center and check in for treatment. Clearly, however, things just aren't that simple. Much of the time, people with alcohol problems not only refuse any efforts toward treatment but deny that they have a drinking problem. Denial, self-deception, rationalizing and a whole host of other psychological mechanisms work against easy therapeutic intervention. [Ward, "Motivation in Treatment," in *Alcoholism: Introduction to Theory and Treatment* (Dubuque, Iowa: Kendall/Hunt, 1980), ch 7, p 252.]

See also Johnson, *I'll Quit Tomorrow* (New York: Harper & Row, 1973), p 63, where the author describes the first step of a recovery program. "First, he makes a mental commitment to cooperate in his treatment and to adopt a measure of responsibility for his own recovery."

In re SEITZ ESTATE

SEITZ v METROPOLITAN LIFE INSURANCE COMPANY

Docket No. 76456. Argued October 9, 1986 (Calendar No. 18). Decided December 8, 1986.

Linda Seitz, widow of Leroy J. Seitz, for herself and as personal representative of the estate of Leroy J. Seitz, petitioned the Saginaw County Probate Court, claiming a share of proceeds of a policy of insurance issued by the Metropolitan Life Insurance Company to Leroy Seitz which named Loretta Seitz, the former wife of the decedent, as primary beneficiary, and Aaron Seitz, their son, as contingent beneficiary in the event the primary beneficiary predeceased the decedent. Loretta Seitz previously had filed a claim for the full amount of the proceeds. By statute, the judgment of divorce terminated all rights she may have had in the proceeds. Prior to trial, the parties stipulated, pursuant to the judgment of divorce, to payment by Metropolitan of a portion of the proceeds to Loretta Seitz as guardian of the estates of the decedent's children by his first marriage and to payment of the remainder to the parties' attorneys, pending the outcome of the litigation. The court, Edmund M. Troester, J., ordered the proceeds paid to Aaron Seitz, the contingent beneficiary. The Court of Appeals, BEASLEY, P.J., and R. B. BURNS and GARDNER, JJ., affirmed, finding that the words requiring that the primary beneficiary predecease the contingent beneficiary should be construed as being illustrative of a form of disqualification rather than being dispositive or preconditional (Docket No. 78325). The petitioner appeals.

In an opinion by Chief Justice WILLIAMS, joined by Justices LEVIN, BRICKLEY, CAVANAGH, and ARCHER, the Supreme Court *held:*

When a beneficiary designation of a life insurance policy

REFERENCES

Am Jur 2d, Insurance §§ 795, 1714.

Property settlement agreement as affecting divorced spouse's right to recover as named beneficiary under former spouse's life insurance policy. 31 ALR4th 59.

Effectiveness of change of named beneficiary of life or accident insurance policy by will. 25 ALR4th 1164.

states that a contingent beneficiary takes in the event the primary beneficiary predeceases the insured, and the primary beneficiary has not predeceased the insured but is disqualified by divorce, the contingent beneficiary is not qualified to receive the proceeds of the policy.

1. In this case, two provisions govern the eventual distribution of the life insurance proceeds: The first, contained in the life insurance contract, provided that if at the death of the insured there was no designated beneficiary, the proceeds would be payable to the estate of the insured; and the second, contained in the applicable divorce statute, provided that if the decree of divorce did not determine the rights of the wife in the policy, the proceeds were payable to the estate. The judgment of divorce did not determine Loretta Seitz' rights in the policy.

2. Absent ambiguity, the rights of parties rest on a contract as written. In this case, the beneficiary designation card unambiguously provides that if the primary beneficiary predeceased the insured, the contingent beneficiary would take. Because the primary beneficiary did not predecease the insured, the contingent beneficiary is not qualified to receive the proceeds. Under the terms of the contract, the estate of the insured is the next beneficiary of the proceeds.

Reversed.

Justice RILEY, joined by Justice BOYLE, dissenting, stated that the decision of the majority is substantially inconsistent with the Court's decision in *Holley v Schneider,* 422 Mich 248 (1985). While this case is distinguishable to the extent that the beneficiary card differs in form, the distinction does not adequately support the inconsistency in result. The judicial policy favoring consistency and predictability and the Court's reasoning in *Holley* and *Starbuck v City Bank & Trust Co,* 384 Mich 295 (1970), militate against it.

142 Mich App 39; 369 NW2d 258 (1985) reversed.

OPINION OF THE COURT

INSURANCE — LIFE INSURANCE — DISQUALIFICATION BY DIVORCE — CONTINGENT BENEFICIARY.

When a beneficiary designation of a life insurance policy states that a contingent beneficiary takes in the event the primary beneficiary predeceases the insured, and the primary beneficiary has not predeceased the insured but is disqualified by divorce, the contingent beneficiary is not qualified to receive the proceeds of the policy (1982 PA 184, MCL 552.101[2]; MSA 25.131[2]).

Braun, Kendrick, Finkbeiner, Schafer & Murphy (by *Thomas R. Luplow* and *Scott C. Strattard*) for the petitioner.

Joseph, Wolf & Endean, P.C. (by *Lorraine S. Paskiewicz*), for the respondents.

WILLIAMS, C.J. This case arises from a dispute between an insured's first wife and second wife over the proceeds of a life insurance policy. The insured's first wife and son were named primary and contingent beneficiaries, respectively, and the insured never changed these beneficiary designations after his divorce and second marriage.

The specific issue we address is whether the proceeds of a life insurance policy should be paid to the contingent beneficiary or to the estate of the insured when the policy designates the contingent beneficiary as taking in the event the primary beneficiary predeceases the insured, and this precondition has not occurred. We hold that a contingent beneficiary is not qualified to receive the proceeds of a life insurance policy when the primary beneficiary has been disqualified by divorce if the beneficiary designation explicitly states, "In the event said [primary] beneficiary predeceases me, I hereby designate as contingent beneficiary" on the line preceding the naming of the contingent beneficiary, and the primary beneficiary has not predeceased the insured.

I. FACTS

On January 2, 1974, Leroy J. Seitz enrolled in a group life insurance plan with Metropolitan Life Insurance Company offered through his employer, Michigan Bell Telephone Company. On the beneficiary designation form, Seitz named his then-wife,

Loretta Seitz, as primary beneficiary. Below the line naming the primary beneficiary, the beneficiary designation card read, "In the event said beneficiary predeceases me, I hereby designate as contingent beneficiary _____." In the space provided, Seitz filled in the name of his only child at the time, Aaron A. Seitz, as contingent beneficiary. Less than two weeks later, on January 13, 1974, Loretta gave birth to their second child, Erica.

Leroy and Loretta Seitz were divorced on September 14, 1981. By statute, the divorce judgment terminated all rights Loretta may have had in the proceeds of any life insurance policy on Leroy in which she was a named beneficiary. See MCL 552.101; MSA 25.131. Further, the divorce judgment ordered that Leroy Seitz "shall designate his two children as beneficiaries of the total sum of $40,000.00 dollars in insurance coverage on his life . . . [to] continue until the children have reached the age of 18 . . . ."

Subsequently, Leroy married his second wife, Linda Seitz. Leroy was killed in a farm accident on June 11, 1983, when Linda was seven months pregnant with Leroy's third child, Lisa. At no time after Leroy's initial enrollment and before his death were the beneficiary designations on Leroy's group life insurance policy with Metropolitan Life changed.

On June 27, 1983, Loretta Seitz filed a claim with Metropolitan Life for the full amount of the life insurance policy. The policy paid a basic amount of $37,000, a supplemental amount of $37,000, and an accidental death benefit of $37,000 for a total of $111,000 plus accrued interest from the date of death to the date of payment.

On August 4, 1983, the Saginaw County Probate Court entered an order naming Linda Seitz as personal representative for the estate of Leroy J.

Seitz. On November 14, 1983, Linda Seitz, individually, and on behalf of the estate, filed a petition against the Metropolitan Life Insurance Company in which she claimed $71,000 of the life insurance proceeds, recognizing that the divorce judgment mandated the prior payout of $40,000, plus $1,865 in accrued interest, to Aaron and Erica Seitz. Linda Seitz later amended this petition to include as additional respondents, Loretta Seitz, individually, and as general guardian for the estates of the minor children, Aaron Seitz and Erica Seitz, and George Bush, as guardian ad litem for Lisa Seitz.

In a response filed December 8, 1983, Loretta Seitz claimed that the $71,000 balance was payable to the contingent beneficiary, Aaron Seitz. On December 13, 1983, Lisa Seitz, through her guardian ad litem, filed a response consenting to an order granting the petition.

On January 19, 1984, all parties stipulated to discharge Metropolitan Life Insurance Company from any liability arising from the insurance claim upon its payment of $41,865 to Loretta Seitz as guardian for the estates of Aaron Seitz and Erica Seitz and payment of the remaining $71,000 plus accrued interest jointly to the two attorneys representing the petitioner and the respondents, respectively. These payments were made, and the parties went to trial on the remaining issue. On May 3, 1984, the Saginaw County Probate Judge issued an order directing the release of the remaining $71,000 to the contingent beneficiary, Aaron Seitz. The Court of Appeals affirmed, *In re Seitz Estate,* 142 Mich App 39, 45; 369 NW2d 258 (1985), finding that the words requiring that the primary beneficiary predecease the contingent beneficiary "should be construed as being illustrative of a form of disqualification rather then [sic] being dispositive or preconditional."

We reverse the decision of the Court of Appeals and hold that when a life insurance policy beneficiary designation states that a contingent beneficiary takes in the event the primary beneficiary predeceases the insured, and the primary beneficiary has not predeceased the insured but is disqualified by divorce, the contingent beneficiary is not qualified to receive the proceeds of the insurance policy.

II. ANALYSIS

As stated previously, only $71,000 of the total of $111,000 is contested in this case. Both parties have stipulated to a prior payout of $40,000 plus interest that Aaron and Erica Seitz are to share equally.[1] Further, both parties concede that the divorce judgment and MCL 552.101; MSA 25.131 operate to disqualify Loretta Seitz from being the primary beneficiary. Thus, Loretta Seitz' only claim against Linda Seitz is as guardian for Aaron Seitz, the contingent beneficiary named in the policy.

Two provisions govern the eventual distribution of the life insurance proceeds in this case. The first is contained in § 13 of the life insurance contract, which states, in pertinent part:

> If any designated Beneficiary shall predecease the Employee or Retired Employee the rights and interest of such Beneficiary shall thereupon automatically terminate. *If, at the death of the Employee or Retired Employee there be no designated Beneficiary as to all or any part of the insurance, then the amount of the insurance payable for which there is no designated Beneficiary shall be*

[1] Recall that in the divorce judgment between Loretta and Leroy Seitz, Leroy was to have designated Aaron and Erica as joint beneficiaries of $40,000 of life insurance.

> *payable to the estate of the Employee* or Retired Employee, provided, however, that the Insurance Company may, in such case, at its option, pay such amount to any one of the following surviving relatives: wife, husband, mother, father, child, or children, and payment to any one or more of such surviving relatives shall completely discharge the Insurance Company's liability with respect to the amount of insurance so paid. [Emphasis added.]

This provision becomes relevant if both the primary and contingent beneficiaries are disqualified and a determination must be made as to who or what is authorized to receive the policy proceeds.

The second provision is a subsection contained within the Michigan divorce statutes. The applicable portion provided:

> Each 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 the wife was named or designated as beneficiary, or to which the wife became entitled by assignment or change of beneficiary during the marriage or in anticipation of marriage. *If the decree of divorce does not determine the rights of the wife in and to a policy of life insurance,* endowment, or annuity, *the policy shall be payable to the estate of the husband* or to the named beneficiary if the husband so designates. [1982 PA 184, MCL 552.101(2); MSA 25.131(2). Emphasis added.]

This subsection applies when the rights of the insured's wife "in and to a policy of life insurance" are not determined in the divorce decree. An examination of the divorce judgment between Leroy and Loretta Seitz, reveals this to be the situation in the case at bar.

Before we decide whether these provisions come

into play, however, we must first ask whether the contingency statement on the beneficiary designation card of the insured's life insurance policy is ambiguous when it states, "In the event said beneficiary predeceases me, I hereby designate _____." The applicable rule is that "[i]n the absence of ambiguity, the rights of the parties rest on the contract as written." *Vigil v Badger Mutual Ins Co,* 363 Mich 380, 383; 109 NW2d 793 (1961). The critical word in this statement is "predecease." No special definition of the term "predecease" appears in the definition section of the life insurance policy so as to render a disqualification by divorce of a primary beneficiary equivalent to predeceasing an insured. As this Court has stated before, "We do not rewrite the agreement of the parties under the guise of interpretation." *Id.* Thus "predecease" must be construed according to its plain and common meaning. If the word "predecease" means to die before, "said beneficiary" refers to the primary beneficiary, and "me" refers to the insured, the phrase "in the event said beneficiary predeceases me, I hereby designate" means only one thing, that the contingent beneficiary takes when the primary beneficiary dies before the insured dies. Therefore, the contingency statement in this case is not susceptible of two different meanings, but is clear and unambiguous and must be followed according to its terms.

Our prior decisions in *Holley v Schneider,* 422 Mich 248; 369 NW2d 857 (1985), and *Starbuck v City Bank & Trust Co,* 384 Mich 295; 181 NW2d 904 (1970), provide guidance, but do not address the specific issue in the instant case, that is, the effect of an explicitly stated precondition in the policy that the primary beneficiary predecease the contingent beneficiary before the contingent bene-

ficiary may take.[2] In both *Holley* and *Starbuck* this precondition was not stated on either beneficiary designation card. See *Starbuck, supra,* p 296, n 1.

In *Starbuck,* the insured named his wife as primary beneficiary and his mother as contingent beneficiary on a life insurance policy. The insured became divorced from his wife several weeks before his death. The dispute over the proceeds was between the insured's estate and his mother. In its opinion, this Court remarked, "It is perhaps pertinent to note at this point that the insurance policy does not enumerate any events upon which the mother would receive the proceeds of the policy aside from her designation as the 'contingent' beneficiary." *Starbuck, supra,* p 298. Thus finding no contingency, the *Starbuck* Court held that "as a matter of contract interpretation a contingent beneficiary will be qualified to receive the proceeds of an insurance policy upon the disqualification of the primary beneficiary *unless a provision of the insurance contract requires a different result." Id.,* p 301 (emphasis added).

This Court reaffirmed the rule of *Starbuck* in *Holley.* The insured in *Holley* had designated his

[2] In a case that did not reach this Court, *Hilliker v Dowell,* 54 Mich App 249; 220 NW2d 712 (1974), the Court of Appeals followed *Starbuck* and held that "since no provision of the policy requires a different result, upon the disqualification of the 'primary beneficiary,' the 'contingent beneficiaries' are entitled to the proceeds of the policy." *Id.,* p 252. The respondent and the Court below incorrectly characterize the *Hilliker* decision as addressing the precise issue in the instant case. *Seitz,* 142 Mich App 43 (finding that "the contingent beneficiary took 'in the event of the death of the primary beneficiary' "), quoting *Hilliker, supra,* p 251. It is not clear from the Court of Appeals opinion in *Hilliker* whether the beneficiary designation card in that case required the primary beneficiary to predecease the insured. The more complete quote from *Hilliker* is as follows: "At issue is the legal effect of an instrument executed by the decedent on October 5, 1953, in which he named 'Charlie Mae Dowell, wife' as primary beneficiary, and 'children' without further description as contingent beneficiaries under the policy in the event of the death of the primary beneficiary." *Hilliker, supra,* p 251.

estranged wife as primary beneficiary and a friend as contingent beneficiary. The insured's divorce was final over a year before his death. The contingent beneficiary claimed the insurance proceeds. We found for the contingent beneficiary and disagreed with the Court of Appeals which had held that "the insurance policy in the instant case contains a provision sufficient to eliminate the contingent beneficiary's interest." *Holley, supra,* p 252. What distinguishes *Holley* from the instant case, however, is that the enrollment card in *Holley* did not include the precondition. Thus, in *Holley,* there was no reason to exclude the contingent beneficiary from receiving the proceeds because no provision of the insurance contract required a different result.

From this analysis, it is apparent that *Holley* and *Starbuck* lacked the critical fact that determines the outcome in the instant case: an explicitly stated precondition on the beneficiary designation card that requires a different result from that of the contingent beneficiary's taking. The precondition stated that the contingent beneficiary will take in the event that the primary beneficiary predeceases the insured. The primary beneficiary has been disqualified by divorce, but has not predeceased the insured. This Court will not expand the plain meaning of a contract or attempt to discern the intent of an insured beyond the stated language of the policy when that language is unambiguous. Therefore, because a provision of the insurance contract requires a different result, the contingent beneficiary is not qualified to receive the proceeds of the insurance policy upon the disqualification of the primary beneficiary.

With the contingent beneficiary disqualified, we must look to the insured's insurance contract and MCL 552.101(2); MSA 25.131(2) for the determina-

tion of who or what will receive the insurance proceeds. The contract and the statute list the insured's estate as the next beneficiary after the disqualification of the named beneficiaries, in the case of the insurance contract, or the nonprovision for the wife in the divorce judgment, in the case of the statute. Thus, upon the disqualification of the primary and contingent beneficiaries, the estate of Leroy Seitz is the beneficiary of the $71,000 balance in insurance proceeds.

III. CONCLUSION

We hold that a contingent beneficiary is not qualified to receive the proceeds of a life insurance policy when the primary beneficiary has become disqualified by divorce and an explicit precondition in the beneficiary designation requires that the primary beneficiary predecease the contingent beneficiary and this prior death has not occurred.

We reverse the decisions of the Court of Appeals and the trial court and order the balance of Leroy Seitz' life insurance policy, $71,000 plus accrued interest, to be paid to Linda Seitz in her capacity as personal representative of the estate of Leroy Seitz.

LEVIN, BRICKLEY, CAVANAGH, and ARCHER, JJ., concurred with WILLIAMS, C.J.

RILEY, J. (*dissenting*). Because I believe the Court's decision is substantially inconsistent with our decision in *Holley v Schneider,* 422 Mich 248; 369 NW2d 857 (1985), I cannot join in it. While I agree that the present case is distinguishable to the extent that the printed beneficiary card differs in form, I am not persuaded that the distinction relied upon adequately supports the ultimate in-

consistency in result. If anything, the judicial policy favoring consistency and predictability, and our reasoning in both *Holley* and *Starbuck v City Bank & Trust Co,* 384 Mich 295; 181 NW2d 904 (1970), militate against it.

BOYLE, J., concurred with RILEY, J.

TYRONE TOWNSHIP v CROUCH

Docket No. 72730. Argued November 12, 1985 (Calendar No. 2). Decided December 16, 1986.

Tyrone Township brought an action in the Kent Circuit Court against Rick W. Crouch, Elizabeth Crouch, and Charles O. Ridgeway, seeking an injunction to prevent the Crouches from placing a single-width prefabricated mobile home on certain property within the township owned by Ridgeway on the ground that the dimensions of the home did not meet minimum zoning standards. The court, George R. Cook, J., held that the zoning ordinance was valid and enjoined the Crouches from placing their home on the property. The Court of Appeals, D. E. HOLBROOK, JR., P.J., and D. F. WALSH and KINGSLEY, JJ., reversed in an opinion per curiam, holding the ordinance invalid because its result was to effect a prohibition per se of all such homes outside mobile home parks (Docket No. 64143). The township appeals.

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

The criteria under the zoning ordinance applicable only to prefabricated homes are not standards designed to assure favorable comparison of prefabricated homes with homes that could be constructed on site as required under *Robinson Twp v Knoll,* 410 Mich 293 (1981).

Affirmed.

Justice ARCHER took no part in the decision of this case.

129 Mich App 388; 341 NW2d 218 (1983) affirmed.

Annis, Annis & Visser (by *Richard C. Annis, Jr.*) for the plaintiff.

Legal Aid of Western Michigan (by *Michael Nelson*) for the defendants.

Amicus Curiae:

Bauckham, Reed, Lang, Schaefer, Sparks &

Rolfe, P.C. (by *John H. Bauckham*), for Michigan Townships Association.

LEVIN, J. In *Robinson Twp v Knoll,* 410 Mich 293, 310; 302 NW2d 146 (1981), this Court held that a prefabricated home could not be excluded from a residential area unless it failed to satisfy "reasonable standards designed to assure favorable comparison" of such homes with site-built housing which would be permitted on the site.

After *Robinson Twp* was decided, Tyrone Township amended its zoning ordinance to permit prefabricated homes in agricultural and residential zoning districts if there is a double pitched roof, the minimum width throughout the entire length of the home is twenty-two feet, and there is a minimum of 1,000 square feet of floor area.[1] The width and pitched roof requirements do not apply to site-built homes. The post-*Robinson Twp* amendment also made the minimum square foot criterion applicable to site-built homes; before the amendment, site-built homes with a minimum of 800 square feet were permitted.

The Crouches were denied a building permit to place a 14′× 70′ prefabricated home on an eleven-acre parcel owned by Mrs. Crouch's parents because the width of the home was less than twenty-two feet, the home did not have a pitched roof, and the floor area was twenty or seventy-six square feet[2] less than 1,000 square feet.

The standard "single-wide" mobile or prefabri-

[1] There are a number of other criteria, but the Crouches' prefabricated home apparently can conform with them.

[2] Rick Crouch was asked:

Q. What are the dimensions of your home?
A. Fourteen by seventy.
Q. How many square feet is that?
A. Nine hundred twenty-four, I believe.

cated home has dimensions of 14′× 70′. A structure of greater width is not permitted on the highways. Eighty-five percent of the prefabricated homes sold are single wides of the 14′× 70′ dimension.[3]

The circuit judge concluded that the amendatory ordinance was valid and enjoined the Crouches from placing their prefabricated home on the property.[4] The Court of Appeals reversed, saying that it agreed with the Crouches that the amendatory ordinance is invalid because "the result of the ordinance is to effect a per se prohibition on all single-wide mobile homes outside mobile home parks." The Court saw no need to address the Crouches' other claims of error. Nor do we.

We do not reach the question whether criteria that in effect exclude single (fourteen-foot) wide prefabricated homes from all residential areas of a community other than mobile home parks are valid. We affirm the judgment of the Court of Appeals on the ground that the three criteria are not, under the Tyrone Township ordinance, standards designed to assure favorable comparison of prefabricated homes with site-built homes which would be permitted on the site.

It does not appear whether Crouch's 14′ × 70′ home had only 924 square feet, or whether this was simply a mistake in multiplication—14 × 70 equaling 980.

[3] It is unclear whether the square foot shortage is twenty or seventy-six square feet; see n 2.

On the assumption that it is seventy-six square feet, the square-foot requirement might be met by adding six feet to the length of the home (eighty-four square feet) or by attaching a 9′ × 9′ room (eighty-one square feet) on the side of the home, but the ordinance provides that no addition to living space is permitted unless it "is built according to the same standard" as the prefabricated home or unless a special use is allowed by the building inspector.

[4] The circuit judge said that Tyrone Township candidly admitted that the amendatory ordinance in effect forbids the use of single-wide prefabricated homes. "This is done in three ways—the square foot requirement, the sloped roof requirement, and the width requirement."

The ordinance would permit construction on the site of a flat roof, tri-level home with dimensions of fourteen feet wide by twenty-four feet long—336 square feet per floor, 1008 for the three floors—which, because of the need for two staircases (from the first level to the second, and from the second to the third), would have no more useable living space than the Crouches' $924/980^{5}$ square foot prefabricated home. The site-built home could be constructed of materials no better, and perhaps inferior, in serviceability and appearance to the Crouches' prefabricated home. The difference in floor area, whether twenty or seventy-six square feet, is not, from the standpoint of aesthetics, observable.

Because a home with a flat roof that is less than twenty-two (even less than fourteen) feet wide could, consistent with the township zoning ordinance, be built on the Crouch site, the pitched roof and twenty-two foot wide limitations, applicable only to prefabricated and not to site-built homes, are not "standards designed to assure favorable comparison" of prefabricated homes with site-built homes that would be permitted on the site.

Because the difference (twenty or seventy-six square feet) in floor area is not, from an aesthetics standpoint, observable and does not assure more usable living space, the 1,000 square foot standard —taken together with the pitched roof and twenty-two foot limitations applicable only to prefabricated homes—is not a standard that assures favorable comparison of a prefabricated home with a flat roofed, site-built home of undefined width. A one, two, or three floor site-built home of 1,000 square feet might easily compare less favorably with a 14′× 70′ prefabricated home depending on

[5] See n 2.

the materials used in the two homes and other amenities.

In sum, the pitched roof and twenty-two-foot-wide limitations combined with the 1,000 square foot limitation do not, under the Tyrone Township ordinance, assure favorable comparison of a prefabricated home with a home that could be built on the instant site.

We express no opinion on whether the same result would be reached if the pitched roof and twenty-two foot wide criteria were applicable to site-built homes.[6]

Affirmed.

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

ARCHER, J., took no part in the decision of this case.

[6] The township directs our attention to n 6 of *Robinson Twp v Knoll, supra.* Footnote 6 and the accompanying text speak of a valid rule establishing reasonable standards designed to assure favorable comparison of prefabricated homes with site-built homes that would be permitted on the site.

KOVACS v CHESAPEAKE AND OHIO RAILWAY COMPANY

Docket No. 74779. Argued March 5, 1986 (Calendar No. 11). Decided December 16, 1986. Rehearing denied 428 Mich 1201.

Rosemary Kovacs, as administratrix of the estate of Charles L. Kovacs, deceased, brought a wrongful death action in the Livingston Circuit Court against the Chesapeake and Ohio Railway Company, alleging negligence in failing to sound a warning whistle as required by statute prior to collision with the decedent's truck at a train crossing. The court, Paul R. Mahinske, J., entered judgment on a jury verdict for the plaintiff. The Court of Appeals, BRONSON, P.J., and M. J. KELLY and HOFFIUS, JJ., affirmed (Docket No. 68420). The defendant appeals.

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

1. In an action for wrongful death or injury, after a verdict is entered in favor of a plaintiff, the trial court must enter judgment for all future economic and noneconomic damages reduced to gross present cash value. Gross present cash value is the total amount of future damages reduced to present value at a rate of five percent per year for each year in which the damages accrue. The trial court properly instructed the jury as to reduction to present value.

2. The trier of fact should consider possible inflation in determining damages to be awarded for future losses; however, a plaintiff should not be required to introduce evidence regarding inflation, it being a fact known to every juror without expert testimony. Just as the amount of a plaintiff's damages should be reduced to present value to take into account the income that might be earned upon investment of an award, inflation should be taken into account in assessing the plaintiff's damages to reflect the attrition of the award as a result of inflation.

Affirmed.

REFERENCES

Am Jur 2d, Death §§ 2, 115, 119, 126, 140, 156.

Effect of anticipated inflation on damages for future losses—Modern cases. 21 ALR4th 21.

134 Mich App 514; 351 NW2d 581 (1984) affirmed.

1. DAMAGES — WRONGFUL DEATH — PERSONAL INJURY — FUTURE LOSSES — REDUCTION TO PRESENT VALUE.

In an action for wrongful death or personal injury, after a verdict is entered in favor of a plaintiff, the trial court must enter judgment for the total amount of all future economic and noneconomic damages reduced to present value at a rate of five percent per year for each year in which the damages accrue (1986 PA 178, MCL 600.6306; MSA 27A.6306).

2. DAMAGES — WRONGFUL DEATH — PERSONAL INJURY — FUTURE LOSSES — INFLATION.

In an action for wrongful death or personal injury, the trier of fact should consider possible inflation in determining the damages to be awarded for future losses; however, a plaintiff should not be required to introduce evidence regarding inflation.

C. Robert Beltz for the plaintiff.

Cross, Wrock, Miller & Vieson (by *Gene S. Davis* and *Craig A. Anderson*) for the defendant.

Amici Curiae:

Michael F. Schmidt for Product Liability Advisory Council, Inc., and Motor Vehicle Manufacturer's Association of the United States, Inc.

LEVIN, J. This is an action for wrongful death brought by the decedent's widow as administratrix of his estate.

The decedent, Charles L. Kovacs, was killed when the dump truck he was driving was struck by a Chesapeake and Ohio train sometime after 8:00 A.M. in fog so dense that visibility was reduced to under 150 feet.

The principal factual dispute was whether the train whistle had been blown as required by the statute.

The jury found for the plaintiff, assessed the damages at $1,500,000, and found that Kovacs was one-third negligent, and a judgment for $1,000,000

plus interest was entered. The Court of Appeals affirmed.[1] We affirm.

I

The C & O asked the trial judge to substitute twelve percent for five percent in the standard jury instruction concerning reduction to present value.[2] One of the tort reform acts enacted last summer, 1986 PA 178, provides that "[a]fter a verdict rendered by a trier of fact in favor of a plaintiff," the court shall enter a judgment for, among other things, all future economic and all future non-economic damages "reduced to gross present cash value," which latter term is defined as meaning "the total amount of future damages reduced to present value at a rate of 5% per year for each year in which those damages accrue . . . ."[3] The Legislature thus has opted for the five percent rate. Although the amendatory

[1] *Kovacs v Chesapeake & O R Co,* 134 Mich App 514; 351 NW2d 581 (1984).

[2] SJI2d 53.03.

[3](1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. The order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:

(a) All past economic damages, less collateral source payments as provided for in section 6303.

(b) All past noneconomic damages.

(c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value.

(d) All future medical and other health care costs reduced to gross present cash value.

(e) All future noneconomic damages reduced to gross present cash value.

(f) All taxable and allowable costs, including interest as permitted by section 6013 or 6455 on the judgment amounts.

(2) As used in this section, "gross present cash value" means the total amount of future damages reduced to present value at

provision is not effective except as to cases filed on or after October 1, 1986, we conclude, in light of the legislative action, that no further consideration should be given to the reduction to present-value issue.

II

We are also of the opinion that the recent tort reform legislation should be our guide to decision of another issue raised by the C & O. The C & O asked the judge to charge the jury that "any sum of money which you award plaintiff is not subject to income tax." It has not been the practice to charge the jury regarding income tax consequences.

The requested instruction would, in effect, ask the jury to reduce the amount that it might otherwise award the plaintiff by the amount that would be payable as income tax if the damages assessed by the jury were subject to income tax. Such a reduction would be much like the reduction of a judgment for past economic damages by the amount of collateral source payments, also provided for in 1986 PA 178.[4] Under the circumstance that the Legislature has recently considered whether a judgment should be reduced by other benefits accruing to the plaintiff, we conclude that it would not be appropriate for this Court to address the question at this time.[5]

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a rate of 5% per year for each year in which those damages accrue, as found by the trier of fact pursuant to section 6305(1)(b). [MCL 600.6306; MSA 27A.6306, added by 1986 PA 178.]

[4] MCL 600.6303; MSA 27A.6303, MCL 600.6306; MSA 27A.6306, added by 1986 PA 178.

[5] Although there is no decision of this Court on the question, the practice has not been to charge on the possible tax benefit to the

III

The C & O also claims that the judge erred in instructing the jury that it could "consider the effect of inflation on the reduction to present worth and the amount of damages which you find the plaintiffs have suffered." The majority rule is that the trier of fact may consider possible inflation in determining the damages to be awarded for future losses,[6] and we agree that the trier of fact should do so.

Just as the amount of a plaintiff's damages should be reduced to present value to take into account the income that might be earned upon investment of the award, so too inflation should be taken into account in assessing plaintiff's damages to reflect the attrition of the award as a result of inflation.

We are also of the opinion that a plaintiff should not be required to introduce evidence on inflation. Inflation is a fact known to every juror without expert testimony. There is no expert consensus regarding the rate of inflation, and it would unnecessarily and unduly prolong the trial of personal injury actions to require evidence thereon.

On further consideration of the remaining issues raised by the C & O, we are no longer of the

plaintiff resulting from the award not being subject to income tax. The majority rule is that the jury should not be charged on income tax consequences. Anno: *Propriety of taking income tax into consideration in fixing damages in personal injury or death action,* 16 ALR4th 589.

Section 3107(b) of the Insurance Code provides that personal protection insurance (no-fault) benefits for work loss shall be reduced by fifteen percent because a money judgment for the plaintiff is not taxable unless the plaintiff presents "reasonable proof of a lower value of the income tax advantage . . . ." MCL 500.3107(b); MSA 24.13107(b).

[6] Anno: *Effect of anticipated inflation on damages for future losses —Modern cases,* 21 ALR4th 21.

opinion that they should be reviewed by this Court, and they therefore are not addressed.

Affirmed.

WILLIAMS, C.J., and BRICKLEY, CAVANAGH, BOYLE, RILEY, and ARCHER, JJ., concurred with LEVIN, J.

SZOPKO v KINSMAN MARINE TRANSIT COMPANY

Docket No. 74646. Argued March 4, 1986 (Calendar No. 5). Decided December 17, 1986. Rehearing denied 428 Mich 1201.

Frank J. Szopko, a seaman, brought an action in the Wayne Circuit Court against Kinsman Marine Transit Company, his employer, seeking damages under the Jones Act for injuries suffered when he slipped on a dock while returning to his ship. The court, Gilbert Zitzelsberger, J., entered judgment on a jury verdict for the plaintiff, reduced by a finding of thirty-five percent comparative negligence. The Court of Appeals, T. M. BURNS, P.J., and WAHLS and HOOD, JJ., affirmed in an unpublished opinion per curiam (Docket No. 64766). The defendant appeals.

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

For purposes of a Jones Act claim, a seaman is in the course of employment if doing the work of an employer pursuant to the employer's orders or when the nature of the service rendered and its relation to the operation of the vessel is of such nature that a seaman may be deemed in the course of employment. In this case, the courts below erred in failing to direct a verdict in favor of the defendant because the plaintiff was not in the course of his employment at the time of the injury.

1. A seaman is entitled to bring an action for damages against an employer under the Jones Act if personal injury is suffered in the course of employment and the injury was caused in some way by the employer's negligence. The location of the injury may have a bearing on the employer's negligence in determining whether the employer owed the plaintiff a duty of

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REFERENCES

Am Jur 2d, Admiralty §§ 190-193.

Am Jur 2d, Federal Employers' Liability and Compensation Acts §§ 41-47.

Seaman as injured "in the course of his employment" for purposes of the Jones Act—Federal cases. 4 L Ed 2d 1777.

Recovery, under Jones Act or seaworthiness doctrine, by seaman or maritime worker injured in boarding or leaving ship. 8 ALR3d 505.

reasonable care under the circumstances. However, recovery under the act does not depend upon the location of the injury, but instead upon the nature of the service and its relationship to the operation of the vessel.

2. In this case, the plaintiff was not in the course of his employment at the time of the injury; he was off duty and returning from a clearly personal excursion. The plaintiff was injured on a dock owned and operated by a separate company which was solely responsible for the area in which the injury occurred. No evidence of control over the dock by the defendant was shown, and thus no duty of care was owed by the defendant under the facts in this case. A seaman is not necessarily in the course of his employment when leaving or returning to his vessel. An employer's duty to provide a seaman with a safe place to work does not extend beyond the immediate vicinity of the gangway when the seaman is not in the performance of his duties.

Justice LEVIN, concurring, stated that a seaman returning from shore leave is in the course of his employment under the Jones Act.

Reversed.

Justice ARCHER, dissenting, stated that the term "course of employment" under the Jones Act is equivalent to the "in the service of the ship" formula used in maintenance and cure cases. By reason of the unique nature of the employment, a seaman is considered to be on the shipowner's business while enjoying shore leave because such leave, with its attendant relaxation, is a necessary and beneficial remedy for the confinement and discipline to which the seaman is subjected while aboard ship. There is no valid reason why, for purposes of determining the shipowner's liability under the Jones Act, a seaman on leave who slips and falls on the dock while returning to the ship should not be considered to be in the course of employment. If a seaman on shore is in the course of employment for purposes of Jones Act coverage, it seems contradictory to limit the shipowner's liability for negligence to the end of the gangplank; such a strict delineation of the employer's duty renders irrelevant the fact that a seaman is in the course of employment even though off the ship.

OPINION OF THE COURT

1. ADMIRALTY — JONES ACT — COURSE OF EMPLOYMENT.

A seaman is in the course of employment if doing the work of an employer pursuant to the employer's orders or when the nature of the service rendered and its relation to the operation of the

vessel is of such nature that a seaman may be deemed in the course of employment (46 USC 688).

2. ADMIRALTY — JONES ACT — NEGLIGENCE.

An employer's duty to provide a seaman with a safe place to work does not extend beyond the immediate vicinity of the gangway when the seaman is not in the performance of his duties (46 USC 688).

3. ADMIRALTY — JONES ACT — DAMAGES.

Recovery under the Jones Act does not depend upon the location of the injury, but instead upon the nature of the service and its relationship to the operation of the vessel; the location of an injury may have a bearing on an employer's negligence, however, in determining whether the employer owed the plaintiff a duty of reasonable care under the circumstances (46 USC 688).

The Jaques Admiralty Law Firm, P.C. (by *Robert E. Swickle*), for the plaintiff.

Foster, Meadows & Ballard (by *John A. Hamilton*) and *Andich & Belgrade* (by *Steven B. Belgrade* and *David W. Andich*) for the defendant.

CAVANAGH, J. This case plunges the Court into the depths of uncharted waters—federal admiralty law.[1]

FACTS

Plaintiff Szopko was a crew member of the S. S. Buckeye Monitor, a Great Lakes freighter owned by defendant Kinsman Marine. The vessel was docked at Conneaut, Ohio, to unload a cargo of taconite pellets. Pittsburgh and Conneaut Dock Company owned and operated the dock and was

[1] We have reviewed claims brought under the Jones Act before, but none of the cases involved the issues before us today. For example, in *Manion v State Hwy Comm,* 303 Mich 1; 5 NW2d 527 (1942), plaintiff's claim was dismissed on the basis of governmental immunity. Similarly, a jury verdict was reversed on the basis of insufficient evidence in *King v Nicholson Transit Co,* 329 Mich 586; 46 NW2d 389 (1951).

responsible for the unloading operation. The dock company is not a party in this case.

The Buckeye Monitor's cargo was unloaded by a conveyor belt system. The dock company constructed a stairway and grated ramp to allow seamen and longshoremen to walk over the conveyor belt. This "crossover ramp" was located on the dock company's property near the water's edge, and one flight of stairs was approximately twenty-five feet from the ship's ladder.

On September 2, 1973, plaintiff worked his customary eight-hour shift (8:00 A.M. to 4:00 P.M.). Plaintiff went into the town to have a few drinks around 6:30 P.M. Before leaving, his supervisor asked him to purchase a carton of cigarettes in town.

Plaintiff started to walk back to the ship at approximately 11:30 P.M. He met two fellow crewmembers (Adamzak and Johnson), who testified that his gait was slow and staggering. Plaintiff told these men to leave him alone, indicating that he could make it to the ship without their assistance. Plaintiff testified at his second trial[2] that he slipped on the dock near the stairway to the crossover ramp due to the darkness and spillage of taconite pellets. Adamzak testified that the area was "all gravel" and "kind of dim," but he had no difficulty walking in the area. Johnson stated that he encountered no difficulty walking in the area and did not know of any debris in the area at the time of the accident.

The examining physician testified that the plaintiff received a mild concussion and a very large cut

[2] Plaintiff's first trial resulted in a verdict of $180,000, with a finding of ninety-five percent comparative negligence, for a judgment of $9,000. The Court of Appeals reversed and remanded for a new trial on the sole basis that the trial judge improperly engaged in an off-the-record discussion with a juror. 96 Mich App 64; 292 NW2d 486 (1980).

on the head which required several stitches to close. Plaintiff was held for five days for observation and released. Plaintiff testified that he continued to have headaches and dizziness after the accident and that he could no longer work on ships.

Plaintiff's second trial resulted in a verdict of $380,000, and a finding of thirty-five percent comparative negligence, for a judgment of $247,000. The Court of Appeals affirmed in an unpublished decision. We granted leave to appeal. 422 Mich 936 (1985).

BACKGROUND

In order to analyze the questions presented, it is helpful to understand some basic principles of admiralty law. In general, a seaman has three basic theories of recovery: unseaworthiness of a vessel, maintenance and cure, and an action for damages under the Jones Act, 46 USC 688.

A seaman who becomes ill or injured while "in the service of the ship"[3] is entitled to "maintenance and cure" ("cure" from the Latin noun *cura,* care, healing). Recovery is in the form of a per diem living allowance and payment of medical costs. Recovery is not based on fault and is analogous to workers' compensation. Plaintiff did not make a claim for maintenance and cure in this case.

A seaman may also sue on the basis of the vessel's "unseaworthiness,"[4] since a shipowner has an absolute, nondelegable duty to furnish a vessel that is reasonably safe for its intended purposes.

[3] See *Aguilar v Standard Oil Co,* 318 US 724, 730-731, n 6; 63 S Ct 930; 87 L Ed 1107 (1943).

[4] See *Shemman v American Steamship Co,* 89 Mich App 656, 665; 280 NW2d 852 (1979); *Hubbard v Faros Fisheries, Inc,* 626 F2d 196 (CA 1, 1980).

Plaintiff's claim under this theory was rejected prior to both trials, and the unseaworthiness of the vessel is not at issue here.

We stress that plaintiff's sole basis for recovery in this case is grounded upon the Jones Act. It is important to recognize that the three theories are separate, and each has its own body of interpretative case law.

The Jones Act states that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . ." The parties agree that there are two basic elements in a Jones Act claim. First, the injury must have occurred "in the course of . . . employment." Second, the injury must have been caused in some way by the defendant's negligence. In interpreting claims under the Jones Act, several courts have looked at analogous cases under the Federal Employers' Liability Act, 45 USC 51-60, since the Jones Act was meant to provide statutory rights and remedies comparable to those granted to railroad workers under the FELA.

ANALYSIS

Defendant argues that the lower courts erred in failing to direct a verdict in its favor for two reasons. First, plaintiff was not "in the course of his employment" for purposes of the Jones Act. Second, even if he was, the defendant was not negligent since it owed no duty to the plaintiff under the facts of this case. We will analyze these arguments separately, keeping in mind the appro-

priate standard of review for a denial of a motion for a directed verdict.[5]

I. WAS THE PLAINTIFF "IN THE COURSE OF HIS EMPLOYMENT" AT THE TIME OF THE INJURY?

The plaintiff's argument was accepted by the Court of Appeals which concluded:

> The term "course of employment" as used in the statute "is the equivalent of the 'service of the ship' formula used in maintenance and cure cases." *Braen v Pfeifer Oil Transportation Co,* 361 US 129; 80 S Ct 247; 4 L Ed 2d 191 (1959). The United States Supreme Court has long held that a seaman on shore leave is in the service of the ship. *Warren v United States,* 340 US 523; 71 S Ct 432; 95 L Ed 503, 509 (1951). A seaman on shore leave is, therefore, in the course of his employment. *Central Gulf Steamship Corp v Sambula,* 405 F2d 291, 298-299 (CA 5, 1968); *Marceau v Great Lakes Transit Corp,* 146 F2d 416, 418-419 (CA 2, 1945).

Defendant concedes that a seaman on shore leave is "in the service of the ship" for purposes of recovering *maintenance and cure.* However, defendant argues that the Court of Appeals erred in concluding that a seaman on shore leave is "in the course of his employment" for the purposes of the

[5] A motion for directed verdict may only be granted when no factual question exists upon which reasonable minds can differ. *Caldwell v Fox,* 394 Mich 401, 407; 231 NW2d 46 (1975). In reviewing a trial court's denial of a motion for directed verdict, this Court views the evidence in the light most favorable to the nonmoving party to determine whether a prima facie case has been established. *Id.* See also *May v Parke, Davis & Co,* 142 Mich App 404, 411; 370 NW2d 371 (1985). [*Latimer v William Mueller & Son, Inc,* 149 Mich App 620, 629-630; 386 NW2d 618 (1986). See also *Shemman,* n 4 *supra,* p 664.]

Jones Act. Our review of the cases cited by both parties convinces us that the Court of Appeals clearly erred, and that defendant was entitled to a directed verdict.

In *Braen, supra,* pp 132-133, petitioner was *ordered* to replace worn decking on a repair raft. He was injured when a catwalk gave way, and he brought suit under the Jones Act. In reviewing whether the injury occurred in the course of petitioner's employment, the United States Supreme Court stated:

> The fact that the injury did not occur on the vessel is not controlling, as *Senko v LaCrosse Dredging Corp,* [352 US 370, 373; 77 S Ct 415; 1 L Ed 2d 404 (1957)], holds. *A "seaman" may often be sent off ship to perform duties of his employment. O'Donnell v Great Lakes* [*Dredge & Dock*] *Co,* [318 US 36; 63 S Ct 488; 87 L Ed 596 (1943)]. In *Marceau v Great Lakes Transit Corp,* (CA 2 NY [1945]) 146 F2d 416, a ship's cook was allowed to recover under the Jones Act when, *pursuant to duty,* he was returning to the ship and was injured on the dock while approaching a ladder used as ingress to the vessel.
>
> *We held that a seaman who was injured on the dock while departing from the ship on shore leave was in the service of the vessel and was entitled to recover for maintenance and cure in Aguilar v Standard Oil Co,* 318 US 724 [63 S Ct 930; 87 L Ed 1107 (1943)]. It was there recognized that a seaman is as much in the service of his ship when boarding it on first reporting for duty, quitting it on being discharged, or going to and from the ship while on shore leave, as he is while on board at high sea. *Id.,* at 736-737. We also held that a seaman injured in a dance hall while on shore leave was in the service of his ship in *Warren v United States,* 340 US 523, 529. These two cases were not brought under the Jones Act but involved maintenance and cure. Yet they make clear

> that the scope of a seaman's employment or the activities which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships. *They also supply relevant guides to the meaning of the term "course of employment" under the Act since it is the equivalent of the "service of the ship" formula used in maintenance and cure cases.* See Gilmore and Black, The Law of Admiralty, p 284. And see *O'Donnell v Great Lakes* [*Dredge & Dock*] *Co, supra* at 43; *Marceau v Great Lakes Transit Corp, supra.*
>
> *Petitioner in the present case was ordered by a superior to perform some carpentry work on a raft which lay between the lighter and the dock.* Petitioner was injured, as we have said, while on the catwalk attempting to move the raft into position for boarding. The raft was used to facilitate chipping, painting and welding on respondent's vessels. Cf. *Grant Smith-Porter Ship Co v Rohde,* 257 US 469 [42 S Ct 157; 66 L Ed 321 (1922)]. New decking was to be installed on the raft. The fact that the raft was not presently being used to repair respondent's barge is in our view immaterial. *Petitioner was acting "in the course of his employment" at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders.* No more is required by the Jones Act, as the *O'Donnell* case indicates, *petitioner being a seaman who was injured as a consequence of the negligence of his employer.* [Emphasis supplied.]

We agree with the defendant that the Court of Appeals placed improper emphasis on portions of *Braen,* while ignoring its holding. *Aguilar* and *Warren* are relevant guides in determining the meaning of "in the course of his employment," but those cases involved claims for maintenance and cure.

As interpreted by *Braen,* the seaman must be "doing the work of his employer pursuant to his

employer's orders" at the time of the injury. No more is required under the act (*Braen, supra*), but we are asked whether the act can be satisfied with less. Cf. *Vincent v Harvey Well Service,* 441 F2d 146, 148 (CA 5, 1971).[6] In answering this question, we note that recovery under the Jones Act does not depend on the location of an injury, but instead "on the nature of the service and its relationship to the operation of the vessel plying in navigable waters." *O'Donnell, supra,* pp 42-43. We cannot ignore the phrase "in the course of his employment," because it was intended to mean what it says. *Id.*

Under these facts, we find that the Court of Appeals erred by taking an analytical step which implies that a seaman on shore leave is always in the course of his employment.

The Court of Appeals cited *Marceau, supra,* and *Sambula, supra,* in support of its analytical step. In *Marceau,* the plaintiff was ashore on personal business, but was ordered to return at a designated time to provide the night lunch. He slipped on the dock near the ship's ladder, and sued for damages under the Jones Act. The *Marceau* court stated:

> The defendant's other two contentions are likewise without merit. The *plaintiff was acting under*

[6] In *Vincent,* a seaman employed on an amphibious drilling rig was injured while riding to work as a passenger in an automobile furnished by his employer. The court noted that a seaman is plainly in the course of his employment when he is doing the work of his employer pursuant to his employer's orders. This instant case, like *Vincent,* involves the more complicated situation involving activity done off the ship and not strictly "pursuant to duty." In affording coverage, the *Vincent* court noted several factors which demonstrated that the employer had substantial interests in providing transportation to the crew. These included the location and nature of the submersible rig, its lack of sleeping and eating quarters, and the remote proximity of the rig to land. None of these factors are present in the instant case.

> *orders when he returned to the ship.* Consequently at the time of the accident he was not only acting in the course of his employment *but suffered his injuries while on property in the possession and under the control of the defendant as lessee and over which the plaintiff had to pass in order to return to his work.* Under the decisions a man is acting in the course of his employment when coming to or returning from work, and upon the employer's premises or upon adjacent property if approaching by a customary route. *Wong Bar v Suburban Petroleum Transport,* 2 Cir, 119 F2d 745 [1941]. [Emphasis supplied. *Id.,* p 418.]

Even though the *Marceau* court did not have the benefit of the *Braen* analysis at the time it rendered a decision, *Marceau* still emphasized that "the plaintiff was acting under orders when he returned to the ship." Szopko notes that *Braen* cited *Marceau.* However, *Braen* also noted that the petitioner in *Marceau* was acting "pursuant to duty." Thus, the relevant focus in *Marceau* was on whether the plaintiff was performing his duty in the course of his employment at the time of the injury.[7]

The Court of Appeals also cited *Sambula.* In that case, the plaintiff was assaulted while on shore leave and received a cut beside his eye. The plaintiff was taken to a public hospital and later allowed to join his vessel for the remainder of the voyage. Complications resulted in the loss of the plaintiff's eye. The plaintiff argued that he should have been treated by a specialist and that the shipowner was negligent in the administration of medical care.

[7] We also note that *Marceau* is distinguishable because the injury occurred while on property under the control of the shipowner. See section II.

The *Sambula* court stated:

> In *Nowery v Smith,* ED Pa 1946, 69 F Supp 755, aff'd 3 Cir 1947; 161 F2d 732, it was held that a seaman was "in the course of his employment," as that phrase is used in the Jones Act, while enjoying his shore leave in a foreign port. [405 F2d 298.]

However, the court also noted:

> The preceding language from *Nowery v Smith* does not mean that a seaman may recover under the Jones Act for all injuries sustained while he is on shore leave; it means only that recovery cannot be denied solely on the ground that a seaman, while on shore leave, is not "in the course of his employment." Annot, 4 L Ed 2d 1777, 1782 at fn 5. [*Id.,* p 298, n 4.]

Accordingly, the Court of Appeals erred in citing *Marceau* and *Sambula* for the proposition that a seaman on shore leave is always in the course of his employment.

We hold that, for purposes of a Jones Act claim, a seaman is in the course of his employment if he is doing the work of his employer pursuant to his employer's orders, *Braen, supra,* or when the nature of the service rendered and its relation to the operation of the vessel, *O'Donnell, supra,* is of such a nature that a seaman may be deemed in the course of his employment. We decline to adopt a more precise rule since this determination should be made case by case.

However, given the facts of the present case, we find that plaintiff was not in the course of his employment at the time of the injury. By his own admission, he was off duty and on his own time. He did not have to return to work until 8:00 A.M.

the next morning. He was returning from several hours of drinking, clearly a personal excursion.[8]

Plaintiff finally argues that he was in the course of his employment because he was returning with a carton of cigarettes he purchased at the request of his supervisor. The Court of Appeals analysis did not require a discussion of this theory. However, even taken in the light most favorable to the plaintiff, the proofs indicate that this action was strictly a personal favor as opposed to an order from a supervisor. According to Szopko's own testimony, he was off duty until his regular shift started the next morning and was not working at the time of the injury.[9]

For all of these reasons, we hold that the lower courts erred in failing to direct a verdict in defendant's favor, because plaintiff was not "in the

[8] See *Petition of Atlass,* 350 F2d 592, 597 (CA 7, 1965):

> Assuming that Muth and Darr were in the course of their employment while departing from the yacht for the purpose of obtaining their meals and returning thereto in the normal manner, it certainly is a far-fetched idea that they continued in such course when they took to themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors. Neither do we think that such relationship was restored when they attempted to return to the yacht, one in a drunken stupor and the other badly intoxicated.

[9] Plaintiff also testified on redirect examination as follows:

> *Q.* Now when you went ashore, on that September 1, 1973, in the twilight of the evening, you had to perform a service for your engineer in getting him some cigarettes, right?
> *A.* Yes sir.
> *Q.* And he told you that, right?
> *A.* Yes sir. He asked me, he didn't tell me.
> *Q.* He is your boss?
> *A.* Yes sir, he is my engineer.

Although the trial court found that this was a personal favor rather than a duty, both lower courts ignored this finding in their subsequent rulings.

course of his employment" at the time of his injury.

II

Although the location of the injury does not control for purposes of determining whether a seaman is in the course of his employment, *O'Donnell, supra,* it may have a bearing on whether defendant was negligent. Since a Jones Act claim is grounded on the defendant's negligence, the defendant must owe some duty of reasonable care to the plaintiff under the circumstances. Accordingly, even *if* we were to assume that the plaintiff was acting in the course of his employment, his claim would fail for another reason. We find that the trial court erred in failing to direct a verdict in defendant's favor, since the defendant did not owe the plaintiff a duty of care under the facts of this case.

The Court of Appeals addressed and rejected defendant's second claim of error as follows:

> Defendant claims that it had no duty to concern itself with the conditions on the dock adjacent to its ship, over which it had no dominion or control, and therefore it cannot be held negligent for injuries arising from those conditions. *Bates v Prudential-Grace Lines, Inc,* 497 F2d 900 (CA 9, 1974) (adopting the lower court decision reported at 375 F Supp 774 [WD Wash, 1972]); *Paul v United States,* 205 F2d 38 (CA 3, 1953); *Todahl v Sudden & Christenson,* 5 F2d 462 (CA 9, 1925). Defendant is mistaken, however, in asserting that *Hamilton v Marine Carriers Corp,* 332 F Supp 223 (ED Pa, 1971) is the only decision to the contrary. In *Magnolia Towing Co v Pace,* 378 F2d 12 (CA 5, 1967), the Court held that a tugboat operator injured in an automobile driven by the ship owner's employee en route to the work site could

recover under the Jones Act. The seaman in *Marceau, supra,* was injured when he slipped and fell on the dock within a few feet of the ship's ladder. "The plaintiff accordingly made out a prima facie case by furnishing evidence of a slippery and ill-lighted place on the dock which he had to traverse in order to ascend the ladder upon returning to work." 146 F2d 419.

Review of the decisions cited by defendant suggest[s] that they make little sense in light of the Supreme Court precedents. If a seaman on shore is in the course of his employment for purposes of Jones Act coverage, it seems contradictory to limit the ship owner's liability for its negligence at the end of the gangplank. Such a strict delineation of the employer's duty renders irrelevant the fact that a seaman is in the course of his employment even though off the ship.

Moreover, a finding that defendant's duty extends beyond the ship itself does not make it "liable for the dock owner's negligence." *Paul, supra,* p 43. Under the Jones Act, an employer has a duty to provide seamen with a safe place to work, including a safe, adequately lighted means of ingress and egress to and from the vessel. [Petition of] *Atlass,* [350 F2d 592, 599 (CA 7, 1965)]; *Marceau, supra,* p 419. An employer may also be held liable "for permitting a dangerous condition emanating from the vessel to arise at the place where [the employee] was injured even though it lacked control or right of control over that place." *Hagans v Ellerman & Bucknall Steamship Co,* 318 F2d 563, 579 (CA 3, 1963).

A

We first note that the Court of Appeals decision on this issue was based on its faulty initial premise, i.e., that "a seaman on shore is in the course of his employment for purposes of Jones Act coverage." In other words, since a seaman on shore is not necessarily in the course of his employment, it

is *not* contradictory to limit a shipowner's liability for negligence at the gangway under the appropriate circumstances.

Contrary to the Court of Appeals analysis, we find that the rule summarized in *Bates* precludes recovery under these facts. In *Bates,* plaintiff left his ship on a personal errand, and stepped into a hole located some 400 to 600 feet from the ship. The pier was owned, operated, and controlled by the Chilean government. *Bates* first cited *Todahl* as follows:

> [T]he substantive duty of a vessel owner to provide a seaman with a safe place to work did not "extend to his protection when going beyond the premises of his employment for purposes of his own and over premises of which his employers had no dominion or control." [375 F Supp 775.]

The *Bates* court continued:

> The Second Circuit also has followed the general rule of *Todahl.* In *Wheeler v West India S S Co,* 205 F2d 354 (2d Cir 1953), the Court of Appeals in a per curiam opinion adopted the opinion of the District Court for the Southern District of New York which noted:
>
> "Though the defendant was duty-bound to provide reasonably safe means of immediate access to the vessel (citing authority), shipowners have generally been held not liable for unsafe conditions in places *beyond the gangway not under their control when the seaman is there for his own purposes and not in the performance of his duties."*
>
> * * *
>
> District courts in the Fourth and Fifth Circuits have cited *Todahl* and denied recovery for seamen under even more compelling circumstances than are present in the case now before this Court. In both *Lemon v United States,* 68 F Supp 793 (D Md

1946), and *Miles v States Marine Lines, Inc,* 325 F Supp 1370 (ED Tex 1971), seamen were killed while attempting to return by small boat to their ships which were anchored off shore. The courts found that the shipowners had no duty to provide a means of transportation between ship and shore for seamen granted shore leave. It followed that the shipowners were not liable for any negligent injury to seamen who arranged their own transportation.[6]

[6] The Supreme Court also gave some support to the holding in *Todahl* in *Aguilar v Standard Oil Co of New Jersey,* 318 US 724, 736, 737; 63 S Ct 930, 937; 87 L Ed 1107 (1943), when it stated:

"Consequently the fact that the shipowner might not be liable to the seamen in damages for the dockowner's negligence, cf. *Todahl v Sudden & Christenson,* 9 Cir, 5 F2d 462 (CCA), does not relieve him of his duty of maintenance and cure."

[375 F Supp 776.]

As in *Bates,* the evidence in this case established that Szopko was injured on a dock owned and operated by the dock company. The conveyor belt system was constructed and operated by the dock company, which had exclusive control over and responsibility for the unloading operation. The crewmen who preceded Szopko to the ship without injury testified that, although the dock area was dim, they did not have any trouble seeing where they were going.

Assuming control over the dock area is required, plaintiff points to the following evidence which indicates that the defendant had "de facto control" over these dockside conditions. First, defendant's cargo littered the crossover ramp area. Second, defendant had the ability to illuminate the area. Third, defendant had a watchman on board who should have assisted the plaintiff.

However, even viewing these facts in the light

most favorable to the plaintiff, we cannot conclude that they support the conclusion that the defendant exercised any real control over the dock area. Instead, the evidence clearly showed that the dock company was solely responsible for the area where the injury occurred. Plaintiff's answers to defendant's interrogatories indicated that plaintiff believed that the dock company owned the conveyor system and crossover ramp. Several dock company employees testified about "their" equipment. Finally, in denying the motion for directed verdict, the trial court noted that the shipowner exercised no control over the dock. Since any evidence of control was lacking and for the other reasons set forth below, we believe that the defendant was entitled to a directed verdict.

B

Second, the cases cited by the Court of Appeals have either been discredited or are distinguishable.

For example, in *Hamilton, supra,* plaintiff was injured on the dock owner's property while returning from a personal errand. *Hamilton* relied on a series of cases, including *Law v Victory Carriers, Inc,* 432 F2d 376 (CA 5, 1970), which held that longshoremen could recover from a shipowner under the doctrine of unseaworthiness even though the injury occurred off the vessel. *Law* was later reversed by the United States Supreme Court. *Victory Carriers, Inc v Law,* 404 US 202; 92 S Ct 418; 30 L Ed 2d 383 (1971).

Furthermore, *Hamilton* relied on a series of cases involving FELA claims. While we have already acknowledged that FELA cases are generally analogous, we decline to adopt *Hamilton*'s reasoning in the face of clearly applicable cases inter-

preting the Jones Act.[10] Accord *Bates, supra,* 497 F2d 900, n 1.

We also reject the Court of Appeals reliance on *Magnolia Towing Co v Pace, supra.* The only issue decided in that case involved whether plaintiff was a "seaman" at the time of the injury. *Id.,* p 13. *Magnolia* does not contain a meaningful discussion of either the "in the course of his employment" test, or the nature of the duty owed to a seaman injured on shore.

The Court of Appeals also improperly relied on *Hagans v Ellerman & Bucknall Steamship Co, supra,* for the proposition that an employer may be liable for a dangerous condition emanating

[10] 1B Benedict, Admiralty (7th ed), ch 3, § 29, n 21, pp 3-206 to 3-208 states:

> The recent district court decision in *Hamilton v Marine Carriers Corp,* 332 F Supp 223; 1971 AMC 2454 (ED Pa 1971), raises many troublesome questions concerning shipowner responsibility for pier conditions.
>
> * * *
>
> Although *Hamilton* raises interesting agency and scope of duty questions, and general adoption of its rationale would greatly facilitate recovery for seamen injured ashore, it is doubtful that its expansive reading of the law will be accepted. In the one case which has considered *Hamilton* as precedent, *Bates v Prudential-Grace Lines, Inc, supra,* the Ninth Circuit flatly stated, "we expressly disapprove and reject the *Hamilton* reasoning." The effect of *Hamilton* would be to reject *Paul v United States, supra,* and the many decisions which have since adopted its position. The lower court in *Bates* was doubtful that "either *Carter* [*v Union R Co,* 438 F2d 208 (CA 3, 1971)] or *Shenker* [*v Baltimore & Ohio R Co,* 374 US 1; 83 S Ct 1667; 10 L Ed 2d 709 (1963)] was intended to abrogate [the] well established rule" that the shipowner's liability normally terminated at the gangplank. *Hamilton* is not incorrect in noting that jurisprudential advances under the FELA inure to the benefit of seamen under the Jones Act, see § 2 *supra;* however, the courts must still take account of the differences between these land and sea employments, and cannot always automatically apply FELA law to seafaring operations when to do so would be incompatible with principles developed under the general maritime law. In the case at hand, the court neglected to fully consider the distinction.

from the vessel even though the employer lacks control of the premises. There, plaintiff Hagans was a *longshoreman* injured during unloading operations. Plaintiff had no right of recovery under the Jones Act, and the case is distinguishable on that basis alone. Furthermore, a close reading of *Hagans* indicates that the court accepted the defendant's argument that it owed no duty to furnish the plaintiff with a safe place to work, since it had no control over the place of the injury. *Hagans, supra,* pp 577-579, 588.

C

Plaintiff directs us to cases holding that a seaman is in the course of his employment when coming to or returning from work and upon the employer's premises or upon adjacent property if approaching by a customary route. See *McDonough v Buckeye S S Co,* 103 F Supp 473 (ND Ohio, 1951), aff'd 200 F2d 558 (CA 6, 1952), citing *Marceau, supra.*

We find *McDonough* inapposite on its facts. There, a fellow crew member (Cox) voluntarily undertook to assist the plaintiff aboard after the plaintiff was denied entry to the dock area due to his intoxicated condition. When the plaintiff staggered and fell a second time, Cox left the plaintiff in a position dangerously close to the water. Cox went aboard to summon help, but plaintiff fell into the water to his death before help returned.

The plaintiff's cause of action in *McDonough* was predicated upon the negligence of his fellow crewman. Thus, the case did not focus on the ownership or control of the dock. The court noted that once Cox voluntarily took charge of a helpless person, he had a duty to exercise reasonable care

for that person's safety. In the present case, however, defendant's agents never assumed responsibility for plaintiff's safe passage to the vessel.

D

Both lower courts erred in relying on distinguishable or discredited cases which indicate that a shipowner's duty extends to areas over which it has no control. On the contrary, we embrace the rule announced in *Bates,* and hold that a defendant's duty to provide a seaman with a safe place to work does not extend beyond the immediate vicinity of the gangway when the seaman is not in the performance of his duties. *Bates, supra; Todahl, supra.* Accordingly, defendant was entitled to a directed verdict under the facts of this case.

III

The defendant also argues that the trial court erred in 1) instructing the jury on the issue of liability and damages and, 2) concluding that the plaintiff's treating physician was "unavailable" to testify as a live witness at plaintiff's second trial. See GCR 1963, 302.7; MRE 2.302(B)(4)(d). Our disposition of this appeal makes it unnecessary to address these claims.

Reversed.

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

LEVIN, J. (*concurring*). Frank J. Szopko was a crew member on a Kinsman Marine Transit Company ship. He was injured when he slipped and fell on the dock while returning to the ship from a personal shore leave. He commenced this action

under the Jones Act.[1] As set forth in the opinion of the Court, Szopko can recover for his injuries under the Jones Act only if he can establish both that he was acting "in the course of his employment" when injured, and that his injury was caused by the negligence of Kinsman. The majority holds that Szopko was unable to establish either element, and denies his claim.

I concur in the decision of the majority, but disagree on the "course of employment" issue.

A number of courts have held that a seaman on shore leave, at least when he is leaving from or returning to his ship by a standard route from a personal shore leave, is within the course of his employment under the Jones Act.[2] The United

[1] Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railroad employees shall apply . . . . [46 USC 688.]

[2] See *Nowery v Smith,* 69 F Supp 755 (ED Pa, 1946), aff'd 161 F2d 732 (CA 3, 1947); *Walton v Continental S S Co,* 66 F Supp 836, 841 (D Md, 1946); *Williamson v Western-Pacific Dredging Corp,* 304 F Supp 509 (D Or, 1969), aff'd 441 F2d 65 (CA 9, 1971), cert den 404 US 851 (1971); *Dixon v Grace Lines, Inc,* 27 Cal App 3d 278, 286, n 5; 103 Cal Rptr 595 (1972).

Numerous other cases have so stated in dicta. See, e.g., *Wheeler v West India S S Co,* 103 F Supp 631 (SD NY, 1951), aff'd 205 F2d 354 (CA 2, 1953), cert den 346 US 889 (1953); *Broussard v Marine Transport Lines, Inc,* 369 F Supp 103 (ED Tex, 1974); *Dangovich v Isthmian Lines, Inc,* 218 F Supp 235 (SD NY, 1963), aff'd 327 F2d 355 (CA 2, 1964); *Ugarte v United States Lines, Inc,* 64 NY2d 836; 486 NYS2d 934; 476 NE2d 333 (1985); *Allan v Brown & Root, Inc,* 491 F Supp 398 (SD Tex, 1980); *Marceau v Great Lakes Transit Corp,* 146 F2d 416 (CA 2, 1945). See also Anno: *Jones Act—Course of Employment,* 4 L Ed 2d 1777.

Kinsman relies on *Petition of Atlass,* 350 F2d 592, 597 (CA 7, 1965), where the United States Court of Appeals for the Seventh Circuit denied the claim of two seaman who drowned while returning to the ship from a personal shore leave because they were not in the course of their employment when the accident occurred. In so holding, however, the court stressed that the two seamen were extremely

States Supreme Court has said as much in dicta. See *Braen v Pfeifer Oil Transportation Co,* 361 US 129, 131-132; 80 S Ct 247; 4 L Ed 2d 191 (1959), where the Court said that the meaning of the term "in the course of his employment" under the Jones Act was equivalent to the meaning of the term "in service of the ship" in a maintenance and cure action.[3] The Court had previously held that a

drunk when they fell into the water and said that they were responsible for their own deaths. The court also implied that the plaintiffs would have been in the course of their employment while returning from shore leave in ordinary circumstances, and that it was the excessive drinking that constituted a departure from their employment. Even if *Atlass* is not distinguishable, it is an anomaly among the numerous decisions supporting the rule that a seaman on shore leave, at least when he is leaving the ship or returning to it, is within the course of his employment under the Jones Act.

The majority would distinguish *Central Gulf Steamship Corp v Sambula,* 405 F2d 291 (CA 5, 1968), where the United States Court of Appeals for the Fifth Circuit held that a seaman who was assaulted while on shore leave was within the course of his employment. In so holding, the court cited at length from *Nowery v Smith, supra,* for the view that a seaman on shore leave is in the course of his employment.

In attempting to discredit the authority of *Sambula,* the majority relies on a footnote in *Sambula* that might appear to contradict the rule stated in *Nowery:*

> The preceding language from *Nowery v Smith* does not mean that a seaman may recover under the Jones Act for all injuries sustained while he is on shore leave; it means only that recovery cannot be denied solely on the ground that a seaman, while on shore leave, is not "in the course of his employment." [*Sambula, supra,* p 298, n 4.]

The footnote notes that merely being in the course of one's employment is not sufficient under the Jones Act for the plaintiff to recover. The plaintiff's injury must have been caused by the defendant's negligence. Read this way, what otherwise might be seen as an incongruous footnote becomes understandable. The footnote reminds the reader that under the Jones Act—in contrast with a maintenance and cure action—the plaintiff must establish both that he was in the course of his employment and that the shipowner was negligent.

[3] While the holding in *Braen* goes no further than to state that since the plaintiff was doing the work of his employer when injured he was clearly in the course of his employment, the Court certainly did not suggest, as the majority implies, that a seaman is *not* in the course of his employment if he is not performing the work of his employer. The actual holding does not address the status of a seaman who is off duty or on shore leave.

seaman returning to his ship from a personal shore leave is in the service of his ship for purposes of maintenance and cure.[4]

There are also a number of decisions that contradict the majority's construction of the "course of employment" requirement, although they stop short of affirming the view here stated. Those decisions declare that a seaman may be within the course of his employment under the Jones Act although he is not, at the time he is injured, carrying out his employer's orders, or otherwise performing a job function.[5]

O'Donnell v Great Lakes Dredge & Dock Co, 318 US 36; 63 S Ct 488; 87 L Ed 596 (1943), cited in the opinion of the Court, does not hold that a seaman is within the course of his employment under the Jones Act only when he is following orders or performing a job function. The Court held rather that a seaman can be within the course of his employment although he is injured on land rather than navigable waters. The plaintiff in *O'Donnell* was injured when a weight fell on him while he was working on shore. The United States Court of Appeals for the Seventh Circuit had denied recovery under the Jones Act because the injury did not occur on navigable waters. The United States Supreme Court held that the words "in the course of his employment" are not restricted to injuries that occur at sea. It did not hold that a seaman returning from shore leave was not in the course of his employment.

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[4] *Aguilar v Standard Oil Co,* 318 US 724; 63 S Ct 930; 84 L Ed 1107 (1943). *Warren v United States,* 340 US 523; 71 S Ct 432; 95 L Ed 503 (1951).

[5] See, e.g., *Holm v Cities Service Transportation Co,* 60 F2d 721, 722 (CA 2, 1932); *Sundberg v Washington Fish & Oyster Co,* 138 F2d 801 (CA 9, 1943); *McCall v Inter-Harbor Navigation Co,* 154 Or 252; 59 P2d 697 (1936).

ARCHER, J. I respectfully dissent. The Court of Appeals decision in this case should be affirmed.

In *Braen v Pfeifer Oil Transportation Co,* 361 US 129; 80 S Ct 247; 4 L Ed 2d 191 (1959), the United States Supreme Court held that "course of employment" under the Jones Act is the equivalent of "in the service of the ship" formula used in maintenance and cure cases. The majority states that the Court of Appeals placed improper emphasis on portions of *Braen,* while ignoring its holding. I disagree.

By holding that course of employment under the Jones Act was the equivalent of the "in the service of the ship" formula, the *Braen* Court left the door open for fact situations like the one presented here. By reason of the unique nature of his employment, a seaman is considered to be on the shipowner's business while he is enjoying shore leave because such leave, with its attendant relaxation, is a necessary and beneficial remedy for the confinement and discipline to which the seaman is subjected while aboard ship. There is no valid reason why, for purposes of determining the shipowner's liability under the Jones Act, a seaman on leave who slips and falls on the dock while returning to the ship should not be considered to be "in the course of his employment."

Defendant contends that a shipowner has no duty to provide a safe means of ingress and egress beyond the gangplank to a seaman who is off duty and ashore on his own personal time. I agree with the Court of Appeals treatment of this contention. "If a seaman on shore is in the course of his employment for purposes of Jones Act coverage, it seems contradictory to limit the ship owner's liability for its negligence at the end of the gangplank. Such a strict delineation of the employer's duty renders irrelevant the fact that a seaman is in the course of his employment even though off the ship."

TOMIAK v HAMTRAMCK SCHOOL DISTRICT

Docket Nos. 75897, 75901. Argued May 7, 1986 (Calendar No. 2). Decided December 22, 1986.

Richard J. Tomiak petitioned the State Tenure Commission, challenging a layoff by the Hamtramck School District and the school district's failure to recall him as a tenured teacher, and seeking reinstatement and back pay. The commission found in favor of the district, holding that the plaintiff's initial layoff and the subsequent removal of the plaintiff's name from a recall list were proper. The Ingham Circuit Court, Robert Holmes Bell, J., affirmed, finding no procedural, evidentiary, or constitutional errors which mandated reversal. The Court of Appeals, GRIBBS, P.J., and BRONSON and SHEPHERD, JJ., affirmed in part and reversed in part and remanded for a hearing before the school board, holding that while the act of removing the plaintiff's name from the recall list was not barred by the statute of limitations of the teacher tenure act, it was a revocation of tenure and a preremoval hearing was required (Docket No. 74090). The district appeals and the plaintiff cross-appeals.

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

The plaintiff abandoned his right to recall by the school district and was not entitled to a full evidentiary hearing prior to removal of his name from the district's recall list.

1. The primary purposes of the teacher tenure act are to maintain an adequate and competent teaching staff, free from political and personal interference, and to protect teachers from arbitrary and capricious employment practices by school boards. Under the act, any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel must be appointed to the first vacancy in the school

REFERENCES

Am Jur 2d, Schools §§ 149-160.

Termination of teacher's tenure status by resignation. 9 ALR4th 729.

Elements and measure of damages in action by school teacher for wrongful discharge. 22 ALR3d 1047.

district for which the teacher is certified and qualified. The laid-off teacher has a right to be recalled. In this case, the plaintiff, who was under contract with another district at the time of initial recall, was permitted under the collective bargaining agreement to decline the recall, request a leave of absence, and remain on the recall list. However, evidence and testimony indicated that the plaintiff intended to abandon his subsequent right to recall and acted in accordance with that intent.

2. At the time of a layoff, a teacher has two distinct rights: a right to recall and, upon subsequent employment by another district, a right to a shorter probationary period. The rights in the original school district are entirely dependent upon the right to recall. An abandonment of the right to recall is a resignation of the dependent tenure rights in the original district, although residual subsequent employment rights remain. Abandonment is a voluntary resignation without a written offer to terminate. It is not a revocation of tenure, and, thus, the notice and hearing provisions of the tenure act do not apply. Through the doctrine of abandonment, the Tenure Commission has construed the act to allow a teacher to discontinue services by mutual consent and preserve residual tenure rights without compliance with the act's written notice requirement. While the act does not precisely anticipate the procedure required for abandonment, it does contemplate voluntary resignation. In this case, the plaintiff did not expressly resign. What occurred can be described as resignation by mutual consent. Under the provisions of the act and in the light of logic and prior judicial reasoning, an abandoning teacher does not preserve the right to a full hearing which is reserved for teachers arbitrarily discharged from a position which they actively sought to retain.

3. No due process violation of the United States or Michigan Constitution occurred as a result of the board's action. The plaintiff was afforded a full posttermination hearing and pretermination notice and opportunity to respond, satisfying the requirements of federal due process.

4. The defendant waived the statute of limitations defense by failing to assert it in its answer or before the Tenure Commission.

Reversed.

138 Mich App 644; 360 NW2d 257 (1984) reversed.

1. SCHOOLS — TEACHER TENURE ACT — LAYOFF — RECALL — ABANDONMENT — DUE PROCESS.

Neither the teacher tenure act nor due process requires a full

evidentiary hearing by a school board before the board may remove from a recall list the name of a laid-off teacher who has abandoned the right to recall (US Const, Am XIV, Const 1963, art 1, § 17, MCL 38.105; MSA 15.2005).

2. SCHOOLS — TEACHER TENURE ACT — LAYOFF — RECALL — ABANDONMENT.

At the time of layoff, a tenured teacher has a right to recall; tenure rights in the original school district are entirely dependent upon the right to recall, and an abandonment of the right to recall is a resignation of the dependent tenure rights in the original school district (MCL 38.105, 38.111; MSA 15.2005, 15.2011).

David Melkus for the plaintiff.

Law Offices of Thomas W. H. Barlow, P.C. (by *Thomas W. H. Barlow, Janet E. Lanyon,* and *Paul E. Richards*), for the defendants.

Amici Curiae:

Linda L. Bruin for Michigan Association of School Boards.

Foster, Swift, Collins & Coey, P.C. (by *Stephen O. Schultz* and *William F. Young*), for the Michigan Education Association.

BRICKLEY, J. This case of first impression requires us to decide whether Michigan will recognize the doctrine of abandonment as applied to layoff recall rights under the teacher tenure act. If abandonment is recognized, the parties ask that we determine what process is due a teacher when a board of education makes a determination of abandonment. This case also presents the question, again of first impression, whether the teacher tenure act requires recall beyond the "first vacancy" specified in MCL 38.105; MSA 15.2005. Additional issues of due process, statute of limita-

tions interpretation, and proper remedial action are presented for resolution. We address only those issues necessary to decide the case.

We conclude that plaintiff abandoned his recall rights with the defendant, Hamtramck school system, and was not entitled to a full evidentiary hearing before the Hamtramck Board of Education removed his name from the recall list. Hence, we reverse the judgment of the Court of Appeals.

I. FACTS

The plaintiff-appellee, Richard J. Tomiak, was employed by defendant-appellant, Hamtramck School District, in the school year 1969-70. At the end of his second year of teaching he gained tenure and taught for five more years. Defendant encountered financial difficulties in the summer of 1976 and plaintiff was laid off before the start of the 1976-77 school year. MCL 38.105; MSA 15.2005 provides for laying off tenured teachers. He secured employment for that school year with the Roseville School System.

Defendant, anticipating unexpected funds from the sale of property, was able to issue a recall to plaintiff in January, 1977. Plaintiff declined the recall because of his contract with the Roseville School System. Because § 68 of the collective bargaining agreement in force at Hamtramck allowed a teacher contracted to another school system to decline a recall, plaintiff was retained on the recall list.

Defendant issued a second recall on June 30, 1977, and plaintiff was one of the teachers notified. Plaintiff again refused the recall because of his "contractual" commitment to the Roseville system. However, the State Tenure Commission heard testimony from Roseville school officials and found

that, at the time of the second recall, plaintiff neither had a contract nor was being pressured to remain at Roseville. The Tenure Commission found plaintiff's testimony was not credible on this issue. After plaintiff refused the second recall, Hamtramck Superintendent Clarence Pilatowicz, informed Mr. Tomiak that the only way he could "cover" himself was to request and obtain a leave of absence from the board of education since § 68 of the collective bargaining agreement did not apply to this recall at the end of a school year. Plaintiff requested such a leave. The board committee considered the request and, at a public meeting on September 6, 1977, denied the leave. The board also denied another teacher's request at the same meeting and reasoned that both requests, if granted, would cause administrative and seniority difficulties.

Plaintiff was not formally notified of the board's decision, and when he did not report for work in September, 1977, his name was removed from the recall list. Although plaintiff did not receive notice that he had been removed from the recall list, he remained in contact with defendant's school superintendent and was aware that several new teachers had been hired.

The State Tenure Commission found that from 1977 to 1980 there was continuous contact between plaintiff and the superintendent. The superintendent said that he probably mentioned the denial of leave and removal from the recall list; however, plaintiff responded that he did not know of the denial and removal. The State Tenure Commission disbelieved plaintiff's testimony that he sent written yearly requests in 1978 and 1979. Hence, 1977 was the last written correspondence regarding leave so as to preserve the right to recall.

There was testimony by the superintendent that plaintiff and he began to explore Mr. Tomiak's return as a "new hiree." In fact, plaintiff applied for a position in the same manner that a nontenured new teacher would. Again, plaintiff disagreed that it was clear that he was being considered as a new hiree.

In early 1980, plaintiff found his relationship with the Roseville School System had seriously deteriorated. Plaintiff was disciplined for "gross negligence"; i.e., falsification of student records, and for "making unsavory advances" toward female employees of co-op employers where he attempted to place students. Plaintiff, after grieving the discipline imposed on him, resigned his position with Roseville and began to assert his recall rights with Hamtramck.

Superintendent Pilatowicz offered plaintiff a position with defendant in 1980 at the salary of a new employee. However, there was a dispute as to the events which occurred. Plaintiff stated he did not refuse the job, only the salary. Superintendent Pilatowicz stated that plaintiff refused the job because of the salary. In any event, plaintiff did not begin at the teaching position in the 1980 school year.

In November, 1980, plaintiff filed a petition in propria persona for a hearing with the State Tenure Commission, seeking reinstatement and back pay at Hamtramck. Plaintiff challenged the initial layoff in 1976 as well as the failure to recall him as a tenured teacher. On June 11, 1981, the commission issued three decisions and orders.

The State Tenure Commission concluded that neither party was entitled to summary judgment. The commission held that a tenured teacher's right to recall is not necessarily extinguished

when refusal of the first vacancy is predicated on an obligation to another school board. The commission also held that a board is not required to proceed under article IV of the act, which addresses dismissals, in abandonment cases. The remaining issues were deemed capable of resolution only after an evidentiary hearing.

The parties filed interlocutory appeals in the Ingham Circuit Court. The court denied plaintiff's appeal and granted defendant's. However, the circuit court declined to exercise jurisdiction until the State Tenure Commission made a decision on the merits.

In the Ingham Circuit Court, plaintiff added claims under 42 USC 1983, alleging that the actions taken by the defendant had violated his due process rights. In response, defendant removed the entire case to the United States District Court for the Eastern District of Michigan.

On October 15, 1981, the United States District Court issued an abstention, sua sponte, *Texas v Pullman Co,* 312 US 496; 61 S Ct 643; 85 L Ed 971 (1941), on the 42 USC 1983 claims, and remanded the state claims to the Tenure Commission.

The proceedings in the Tenure Commission involved extensive discovery and two days of hearings. On January 27, 1983, the commission issued its decision in favor of defendant, holding that the initial layoff in 1976 was proper, there was no subterfuge to induce waiver in 1977-78, and plaintiff had totally relinquished his employment relationship with defendant by the end of the 1977-78 school year.

Plaintiff again appealed the decision of the Tenure Commission to the Ingham Circuit Court. On September 15, 1983, the court issued an opinion and order affirming the Tenure Commission. Judge Robert Holmes Bell applied the standard of review

found in § 106 of the Administrative Procedures Act, MCL 24.201; MSA 3.560(101), and concluded, after reviewing the pleadings and hearing oral argument, that there were no procedural, evidentiary, or constitutional errors which mandated reversal.

Plaintiff then appealed to the Court of Appeals, which reversed in part and remanded for a hearing before the Hamtramck School Board. The Court of Appeals affirmed the decision that the action was timely and not barred by the tenure act statute of limitations, MCL 38.121; MSA 15.2021, the survival of recall rights beyond the first vacancy, and the finding that the 1976 layoff was proper. However, the Court disagreed with the commission's and circuit court's characterization of the defendant's removal of plaintiff's name from the recall list as an acknowledgment of abandonment, i.e., resignation. The Court of Appeals reasoned that the act of removing plaintiff's name from the recall list was a revocation of tenure, and held that a preremoval hearing was required.

II. THE TEACHER TENURE ACT

A

Unfortunately, the teacher tenure act was enacted before the Legislature published House and Senate analysis papers.[1] As a result, much of the interpretation of the act has developed through

[1] The preamble to the act provides only:

> "AN ACT relative to continuing tenure of office of certificated teachers in public educational institutions; to provide for probationary periods; to regulate discharges or demotions; to provide for resignations and leaves of absence; to create a state tenure commission and to prescribe the powers and duties thereof; and to prescribe penalties for violation of the provisions of this act.

judicial articulation of the perceived legislative intent.

The most concurrent literature relating to the act appears in 37 Mich L R 430 (1939). The primary "evil" sought to be eliminated by the tenure act was the unfettered power of school boards to hire and fire their employees at will.[2]

> The large turnover in the profession was due in part to certain practices which were widespread throughout the country; among them may be noted discharge (1) because of political reasons, (2) because of non-residence in the community, (3) in order to make places for friends and relatives of board members or influential citizens, (4) in order to break down resistance or reactionary school policies, and (5) in order to effect economies either by diminishing the number of teachers and increasing the amount of work assigned to those retained, or by creating vacancies to be filled by lower salaried, inexperienced employees. Of these practices the first was exceedingly influential in the growth of the tenure movement, some of the more notorious cases of political dismissal challenging the attention of the public to the injury to professional morale and efficiency resulting from the misuse of the control vested in the administrative agencies. The remedy for such abuses was sought in legislation designed to strip the school boards of their autocratic power and to prescribe for them rules of administrative action which would ensure a greater degree of security to their employees. [37 Mich L R 430, 431-432 (1939).]

This Court has held, and the Court of Appeals has reiterated, that the primary purposes of the teacher tenure act are to maintain an adequate

[2] For example, in 1923 the State of Wyoming had a forty-seven percent turnover in one year. Courts generally upheld the board's power to fire at will and would not impose upon the board any duty to give reasons for its actions. See, e.g., *People ex rel Fursman v Chicago,* 278 Ill 318, 325-326; 116 NE 158 (1917).

and competent teaching staff, free from political and personal interference, *Detroit Bd of Ed v Parks,* 417 Mich 268; 335 NW2d 641 (1983), and to protect teachers from arbitrary and capricious employment practices of school boards. See *Davis v Harrison Bd of Ed,* 126 Mich App 89; 342 NW2d 528 (1983).

In a case which considered whether striking teachers were entitled to a hearing before discharge, we said:

> These goals, as set forth in *Rehberg v Ecorse School Dist No 11,* 330 Mich 541, 545; 48 NW2d 142 (1951), quoting cases from foreign jurisdictions, are to "maintain an adequate and competent teaching staff, free from political and personal arbitrary interference"; to promote "good order and the welfare of the State and of the school system by preventing removal of capable and experienced teachers at the personal whims of changing office holders"; and "to protect and improve State education by retaining in their positions teachers who are qualified and capable and who have demonstrated their fitness, and to prevent the dismissal of such teachers without just cause." [*Rockwell v Crestwood School Dist,* 393 Mich 616, 632; 227 NW2d 736 (1975), app dis 427 US 901; 96 S Ct 3184; 49 L Ed 2d 1195 (1976).]

B

This case primarily involves the sections in article IV and article V, with emphasis on the recall provision in article IV. The following are the statutory provisions which are most pertinent:

1. Art. IV, § 5 Necessary Reduction in Personnel, First Vacancy. MCL 38.105; MSA 15.2005.

> Any teacher on permanent tenure whose services are terminated because of a necessary reduc-

> tion in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified.

The statute grants to a laid-off teacher a right of recall, provided the teacher is certified and qualified. However, a school board has not been considered to be required to have a pretermination hearing for such teacher who is laid off, because a layoff under this section of the act is not a discharge or demotion. See *Anderson v Harper Woods School Dist,* 74 Mich App 227; 253 NW2d 718 (1977). See *Steeby v Highland Park School Dist,* 56 Mich App 395; 224 NW2d 97 (1974). Thus, this section is unique in that a teacher may "lose" a job without a hearing, while some rights of tenure continue.

2. Art. IV, § 1 Discharge, Demotion or Retirement of Teachers. MCL 38.101; MSA 15.2001.

> Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and only after such charges, notice, hearing, and determination thereof, as are hereinafter provided. Nothing in this act shall be construed as preventing any controlling board from establishing a reasonable policy for retirement to apply equally to all teachers who are eligible for retirement under Act No. 136 of the Public Acts of 1945 or having established a reasonable retirement age policy, from temporarily continuing on criteria equally applied to all teachers the contract on a year-to-year basis of any teacher whom the controlling board might wish to retain beyond the established retirement age for the benefit of the school system.

This section provides the primary protection for a tenured teacher. This Court has held that the very purpose of the act is to protect tenured

teachers from being demoted or discharged unless the board can show just and reasonable cause, and only after written charges are filed and the teacher has been furnished with notice of the date of a hearing. *Rehberg v Ecorse School District #11,* 330 Mich 541; 48 NW2d 142 (1951).

It is this section which plaintiff argues should govern defendant's act of removing his name from the recall list. The Court of Appeals seems to have accepted this argument.

3. Art. V, § 1 Resignation and Leave of Absence; Teacher's Duties, Notice. MCL 38.111; MSA 15.2011.

> No teacher on continuing tenure shall discontinue his services with any controlling board except by mutual consent, without giving a written notice to said controlling board at least 60 days before September first of the ensuing school year. Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under this act.

It is defendant's argument that when plaintiff abandoned his recall rights, he had, in effect, resigned his employment and was no longer entitled to the procedural rights of article IV. The Court of Appeals found no resignation.

III. FIRST VACANCY

The Tenure Commission, circuit court, and Court of Appeals all held that plaintiff was entitled to recall beyond the first vacancy, and, thus, the right to recall is not extinguished as a matter of law by refusal. The Court of Appeals reasoning "[t]hat a teacher is entitled to the first available position sheds no light on whether refusal of that

position destroys all of the teacher's right under the Act."

We believe the first vacancy provision, MCL 38.105; MSA 15.2005, is a legislative statement of priority. That is, the Legislature has made a clear directive that a school board must offer the first vacancy, not a vacancy chosen by the board. Therefore, the wording of this provision neither precludes additional vacancy offers, nor in our view does it guarantee recall offers ad infinitum.

Because the teacher tenure act is a relatively skeletal act and was enacted before the Legislature published its own analysis, the limits of the first vacancy provision are not readily discerned. As we have in the past, however, we give great weight to the expertise of the Tenure Commission where there are gaps in the statutory scheme. *Magreta v Ambassador Steel Co (On Rehearing)*, 380 Mich 513; 158 NW2d 473 (1968).

Indeed, the varied analyses by the commission, courts, parties, and amicus curiae are all worthy of consideration.[3] Hence, we urge legislative attention

[3] Hamtramck makes a cogent argument that multiple recalls would create chaos in determining seniority within the district, and this disruption would be adverse to the goals of the tenure act. Amicus curiae Michigan Association of School Boards argues that the rights and duties of school boards must be protected as well. And, when the first vacancy provision is considered in conjunction with MCL 38.92; MSA 15.1992, which guarantees shorter probationary periods, a tenured teacher who declines a recall because of a commitment to another district, will become a tenured teacher in that district after one year, if not sooner.

> The choices for the capable teacher, whom the Teachers' Tenure Act seeks to protect, are not as risky as may first appear and certainly not so impossible as the State Tenure Commission suggests in its 1981 opinion. The teacher may: (1) return to the first school district where he or she already has tenure; (2) complete a year of teaching in the second school district and become tenured there; or (3) request that the second district grant him or her tenured status immediately. If anything, this range of options gives the tenured teacher who is laid off considerably more flexibility than that available to most employees who must make similar employment decisions.

to MCL 38.105; MSA 15.2005, in order to define the rights of laid-off teachers and the duties of controlling school boards.

IV. ABANDONMENT

When plaintiff was recalled to the first available vacancy in January, 1977, he was teaching in the Roseville School District and declined the recall. The collective bargaining agreement in effect at Hamtramck allowed a teacher under contract with another system to request a leave of absence and remain on the recall list.[4] The finding of abandonment, then, requires an inquiry into the recalls subsequent to January, 1977.

Because the Court of Appeals remanded for a hearing, the questions raised by the abandonment doctrine and its application here were not decided below. However, the circuit court and the Tenure

On the other hand, a strict reading of the first vacancy provision could produce unwanted results.

> As noted by the commission below, when a tenured teacher's services are terminated due to a necessary reduction in personnel, no controlling board can realistically expect the teacher to remain idle in the hope that a vacancy will occur. Defendant's view, if adopted, might cause other school systems to refrain from hiring qualified teachers who are laid off, for fear that the teachers would have to accept the first recall by their prior employer or forfeit tenure previously achieved. [138 Mich App 644, 651; 360 NW2d 257 (1984).]

[4] If a laid off teacher has committed himself to a full time study program, or a contractual term of employment and is recalled to his teaching position, he shall have the option of returning to it or of accepting a leave of absence without loss of senioity [sic] for the remainder of that school year and negates any unemployment compensation for that period. [Section 68(I), Agreement between the Board of Education of the School District of the City of Hamtramck and the Hamtramck Federation of Teachers, Local 1052, American Federation of Teachers AFL-CIO, September 7, 1976 to Labor Day, 1977.]

Commission both accepted its use in this state, as well as its application to the facts here. We agree. As the circuit court ably reasoned:

> Clearly, the abandonment doctrine cannot be employed against a tenured teacher who manifests every intention of continuing on the job. But it is equally clear that a local board must have some legal mechanism with which to treat those employees who for whatever reason, refuse to work and refuse to verbalize a resignation. The abandonment doctrine provides that tool. It has been accepted and affirmed in several Michigan cases *Johnson v Taylor School District,* STC 69-17 (1970); *Purcell v Ferndale School District,* STC 76-56 (1979), Court of Appeals No. 59505, Nov. 24, 1982; *Carswell v Wayne-Westland Schools,* STC 78-36 (1979). It is an established legal principle in Michigan.

In the case sub judice, the Tenure Commission considered the evidence and testimony to determine whether plaintiff had evidenced an intent to abandon and effectuated that intent with an external act. Of particular importance was the collective bargaining agreement in effect at Hamtramck. Section 69(B) provided that teachers interested in remaining on recall were required to submit annual notification by registered letter.[5] In fact, upon receipt of the second recall notice, plaintiff sent a letter complying with § 69(B). However, plaintiff testified that in 1978 and 1979 he "hand delivered" the letters to Superintendent Pilatowicz,

[5] Section 69(B) of the collective bargaining agreement states:

> To remain on layoff and subject to recall from layoff, a teacher shall notify the school district of such intention annually by registered letter (return receipt requested) postmarked on or between June 1 and June 30.

even though he knew of the contract language.[6] Mr. Pilatowicz denied receiving either letter. Therefore, the commission was compelled to make a judgment regarding credibility.

Finding plaintiff's testimony "replete with inconsistencies, revisions and evasive responses," the commission gave greater weight to Mr. Pilatowicz's account and found that the 1978 and 1979 letters were not delivered. The commission also found that plaintiff remained in contact with Superintendent Pilatowicz after September, visited the Hamtramck district, and was aware that several new teachers had been hired.

We are not persuaded by the circumstances of this case or the arguments of the plaintiff that we should reverse the findings of the lower tribunals that the doctrine of abandonment is viable in teacher tenure circumstances. Neither do we disagree that plaintiff intended to abandon his recall rights at Hamtramck in favor of his position at Roseville, and acted in accordance with that intent. Again, we give great weight to the expertise and experience of the State Tenure Commission.

V. HEARING REQUIREMENT

A. MICHIGAN TEACHER TENURE ACT

Given that abandonment is a recognized doctrine and that the facts here indicate that plaintiff did abandon his rights to recall in Hamtramck, there remains the question what procedure is required. This issue has become one of characterization, that is, if abandonment is a species of resignation, then a full hearing is not required. However, if abandonment is a species of tenure

[6] Plaintiff was a member of the collective bargaining team and the Tenure Commission noted that the "certified mail—return receipt requested" language was added to the contract at plaintiff's request.

revocation, then a full hearing is required before a school board may remove a teacher from a recall list. This is more than a mere exercise in semantics.

This dispute as to characterization formed the basis of the State Tenure Commission's and circuit court's decisions that a full hearing *was not* required, as well as the Court of Appeals decision that a hearing *was* required. We hold that neither the teacher tenure act nor due process requires a full hearing before an abandoning teacher's name may be removed from the recall list.

The following are the different articulations by the commission, the circuit court, and the Court of Appeals.

> [Plaintiff] suggests, however, that a controlling board's treatment of a teacher's actions as an abandonment is a revocation of continuing tenure. By equating these two concepts, appellant contrives an argument in an attempt to lead us to conclude that a teacher's abandonment can only be dealt with under Article IV [dealing with discharge or demotion and the requisite procedural safeguards]. *Abandonment and revocation of continuing tenure are two distinct and different matters, however. An abandonment is a voluntary resignation—without a written offer to terminate* the employment relationship. A voluntary resignation does not give rise to any Article IV rights. Ordinarily, a resignation terminates the employee's right to further employment. (Emphasis added.) [Decision and Order of the State Tenure Commission, January 27, 1983 at p 11.]

The circuit court quoted the passage above and added:

> If one were to accept the premise upon which this argument is founded, that abandonment is a

> method of discharge, then it is certainly arguable that it allows a circumvention of safeguards. However, the Commission declined to accept that premise. See order of January 27, 1983 at 11.

The Court of Appeals rejected this approach and focused on the act of the board in removing Tomiak's name from the recall list:

> The Commission concluded that plaintiff abandoned his employment in Hamtramck in favor of his contractual commitment in Roseville. Thus, according to the Commission, there was no revocation of tenure by defendants, but only an acknowledgment of plaintiff's voluntary abdication of tenure. We disagree with this characterization of the circumstances. Even if plaintiff had already decided to give up his rights in Hamtramck, it is clear that he still had tenure there until defendants removed his name from the recall list. It cannot be denied that defendants acted, and that their action amounted to a revocation of plaintiff's tenure. A teacher may remove himself from the protections of the statute by expressly resigning without giving the 60-days notice required by MCL 38.111; MSA 15.2011. *Wright v Port Huron School District,* 13 Mich App 1, 5; 163 NW2d 673 (1968). However, there was no such resignation in this case.

We perceive that a teacher has two distinct rights at the time of a layoff. First, a right to recall and, second, subsequent employment rights to a shorter probationary period in another school. MCL 38.92; MSA 15.1992.[7] Included in the first

[7] MCL 38.92; MSA 15.1992 provides in part:

> If a teacher on continuing tenure is employed by another controlling board, he shall not be subject to another probationary period of more than 1 year beginning with the date of employment, and may at the option of the controlling board be placed immediately on continuing tenure.

right are the full tenure rights in the original school district. However, the rights in the original school district are *entirely dependent upon the right to recall,* and an abandonment of the right to recall is a resignation of the dependent tenure rights in the original school district.

Although plaintiff was removed from the recall list, and Hamtramck concedes that his subsequent employment tenure rights have not been forfeited, he continued to have residual tenure rights both with Hamtramck and other school districts.[8] The state tenure commission said:

> An abandonment is a voluntary resignation—without a written offer to terminate the employment relationship. A voluntary resignation does not give rise to any Article IV rights. Ordinarily, a resignation terminates the employee's right to further employment. Should the teacher be subsequently reemployed by the same school district, however, he or she could not be required to serve out a probationary period. *Lash v Dearborn School District* (64-1). Similarly, if the resigning teacher is employed by another controlling board only a one year probationary period could be required. MCL 38.92; MSA 15.1992. In contrast, if a controlling board invokes the penalty for improper resigna-

[8] We use the term "subsequent employment tenure rights" to represent those rights provided by statute in MCL 38.92; MSA 15.1992, and those rights articulated by the State Tenure Commission and this Court. *Lash v Dearborn School Dist,* State Tenure Commission Decision No 64-1 (January 12, 1965); *Bode v Roseville School Dist,* 405 Mich 517; 275 NW2d 472 (1979), reh den 406 Mich 1121 (1979).

If Tomiak were to return to the Hamtramck system, where he had already achieved tenure, his subsequent employment tenure rights would prevent the Hamtramck School District from requiring an additional probationary period. *Lash v Dearborn School Dist, supra.*

If Tomiak were to be employed in another school district, his subsequent employment tenure rights would prevent that system from requiring a probationary period longer than one year. MCL 38.92; MSA 15.1992; see n 7 *supra; Bode v Roseville School Dist, supra.*

> tion, the teacher would no longer enjoy these benefits of continuing tenure status. Obviously, this is not a penalty to be taken lightly. Moreover, the penalty can only be extracted through formal action by the controlling board. *Stevens v DeWitt Public Schools* (77-35). [Decision and order of the State Tenure Commission, January 27, 1983 at p 11.]

Hence, the Court of Appeals decision that his tenure was revoked does not, in our view, aptly describe what occurred. The focus upon the board's act of removing plaintiff's name from the list ignores the actions and inaction of plaintiff which preceded the board's response. Accordingly, because there was not a revocation of tenure, the notice and hearing provisions of MCL 38.102; MSA 15.2002 do not apply.

The provisions of MCL 38.111; MSA 15.2011 create certain duties for a teacher who resigns. Restating for the convenience of the reader, the statute provides:

> No teacher on continuing tenure shall discontinue his services with any controlling board except by mutual consent, without giving a written notice to said controlling board at least 60 days before September first of the ensuing school year. Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under this act.

Here, plaintiff did not expressly resign, and by not doing so, what occurred can be described as resignation by mutual consent.[9]

[9] As the Supreme Court of Pennsylvania reasoned in *Jacobs v Wilkes-Barre Twp School Dist,* 355 Pa 449, 453-454; 50 A2d 354 (1947):

We believe the obvious import of MCL 38.111; MSA 15.2011 is to protect school boards from precipitous resignations, as well as to preserve residual subsequent employment rights. The statute expressly allows resignation by mutual consent, which obviates the need for a written notice. In this case, Tomiak's refusal to accept recall and Hamtramck's removal of his name from the recall list acted as mutual consent resignation. However, resignation by mutual consent still preserves the residual subsequent employment rights. Therefore, the Court of Appeals characterization of this case as tenure revocation is incorrect, because the subsequent employment rights remain with the abandoning teacher. Through the doctrine of abandonment, the commission construed the statute to allow a teacher to discontinue his services "by mutual consent," and to preserve tenure rights without compliance with the written notice requirements of § 1.

We find the reasoning of the Court of Appeals decision in *Purcell v Ferndale School Dist,* unpub-

Appellant's failure to report for two consecutive years, the failure to avail herself of the rules governing maternity leaves, of which she had knowledge, and, more specifically, her refusal or failure to notify Davis or the board of her intention regarding the contract after Davis had contacted her, are facts necessarily leading to the conclusion that she expressed, through her actions, a definite intention to abandon the contract. The action of appellee school board in employing a permanent teacher to replace her, only after a reasonable time had elapsed after they had contacted appellant, was an act of, or acquiescence in, the abandonment. Together, these acts constituted a mutual rescission. That the parties have abandoned the contract by acts instead of words or writing is of no consequence. Had appellant and the board, in writing, agreed that the contract was to be thenceforth void and of no effect, it could not seriously be contended that effect would not be given thereto, even though the procedure required by the Act had not been complied with. Similarly, had the parties orally agreed to the same terms, effect would be given to said oral agreement.

lished opinion per curiam, decided November 24, 1982 (Docket No. 59505), persuasive, if not authority. In *Purcell,* the Court held that a teacher who returned from a sabbatical and refused to teach all of his assigned courses had abandoned his employment. The district had assigned different classes than those he had taught before leaving; a dispute ensued, and, when the school year began, he refused to teach any of his classes. When the district notified him that his absence would be considered a voluntary resignation, he appealed to the Tenure Commission. The commission found abandonment, and the circuit court affirmed. Certainly, factual distinctions are apparent between *Purcell* and this case. However, we agree that a finding of abandonment is more properly considered a resignation than a revocation of tenure. Thus, we find that the Tenure Commission properly followed its own precedent in holding that plaintiff was not entitled to a full hearing.[10] We also find two sister states to be in accord with the position that abandonment is a resignation and does not require a full hearing. See *Jacobs v Wilkes-Barre Twp School Dist,* 355 Pa 449; 50 A2d 354 (1947); *Miller v Noe,* 432 SW2d 818 (Ky App, 1968).

The teacher tenure act does not precisely anticipate the procedure required for abandonment. However, it does contemplate voluntary resignation under Article V, § 1. We find that article v, logic, and prior judicial reasoning compels the conclusion that an abandoning teacher does not preserve the right to the full hearing reserved for those teachers who are arbitrarily discharged from a teaching position which they actively sought to retain.

[10] See, e.g., *Carswell v Wayne-Westland Bd of Ed,* State Tenure Commission Decision No 78-36 (December 21, 1979).

B. DUE PROCESS

Although we hold that the teacher tenure act does not require a full evidentiary hearing before removing an abandoning teacher's name from the recall list, there remains consideration of plaintiff's constitutional right to due process of law. Because continued employment is a protected property interest, a termination of that interest requires conformity to the requirements of due process under the Fourteenth Amendment and Const 1963, art 1, § 17.[11] "[T]he question remains what process is due." *Morrissey v Brewer,* 408 US 471, 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

The recent consolidated cases in *Cleveland Bd of Ed v Loudermill,* 470 US 532; 105 S Ct 1487; 84 L Ed 2d 494 (1985), and their progeny, provide the guidance for our conclusion that no due process violation of the United States or Michigan Constitutions occurred as a result of the Hamtramck board's actions.

In *Loudermill,* boards of education discharged a security guard and bus mechanic without a pretermination opportunity to respond to allegations made against them.

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[11] Respondents' federal constitutional claim depends on their having had a property right in continued employment. *Board of Regents v Roth,* 408 US 564, 576-578 [92 S Ct 2701; 33 L Ed 2d 548] (1972); *Reagan v United States,* 182 US 419, 425 [45 L Ed 1162; 21 S Ct 842] (1901). If they did, the State could not deprive them of this property without due process. See *Memphis Light, Gas & Water Div v Craft,* 436 US 1, 11-12 [98 S Ct 1554; 56 L Ed 2d 30] (1978); *Goss v Lopez,* 419 US 565, 573-574 [95 S Ct 729; 42 L Ed 2d 725] (1975).

Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v Roth, supra,* at 577. See also *Paul v Davis,* 424 US 693, 709 [96 S Ct 1155; 47 L Ed 2d 405] (1976). [*Cleveland Bd of Ed v Loudermill,* 470 US 532, 538; 105 S Ct 1487, 1491; 84 L Ed 2d 494, 501 (1985).]

> The essential requirements of due process, and all that respondents seek and the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement. [470 US 546.]

The United States Supreme Court found a violation of due process because the employees were not given an opportunity to respond before termination. However, the Court heavily relied on the fact that the interest of the discharged employees was financial.

> We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. [Citations omitted. 470 US 543.]

Plaintiff, by contrast, was working as a full-time tenured teacher at Roseville when his name was removed from the recall list, and, the action in Hamtramck in no way affected his tenure rights with Roseville. Thus, the "injury" to plaintiff was much less direct, and, in fact, he did not suffer the financial hardships which the *Loudermill* plaintiffs did. Indeed, if defendant never had an opening for which plaintiff was certified and qualified, his benefit from remaining on the recall list might never be realized.

Post-*Loudermill* decisions have supported the *Loudermill* requirements by holding that due process is satisfied if a discharged employee was given an opportunity to respond before termination, and posttermination procedures are available.

In *Brasslett v Cota,* 761 F2d 827 (CA 1, 1985), a

firechief was discharged after making untrue remarks that the fire department was not prepared for major emergencies. The chief claimed a due process violation because he was not given a pretermination evidentiary hearing. Citing *Loudermill,* the Court of Appeals held that a full evidentiary hearing was not required.

> The specific procedural requirements are to be determined with reference to the interests involved and the availability and extent of post-termination review. When a discharged employee may receive a post-termination hearing to review adverse personnel action, the pretermination hearing need only be extensive enough to guard against mistaken decisions. [761 F2d 836.]

In *Williams v City of Seattle,* 607 F Supp 714 (WD Wash, 1985), a police sergeant was demoted for allegedly using excessive force on a prisoner without a prior evidentiary hearing. The plaintiff claimed that even though there was a right to a postdemotion appeal, the department had violated his due process rights by not holding a predemotion hearing. The court found no due process violation after applying a balancing test weighing the plaintiff's and government's interests as well as the administrative burden.

> Williams' private interest in retaining his rank, from a "property" standpoint is the difference in pay and benefits between sergeants and police officers in the SPD. Although the loss of several hundred dollars of pay per month is substantial, it is less compelling a deprivation than that experienced by the terminated employees in *Loudermill.* Given the availability of post-demotion evidentiary hearing within a few months of the deprivation, the pre-hearing financial loss suffered by plaintiff does not justify process beyond that which the

> *Loudermill* court deemed due. [607 F Supp 720. See also *Levitt v Univ of Texas at El Paso,* 759 F2d 1224 (CA 5, 1985); *DeSarno v Dep't of Commerce,* 761 F2d 657 (CA Fed, 1985).]

There is a significant difference between discharge or demotion, as occurred in the cases above, and abandonment, as occurred here. The employer's actions in discharge and demotion cases are obviously and intentionally against the employee's interest. By contrast, Hamtramck performed a simple ministerial act as a result of the perceived inaction of a former employee. Although it is possible that in a factual situation similar to this case a former employee could claim that the employer came to an erroneous conclusion, the mere recognition of abandonment is a less severe act than discharging or demoting a present employee.

Even though the plaintiffs in *Loudermill* suffered a more direct injury than Tomiak, the Court held that what was required was less than a full pretermination hearing.

> We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute. Because respondents allege in their complaints that they had no chance to respond, the District Court erred in dismissing for failure to state a claim. [470 US 547-548.]

Superintendent Pilatowicz informed plaintiff in July, 1977, that the only way to "cover" himself was to apply to the board for a leave of absence. Thus, plaintiff knew that his right to recall would be terminated if he did not secure a leave. By allowing a written request, the board afforded

plaintiff an opportunity to respond and sway the decisionmaker.

> Due to a series of circumstances, I find myself in the distasteful predicament of having to either break a contract [with Roseville] or *jeopardize my future with Hamtramck Schools by not accepting the present position.* [Tomiak's letter to the Hamtramck School Board, July 20, 1977.]

Even though plaintiff's reason for declining recall was found by the commission to be untrue, it was considered by the board and rejected.

The full post-"termination" Tenure Commission hearing and the pre-"termination" notice and opportunity to respond given to plaintiff do, by our reasoning, more than satisfy the requirements of federal due process in this case. We find no basis in the Michigan Constitution to alter this conclusion.

VI. STATUTE OF LIMITATIONS

When the defendant denied plaintiff's request for leave and subsequently removed his name from the recall list, formal notice of these decisions was not sent to him.[12]

MCL 38.121; MSA 15.2021 provides in part:

> A teacher who has achieved tenure status may appeal any decision of a controlling board under this act within 30 days from the date of such decision, to a state tenure commission.

It has been held by Court of Appeals panels that the running of this appeal period is tolled until the controlling board informs the teacher of his

[12] Testimony revealed that the usual practice was to send notice; however, no copy of a notification was found in plaintiff's file.

right to appeal. *Biberstine v Port Austin School Dist,* 51 Mich App 274; 214 NW2d 729 (1974); *Goodwin v Kalamazoo Bd of Ed,* 82 Mich App 559; 267 NW2d 142 (1978).

In *Biberstine,* the Court added the requirement that the thirty-day period did not commence until the teacher received *formal notice* of the board's decision. The Court reasoned that the extremely brief period required formal notice and based its decision on equitable principles and "sound reasoning and common sense." 51 Mich App 279.

Decisions since *Biberstine* have expanded the formal notice requirement to include the explicit notification that the controlling board's decision may be appealed within thirty days. See *Kramer v Van Dyke Public Schools,* 134 Mich App 479; 351 NW2d 572 (1984).

Plaintiff moved for summary judgment in the Tenure Commission to dismiss the statute of limitations defense, arguing that he had not received the required notice. Defendant's response to this motion did not dispute the lack of notice, but instead argued that the action was barred by the doctrine of laches. The commission rejected the defendant's laches argument. Instead of renewing the laches argument on appeal, defendant substituted the argument that the Court should apply the fraudulent concealment statute in MCL 600.5855; MSA 27A.5855.

We find that defendant waived the statute of limitations defense by failing to assert it in its answer or before the Tenure Commission. See *Liddell v DAIIE,* 102 Mich App 636; 302 NW2d 260 (1981), lv den 411 Mich 1079 (1981); *Butler v DAIIE,* 121 Mich App 727; 321 NW2d 781 (1982). Further, we do not find that this issue rises to the traditional standard for considering issues not preserved—"only to be exercised in compelling cir-

cumstances to avert a miscarriage of justice." *People v Oliphant,* 399 Mich 472, 501; 250 NW2d 443 (1976).

VII. CONCLUSION

We hold that plaintiff abandoned his right to recall to the Hamtramck school system and was not entitled to a full hearing prior to removal of his name from the recall list. Accordingly, we reverse the judgment of the Court of Appeals.

WILLIAMS, C.J., and LEVIN, CAVANAGH, BOYLE, RILEY, and ARCHER, JJ., concurred with BRICKLEY, J.

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Leave to Appeal Denied August 12, 1986:

TRAVELERS INSURANCE COMPANY v DETROIT BULK DOCK COMPANY, INC, No. 78382; Court of Appeals No. 81113. LEVIN, J., would grant leave to appeal.

Leave to Appeal Denied August 20, 1986:

CONSUMERS POWER COMPANY v ATTORNEY GENERAL #1, No. 79199; Court of Appeals No. 93850.

Summary Dispositions August 25, 1986:

PEOPLE v TULLOCK, No. 77449. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated and the case is remanded to that Court for reconsideration in light of *People v Houze*, 425 Mich 82 (1986). MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 75531.

TEMPLE BAPTIST CHURCH v THOMASON, No. 78624. In lieu of granting leave to appeal, the order of the Court of Appeals is vacated and the case is remanded to that Court for plenary consideration. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 87292.

Leave to Appeal Denied August 25, 1986:

PEOPLE v DOUGLAS HILL, No. 78094; Court of Appeals No. 76270.

LECHNAR v MODERN EQUIPMENT COMPANY, No. 78292; Court of Appeals No. 77838.

PEOPLE v GARVIE, No. 78314; reported below: 148 Mich App 444.

PEOPLE v ATCHLEY, No. 78353; Court of Appeals No. 79468.

CUMMINGS v CITY OF DETROIT, No. 78362; reported below: 151 Mich App 347.

PEOPLE v RAYNES, No. 78375; Court of Appeals No. 77764.

PEOPLE v JARRETT, No. 78385; Court of Appeals No. 75635.

SKORUBSKAS v CORNWELL, No. 78388; Court of Appeals No. 79922.

PEOPLE v GALLOWAY, No. 78389; Court of Appeals No. 79525. Reconsideration denied October 27, 1986.

PAINE v SUPERIOR TILE AND POTTERY WORKS and VANDER SLOOT v SUPERIOR TILE AND POTTERY WORKS, Nos. 78390, 78391; Court of Appeals Nos. 76884, 76885.

In re ACQUISITION OF LAND FOR CENTRAL INDUSTRIAL PARK PROJECT (CITY OF DETROIT v SISTERS OF MERCY HEALTH CORPORATION), No. 78402; Court of Appeals No. 83041.

LYLE v DEPARTMENT OF CORRECTIONS, No. 78405; Court of Appeals No. 87795. Reconsideration denied December 3, 1986.

SMITH v B & B ASSOCIATES, INC, and SMITH v DETROIT BOARD OF ZONING APPEALS, Nos. 78413, 78414; Court of Appeals Nos. 82186, 80908.

PEOPLE v CHARLES WATKINS, Nos. 78431, 78432; Court of Appeals No. 86555.

PEOPLE v MESSER, No. 78494; Court of Appeals No. 87809.

MITCHELL v CHRYSLER CORPORATION, No. 78505; Court of Appeals No. 73405.

VANREKEN v ALLSTATE INSURANCE COMPANY, No. 78536; reported below: 150 Mich App 212. Reconsideration denied October 27, 1986.

PEOPLE v SANDRA JONES, No. 78539; reported below: 151 Mich App 1.

NORMAN v GENERAL MOTORS CORPORATION, No. 78556; Court of Appeals No. 90341.

LISECKI v TACO BELL RESTAURANTS, INC, No. 78572; reported below: 150 Mich App 749.

PEOPLE v LOWE, No. 78577; Court of Appeals No. 73347.

MCCORMACK v WORKERS COMPENSATION APPEAL BOARD, No. 78600; Court of Appeals No. 89900.

PEOPLE v MCCONNICO #1, No. 78616; Court of Appeals No. 82697.

PEOPLE v THOMPSON, No. 78620; Court of Appeals No. 81831.

PEOPLE v FIGLUS, No. 78622; Court of Appeals No. 68254.

FARAJ v ALLSTATE INSURANCE COMPANY, No. 78646; Court of Appeals No. 82400.

STORCH v FORD MOTOR COMPANY, No. 78654; Court of Appeals No. 90624.

MACDONALD v MICHIGAN MUTUAL INSURANCE COMPANY, No. 78665; Court of Appeals No. 84355. Reconsideration denied October 27, 1986.

TOCCO v CITY OF DETROIT, No. 78667; Court of Appeals No. 81633.

PEOPLE v BUNK, No. 78670; Court of Appeals No. 86723.

VANWORMER v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, No. 78681; Court of Appeals No. 83890.

MCSHERRY v MCSHERRY, No. 78682; Court of Appeals No. 85254.

NABORS v UNITED STATES PENITENTIARY WARDEN, No. 78689; Court of Appeals No. 87399.

HEINZE v GENERAL MOTORS CORPORATION, No. 78694; Court of Appeals No. 90755.

PEOPLE v DAGNER, No. 78710; Court of Appeals No. 75905.

PEOPLE v SEARS, No. 78714; Court of Appeals No. 88254.

SPOHN v CONDON, No. 78728; Court of Appeals No. 86356.

WELCH v WHIRLPOOL CORPORATION, No. 78747; Court of Appeals No. 88443.

COMERICA FINANCIAL SERVICES v DELMER INDUSTRIES, INC, No. 78754; Court of Appeals No. 92053.

GILBERT v FROSTICK, No. 78763; Court of Appeals No. 82671.

YENNEY v GRAND RAPIDS ASPHALT PAVING COMPANY, No. 78772; Court of Appeals No. 80612.

PEOPLE v MUNN, No. 78787; Court of Appeals No. 88679.

PEOPLE v RALPH WILLIAMS, No. 78789; Court of Appeals No. 89298.

PEOPLE v REID, No. 78794; Court of Appeals No. 86032.

PEOPLE v HOVIS, No. 78878; Court of Appeals No. 85985.

PEOPLE v THORPE, No. 78973; Court of Appeals No. 77749.

Interlocutory Appeals

Leave to Appeal Denied August 25, 1986:

JANSSEN v ZEFF & ZEFF, No. 78373; Court of Appeals No. 85347. Reconsideration denied December 3, 1986.

LENART v RAGSDALE, No. 78614; reported below: 148 Mich App 571.

PEOPLE v ALLEN, No. 78623; Court of Appeals No. 78411.

PEOPLE v WALEN #1, No. 78861; Court of Appeals No. 69064.

PEOPLE v MERLO, No. 78932; Court of Appeals No. 91432.

Leave to Appeal Denied August 26, 1986:

CONSUMERS POWER COMPANY v ATTORNEY GENERAL #2, No. 79284. See *Consumers Power Co v Attorney General, ante,* 1. Court of Appeals No. 94110. Reconsideration denied September 4, 1986.

Summary Disposition August 27, 1986:

STIEMSMA v COASTAL TANK LINES, INC, No. 78444. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 87882.

Leave to Appeal Denied September 4, 1986:

In re CONTEMPT OF STONE, No. 79295; reported below: 154 Mich App 121. LEVIN and ARCHER, JJ., would grant leave to appeal.

Leave to Appeal Denied September 5, 1986:

ZEIDMAN v PSCIUK, No. 79177; Court of Appeals No. 93794.

THE DETROIT EDISON COMPANY v BOARD OF STATE CANVASSERS, No. 79229; Court of Appeals No. 93818.

Summary Dispositions September 10, 1986:

PEOPLE v MCCARTHY, Nos. 78716, 78717. In lieu of granting leave to appeal, the order of the Court of Appeals denying the defendant's motion to remand is reversed. MCR 7.302(F)(1). Since the defendant's timely motion identified issues that require development of a testimonial record in the trial court, the Court of Appeals clearly erred by denying the motion to remand. MCR 7.211(C)(1). The case is remanded to the Court of Appeals, which shall, while retaining jurisdiction, remand the case to the Bay Circuit Court for a hearing on the defendant's claim that he did not receive effective assistance of counsel. Jurisdiction is not retained. Court of Appeals Nos. 86348, 86349.

BOYLE, J., would deny leave to appeal.

PEOPLE v MECHIGIAN, Nos. 78955, 78956. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 92485.

BOYLE, J., would deny leave to appeal.

Leave to Appeal Denied September 10, 1986:

PEOPLE v SLEDGE, No. 78123; Court of Appeals No. 79547. LEVIN and ARCHER, JJ., would grant leave to appeal.

PEOPLE v RUFF, No. 78802; Court of Appeals No. 82974.

Interlocutory Appeals

Leave to Appeal Denied September 10, 1986:

In re DEFENDER OFFICE (PEOPLE v MURPHY), No. 78421; Court of Appeals No. 84982. ARCHER, J., would grant leave to appeal.

PEOPLE v SCOTT JONES, No. 78862; Court of Appeals No. 82833.

Summary Disposition September 12, 1986:

PEOPLE v MCCLENDON, No. 79311. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated and the case is remanded to that Court. MCR 7.302(F)(1). On remand, the Court of Appeals shall address defendant's claims that there was insufficient evidence presented at trial to establish the element of causation or to disprove the defense of self-defense and that this insufficiency of evidence prohibits, on double jeopardy grounds, retrial of the defendant. Jurisdiction is not retained. Court of Appeals No. 81101.

Leave to Appeal Granted September 16, 1986:

PEOPLE v DEAN, No. 78035. To be argued and submitted together with *People v Cipriano,* Nos. 77682, 77683, and *People v Harrison,* No. 78446. Court of Appeals No. 87267.

Summary Dispositions September 16, 1986:

WARD v MCNAMARA COMMUNITY HOSPITAL, No. 78218. In lieu of granting leave to appeal, the June 18, 1984 order of dismissal of the 44th District Court is reversed and remanded for further proceedings. MCR 7.302(F)(1). Discovery in district court is by leave of the court only on motion, former DCR 302.2, MCR 2.302(A)(2). Defendants-appellees filed no motion for leave to file discovery. Defendants-appellees did file a motion to compel discovery. However, there was no notice of hearing or written order entered granting the motion, as required by former DCR 302.1, GCR 313, DCR 110.2, DCR 108.4, and DCR 522, currently MCR 2.313, MCR 2.119, and MCR 2.602. Defendants-appellees failed to file a written motion to dismiss and failed to give notice of hearing of any motion to dismiss, former DCR 110.2, DCR 108.4, MCR 2.119. In light of the procedural irregularities, the district court erred in granting defendants-appellees' oral motion to dismiss. Jurisdiction is not retained. Court of Appeals No. 86460.

VARNEY v GENESEE COUNTY SHERIFF, No. 78274. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *Marek v Chesny,* 473 US 1; 105 S Ct 3012; 87 L Ed 2d 1 (1985). MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 77680.

HICKS v WAYNE COUNTY GENERAL HOSPITAL, No. 78462. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 85535.

EUNICE DAVIS v CITY OF DETROIT, Nos. 78652, 78653. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated and the case is remanded to that Court. MCR 7.302(F)(1). The

Court of Appeals erred by holding that the plaintiff's motion to amend her complaint "was properly denied because plaintiff's claim was barred by the statute of limitations." The plaintiff's amendment was not barred by the statute of limitations because it "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" and, consequently, "related back to the date of the original pleading." *LaBar v Cooper,* 376 Mich 401 (1965); GCR 1963, 118.4. On remand the Court of Appeals shall reconsider the plaintiff's claim that the trial court improperly denied her motion to amend her complaint. Jurisdiction is not retained. Court of Appeals No. 80277.

Leave to Appeal Denied September 16, 1986:

In re WAYNE COUNTY (WAYNE COUNTY v WAYNE COUNTY GOVERNMENT BAR ASSOCIATION), No. 78712; Court of Appeals No. 90548.

PEOPLE v MELVIN JACKSON, No. 73885; Court of Appeals No. 70246. LEVIN and ARCHER, JJ., would grant leave to appeal.

SISTERS OF MERCY—PROVINCE OF DETROIT, INC v CITY OF FARMINGTON HILLS, No. 77490; Court of Appeals No. 73285.

STEFANI v BHAGAT, No. 78235; reported below: 149 Mich App 431. ARCHER, J., would grant leave to appeal.

PEOPLE v KENNETH JOHNSON, No. 78643; Court of Appeals No. 82132.

DIANE DAVIS v CITY OF DETROIT, No. 78659; reported below: 149 Mich App 249.

In re FERRIS (CATHOLIC SOCIAL SERVICES v FERRIS), No. 78687. The certification by the Court of Appeals pursuant to Administrative Order No. 1984-2 that its decision in this case conflicts with its decisions in *In re Adrianson,* 105 Mich App 300 (1981), and *In re Dupras,* 140 Mich App 171 (1984), is considered, and the Supreme Court declines to take further consideration of the question presented. Reported below: 151 Mich App 736.

PEOPLE v GONZALEZ, No. 78704; Court of Appeals No. 86109. LEVIN and CAVANAGH, JJ., would grant leave to appeal.

PEOPLE v CORTEZ, No. 78750; Court of Appeals No. 89269. LEVIN and CAVANAGH, JJ., would grant leave to appeal.

PEOPLE v WILSON, No. 78902; Court of Appeals No. 82924. WILLIAMS, C.J., and ARCHER, J., would grant leave to appeal.

PEOPLE v CESPEDES, No. 78966; Court of Appeals No. 87791. LEVIN and CAVANAGH, JJ., would grant leave to appeal.

Reconsideration denied December 26, 1986.

Interlocutory Appeals

Leave to Appeal Denied September 16, 1986:

PEOPLE v WEBB, No. 78532; Court of Appeals No. 85185. CAVANAGH and ARCHER, JJ., would grant leave to appeal.

Reconsideration denied December 3, 1986.

Leave to Appeal Denied September 19, 1986:

PEOPLE v HOLMES, No. 73707. The cause having been briefed and orally argued, the order of September 25, 1985, 422 Mich 974, granting leave to appeal is vacated and leave to appeal is denied because the Court is no longer persuaded that it should review the questions presented. Court of Appeals No. 64391.

ARCHER, J., is of the opinion that the Court should decide by written opinion the questions presented in the briefs filed by the appellant and the appellee.

Summary Disposition September 23, 1986:

THOMAS v CHRYSLER CORPORATION, No. 78510. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals as on leave granted. Court of Appeals No. 90312.

Leave to Appeal Denied September 23, 1986:

NERAT v SWACKER, No. 78419; reported below: 150 Mich App 61.

MONEY v GENERAL MOTORS CORPORATION, No. 78533; Court of Appeals No. 84113. ARCHER, J., would grant leave to appeal.

GROSVENOR SOUTH APARTMENTS v CITY OF TAYLOR, No. 78613; Court of Appeals No. 79812. LEVIN, J., would grant leave to appeal.

HUDSON v GENERAL MOTORS CORPORATION, No. 78706; Court of Appeals No. 90756. RILEY, J., would grant leave to appeal.

Reconsideration denied January 26, 1987.

MCDONALD v GRAND TRUNK WESTERN RAILROAD COMPANY, No. 78708; Court of Appeals No. 79976.

PEOPLE v LEPKOWSKI and PEOPLE v FABBRI, Nos. 78726, 78727; Court of Appeals Nos. 87235, 87236. RILEY, J., would grant leave to appeal.

PEOPLE v TOTZKE, No. 78736; Court of Appeals No. 84013. LEVIN and BRICKLEY, JJ., would grant leave to appeal.

PEOPLE v GRIFFITH, No. 78760; Court of Appeals No. 77911. LEVIN and ARCHER, JJ., would grant leave to appeal.

PEOPLE v COFFEY, No. 78816; reported below: 153 Mich App 311.

PEOPLE v LARMON, No. 78846; Court of Appeals No. 88489.

Interlocutory Appeals

Leave to Appeal Denied September 23, 1986:

PEOPLE v FREEDLAND, No. 78673; Court of Appeals No. 79865. LEVIN, J., would grant leave to appeal.

HUBBARD v GRAND TRUNK WESTERN RAILWAY COMPANY, No. 78836; Court of Appeals No. 88987. LEVIN and ARCHER, JJ., would grant leave to appeal.

Interlocutory Appeal

Leave to Appeal Denied September 25, 1986:

PEOPLE v BAILEY, No. 79447; Court of Appeals No. 95262.

Summary Dispositions September 26, 1986:

FLINT SCHOOL DISTRICT v UNITED TEACHERS OF FLINT, INC, No. 78868. In lieu of granting leave to appeal, the judgments of the Court of Appeals and the Genesee Circuit Court are vacated and the case is remanded to the Genesee Circuit Court for further consideration in light of *Bay City School Dist v Bay City Ed Ass'n, Inc,* 425 Mich 426 (1986). MCR 7.302(F)(1). Jurisdiction is not retained. Reported below: 150 Mich App 351.

SCOTT v PONTIAC SCHOOL DISTRICT, No. 78950. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 91924.

PEOPLE v VIEAU, No. 74981. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of the decision in *People v Love,* 425 Mich 691 (1986). MCR 7.302(F)(1). Reported below: 136 Mich App 670.

JUNCAJ v C & H INDUSTRIES, No. 77139. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted of the res judicata and retroactivity issues in accord with the Court's directions in *Riley v Northland Geriatric Center,* 425 Mich 668 (1986). The parties are to brief these issues prior to consideration by the Court of Appeals. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 85295.

PERRY v DETROIT BANK & TRUST COMPANY #1, No. 78742. In lieu of granting leave to appeal, that portion of the Workers' Compensation

Appeal Board's decision which set plaintiff-appellee's weekly benefit rate is vacated and the cause is remanded to that board for recomputation of the amount of weekly benefits in light of *Riley v Northland Geriatric Center,* 425 Mich 668 (1986). MCR 7.302(F)(1). In all other respects leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 91164.

Reconsideration granted *post,* 879.

Leave to Appeal Denied September 26, 1986:

PEOPLE v HINDS, No. 78793; Court of Appeals No. 81281.

PEOPLE v TRICKEY, No. 78795; Court of Appeals No. 67212.

PLEVINSKI v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, Nos. 78800, 78801; Court of Appeals Nos. 80849, 81367.

GOLDBERG v OAKLAND CIRCUIT JUDGE, No. 78803; Court of Appeals No. 89756.

T R VALENTINE AND ASSOCIATES, INC v WINKLE, No. 78804; Court of Appeals No. 81687.

PEOPLE v GREEN, No. 78805; reported below: 152 Mich App 16.

SZILAGYI v DEPARTMENT OF TREASURY, No. 78815; Court of Appeals No. 86263.

PEOPLE v KERSE, No. 78817; Court of Appeals No. 86754.

PEOPLE v SHARRIE STEWART, No. 78822; Court of Appeals No. 86822.

PEOPLE v CHISOLM, No. 78835; Court of Appeals No. 85953.

GRIEVANCE ADMINISTRATOR v OEMING, No. 78847; reported below: 151 Mich App 575. Reconsideration denied December 26, 1986.

PEOPLE v MICHAEL PETERS and PEOPLE v JULIE PETERS, Nos. 78848, 78849; Court of Appeals Nos. 84298, 84299.

JOHNSON v JOHNSON, Nos. 78865, 78866; Court of Appeals Nos. 81092, 81576.

KUTZLI v SECRETARY OF STATE, No. 78876; reported below: 152 Mich App 38.

SHINER v CITY OF DETROIT, No. 78892; reported below: 150 Mich App 420.

PEOPLE v MURDAY, No. 78895; Court of Appeals No. 84746.

BUSKIRK v VAN BUREN COUNTY BOARD OF ROAD COMMISSIONERS, No. 78896; Court of Appeals No. 89380.

In re HOPKINS ESTATE (ZELANZY v ZELANZY ESTATE), No. 78903; Court of Appeals No. 89513.

McDERMOTT v McDERMOTT, No. 78908; Court of Appeals No. 84060.

PEOPLE v SAFIEDINE, No. 78922; reported below: 152 Mich App 208.

PEOPLE v BURKS, No. 78930; Court of Appeals No. 87892.

COMPREHENSIVE HEALTH SERVICES OF DETROIT, INC v MABIN, No. 78933; Court of Appeals No. 78804.

HADLEY v COLDWATER REGIONAL CENTER, No. 78940; Court of Appeals No. 91301.

PEOPLE v RAYMOND RICHARDSON, No. 78948; Court of Appeals No. 82468.

PEOPLE v BRAND, No. 78949; Court of Appeals No. 78122. Reconsideration denied December 26, 1986.

MADDIN & MADDIN v SHANTY CREEK LODGE, INC, No. 78951; Court of Appeals No. 78913.

PETOSKEY v GENERAL MOTORS CORPORATION, No. 78954; Court of Appeals No. 90216.

PEOPLE v YUHAS, No. 78961; Court of Appeals No. 78306. Reconsideration denied February 23, 1987.

PEOPLE v WALTON, No. 78967; Court of Appeals No. 83697.

JAKUBOVICH v JAKUBOVICH, Nos. 78970, 78971; Court of Appeals Nos. 80781, 81249.

PEOPLE v BANKS, No. 78979; Court of Appeals No. 80715.

PEOPLE v ALAN JONES, No. 78980; Court of Appeals No. 82587.

PEOPLE v PALMORE, No. 78993; Court of Appeals No. 79449.

PEOPLE v DIAZ, No. 78995; Court of Appeals No. 91991.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION #1 and ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY (ABATE) v PUBLIC SERVICE COMMISSION, Nos. 79006, 79007; Court of Appeals Nos. 81573, 81574.

WEINMANN v GENERAL MOTORS CORPORATION, No. 79008; reported below: 152 Mich App 690.

PEOPLE v DALE, No. 79057; Court of Appeals No. 87386.

PEOPLE v SCHULTZ, No. 79073; Court of Appeals No. 86566.

PEOPLE v SERMO, No. 79411; Court of Appeals No. 94992.

CHRYSLER CORPORATION v BRENCAL CONTRACTORS, INC, No. 77578. The certification by the Court of Appeals pursuant to Administrative

Order No. 1984-2 that its decision in this case conflicts with its decision in *Keiser v Chrysler Corp*, No. 73633, is considered and the Court declines to take further consideration of the question. The Court of Appeals conflict no longer exists. See *Keiser v Chrysler Corp (On Remand)*, No. 90556, unpublished per curiam of March 11, 1986, lv den 426 Mich 861 (1986). Reported below: 146 Mich App 766.

PEOPLE v DORNBUSH, No. 78438; Court of Appeals No. 87162. Reconsideration denied April 27, 1987.

WASHTENAW ENGINEERING COMPANY, INC v KURKJIAN, No. 78439; Court of Appeals No. 75631.

PEOPLE v CHARLIE MOORE, No. 78500; Court of Appeals No. 27946. Reconsideration denied December 26, 1986.

PEOPLE v O'NEAL, No. 78507; Court of Appeals No. 87451.

MOLENGRAFF v HOLLAND TRANSMISSION SERVICE, No. 78518; Court of Appeals No. 90074.

PEOPLE v RODNEY WILLIAMS, No. 78592; Court of Appeals No. 85849.

PEOPLE v SWINFORD, No. 78602; reported below: 150 Mich App 507.

PEOPLE v WOODS, No. 78627; Court of Appeals No. 88618.

DUMKA v BONAVENTURE SKATING CENTER, INC (DUMKA v QUADERER), No. 78635; reported below: 151 Mich App 68.

In re MITCHELL ESTATE (LARION v CITY OF DETROIT), No. 78658; reported below: 149 Mich App 402.

PEOPLE v WILLOUGHBY, No. 78672; Court of Appeals No. 87437.

HICKOX v ALUMINUM EXTRUSIONS, INC, No. 78695; Court of Appeals No. 91054.

PEOPLE v MOODY, No. 78711; Court of Appeals No. 78033.

LYLE v MARTIN, No. 78715; Court of Appeals No. 89048. Reconsideration denied December 3, 1986.

PEOPLE v JASMAN, No. 78723; Court of Appeals No. 88467.

PERRY v DETROIT BANK & TRUST COMPANY #2, No. 78737; Court of Appeals No. 91254.

KEISER v CHRYSLER CORPORATION, No. 78738; Court of Appeals No. 90556. Reconsideration denied December 3, 1986.

PEOPLE v FISHER, No. 78752; Court of Appeals No. 82047.

SWEET v PEARSON, No. 78780; Court of Appeals No. 85019.

DEMARCO v GREEN OAK TOWNSHIP, No. 78788; Court of Appeals No. 82911.

Interlocutory Appeals

Leave to Appeal Denied September 26, 1986:

ANDERSON v ASSOCIATED TRUCK LINES, No. 78798; Court of Appeals No. 89030.

PEOPLE v LAWANDA JOHNSON, No. 79046; Court of Appeals No. 81595.

PEOPLE v DARRIN WATKINS, No. 79348; Court of Appeals No. 94041.

PEOPLE v HUMPHREY and PEOPLE v FREEMAN, Nos. 78534, 78566; reported below: 150 Mich App 806.

CLARK v CITY OF DETROIT, Nos. 78773, 78781, 78879; Court of Appeals No. 83319.

Summary Dispositions October 6, 1986:

PEOPLE v LANGSTON, No. 78029. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 87097.

PEOPLE v MOLENKAMP, Nos. 78455, 78456. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *People v Young (After Remand)*, 425 Mich 470 (1986). MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals Nos. 79379, 83814.

PEOPLE v HAMPTON, No. 78527. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *People v Young (After Remand)*, 425 Mich 470 (1986). MCR 7.302(F)(1). Court of Appeals No. 82422.

JOHNSON-EL v DEPARTMENT OF CORRECTIONS, No. 78947. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 91307.

Leave to Appeal Denied October 6, 1986:

SEWELL v TUCKER, No. 78464; Court of Appeals No. 78859. LEVIN, BRICKLEY, and ARCHER, JJ., would grant leave to appeal.

PEOPLE v EGGLESTON, No. 78466; reported below: 148 Mich App 494. ARCHER, J., would grant leave to appeal.

KASSAB v ACHO, No. 78520; reported below: 150 Mich App 104. LEVIN, J., would remand to the Liquor Control Commission in accordance with Judge BRONSON's dissenting opinion.

PEOPLE v SHELSON, No. 78570; reported below: 150 Mich App 718.

BARDONI v KIM, No. 78639; reported below: 151 Mich App 169. ARCHER, J., would grant leave to appeal.

PEOPLE v LEGGIONS, No. 78875. Leave to appeal as cross-appellant is also denied. Reported below: 149 Mich App 612. BOYLE and RILEY, JJ., would grant leave to appeal.

PEOPLE v PARTICA, No. 79072; Court of Appeals No. 86632.

PEOPLE v ROUPE, No. 79090; reported below: 150 Mich App 469.

Interlocutory Appeal

Leave to Appeal Denied October 6, 1986:

PEOPLE v SEABROOK, No. 79195; Court of Appeals No. 93005.

Leave to Appeal Denied October 13, 1986:

KILLEEN v CITY OF DETROIT, No. 75943. The cause having been briefed and orally argued, the order of February 5, 1986, 424 Mich 877, granting leave to appeal is vacated because the Court is no longer persuaded that it should review the questions presented. Court of Appeals No. 75039.

ARCHER, J., is of the opinion that the Court should decide by written opinion the questions presented in the briefs filed by the appellant and the appellee.

Leave to Appeal Denied October 16, 1986:

KUJAWA v CURN (KUJAWA v HAYS), No. 78355; Court of Appeals No. 80151.

Leave to Appeal Granted October 22, 1986:

PEOPLE v OTT, No. 76968. Limited to the issue whether the trial judge improperly interfered with the prosecutor's charging discretion by rejecting the proposed plea bargain. Court of Appeals No. 70019.

BRISBOY v FIBREBOARD PAPER PRODUCTS CORPORATION, No. 78048. Limited to the following issues: (1) did the Court of Appeals err in holding that there was sufficient evidence to establish a causal connection between defendant's product which plaintiff's decedent had been exposed to for six to nine months and decedent's death which was the result of twenty-six years of exposure to products containing asbestos and thirty years of smoking cigarettes, and (2) did the Court of Appeals err in holding that, because decedent's cancer was caused in part by asbestos, plaintiff's damages could not be reduced for the fifty-five percent of the total negligence attributable to decedent's cigarette smoking? Reported below: 148 Mich App 298.

THEOPHELIS v LANSING GENERAL HOSPITAL, No. 78166. Limited to the issues whether the settlements reached by plaintiffs with defendants Palmer and Gilmore released the defendant hospital from vicarious liability for their actions under MCL 600.2925d; MSA 27A.2925(4), and whether the releases of Palmer and Gilmore, if not protected by MCL 600.2925d; MSA 27A.2925(4), should be reformed as covenants not to sue which do not discharge the hospital to effectuate the intent of the settling parties. Reported below: (*On Rehearing*) 148 Mich App 564.

HARDY v MAXHEIMER and JOHNSON v MAXHEIMER, Nos. 78250-78253. Limited to the following issues: (1) whether MCL 600.5852; MSA 27A.5852 applies to wrongful death cases in which death was "instantaneous", and (2) whether death by drowning is instantaneous as a matter of law. Reported below: 149 Mich App 236.

PEOPLE v WRIGHT, No. 78396. Limited to the issue whether the sentencing court impermissibly considered information supplied by a psychiatrist where defendant was not warned that evidence given the psychiatrist could be used against him. *Estelle v Smith,* 451 US 454; 101 S Ct 1866; 68 L Ed 2d 359 (1981). Court of Appeals No. 81403.

In re ACQUISITION OF LAND FOR THE CENTRAL INDUSTRIAL PARK PROJECT (CITY OF DETROIT v MURRAY), Nos. 78449, 78450. Limited to the following issue: whether, in the context of a taking of property by eminent domain, a condemned business may recover its lost profits as a separate element of its damages. Court of Appeals No. 73234.

EL SOURI v DEPARTMENT OF SOCIAL SERVICES, No. 78544. Limited to the issues: (1) whether the appellant has discriminated against the appellee on the basis of alienage, (2) assuming, arguendo, that the appellant has made a classification upon the basis of alienage, whether such classification violates the equal protection provisions of the United States Constitution, and (3) whether the appellant has violated art 10, § 6 of the Michigan Constitution. Reported below: 150 Mich App 380.

PEOPLE v STEELE, No. 78562. Limited to the following issues: (1) whether the Court of Appeals erred in holding that the requested misdemeanor instructions were supported by a rational view of evidence, (2) whether the crime of use of a controlled substance has a rational connection in fact or relationship to the crime charged, and (3) whether the trial court properly exercised its discretion in determining that under a rational view of the evidence adduced at trial, the requested misdemeanor instructions were without support. Leave to appeal as cross-appellant is also denied. Reported below: 150 Mich App 728.

KRESKI v MODERN WHOLESALE ELECTRIC SUPPLY COMPANY, Nos. 78598, 78599. To be argued and submitted together with *Reetz v Tipit, Inc,* No. 78640. Reported below: 151 Mich App 376.

REETZ v TIPIT, INC, No. 78640. To be argued and submitted together with *Kreski v Modern Wholesale Electric Supply Co,* Nos. 78598, 78599. Reported below: 151 Mich App 150.

KILLEEN v DEPARTMENT OF TRANSPORTATION, No. 78625. Limited to the following issues: (1) where the State of Michigan takes jurisdiction of a county highway for purposes of relocation, redesign, and reconstruction, does the state pursuant to MCL 691.1402; MSA 3.996(102), remain liable for its defective design and construction of the highway, notwithstanding a subsequent transfer of "jurisdiction" of the highway to the county road commission prior to the date of casualty, (2) is the State of Michigan liable for its defective design and construction of a highway, wherein said highway was a county highway and the State of Michigan, without proper authority took jurisdiction and negligently designed and constructed the highway, and (3) is jurisdiction over the highway a necessary element to maintain an action against the State of Michigan for intentionally created or continued nuisances in fact of the highway? Reported below: 151 Mich App 7.

PEOPLE v WILEY, No. 78634. Limited to the issue whether the statement made by a codefendant, that defendant had killed a child during the course of an armed robbery was admissible as an adoptive admission. MRE 801(d)(2)(E). Leave to appeal as cross-appellant is also denied. Court of Appeals No. 76042.

DENNIS v ROBBINS FUNERAL HOME, No. 78753. Limited to the following issues: (1) whether the trial judge improperly granted accelerated judgment upon the basis of the two-year statute of limitations where the complaint sounds in breach of contract, and therefore a six-year statute of limitations is applicable, (2) whether the trial judge improperly granted accelerated judgment upon the basis of the two-year statute of limitations where the complaint sounds in ordinary negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress, and accordingly the action should be subject to a three-year statute of limitations, and (3) whether the two-year statute of limitations, MCL 600.5805(4); MSA 27A.5805(4), applies to the profession of the defendant funeral home director. Court of Appeals No. 82917.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION #2, No. 78882. Limited to the following issue: whether the thirty-day period of MCL 462.26; MSA 22.45, for seeking judicial review in circuit court from an order from the Public Service Commission is tolled during the pendency of a motion for rehearing before the commission or whether a new thirty-day period begins when the motion for rehearing is denied. Court of Appeals No. 83528.

ZYSKOWSKI v HABELMANN, No. 78992. Limited to the following issues: (1) whether the Court of Appeals erred in holding that off-road ornamental street lighting is an integral part of the improved portion of the highway designed for vehicular travel as defined by the governmental immunity act, MCL 691.1401 *et seq.;* MSA 3.996(101) *et seq.,* and (2) whether the road commission's enabling legislation for

"the lighting of highways and bridges act," 1931 PA 221, which prescribes the road commission's authority to lighting of county roads solely outside the limits of incorporated cities and villages preclude the imposition of liability for lighting of county roads located wholly inside the limits of incorporated cities under MCL 691.1402; MSA 3.996(102), which itself restricts the road commission's liability solely to the "improved portion of the highway designed for vehicular travel." Leave to appeal as cross-appellant is also denied. Reported below: 150 Mich App 230.

PEOPLE v M L HILL, No. 78796. The State Appellate Defender Office is appointed to represent the defendant and file a brief on his behalf, including among the issues whether "custody" or "focus" triggers the need to give advice per *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Reported below: 152 Mich App 374.

Summary Dispositions October 22, 1986:

PEOPLE v WHETSTONE, No. 78195. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed and the case is remanded to the Genesee Circuit Court for resentencing for the reasons stated by Judge KELLY in dissent in the Court of Appeals. MCR 7.302(F)(1). Court of Appeals No. 81368.

SHEARD v FORD MOTOR COMPANY, No. 78338. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 86099.

Leave to Appeal Denied October 22, 1986:

PEOPLE v RONALD WILLIAMS, No. 76496; Court of Appeals No. 76561.

PEOPLE v COVINGTON, No. 77496; reported below: 144 Mich App 652.

CLIFTON v GRAND TRUNK WESTERN RAILROAD and CLIFTON v DEPARTMENT OF STATE HIGHWAYS, Nos. 77952, 77953; Court of Appeals Nos. 75660, 75661. ARCHER, J., would grant leave to appeal.

FULTON v RING SCREW DIVISION, No. 78057; Court of Appeals No. 83174. RILEY, J., would grant leave to appeal.

KIRK v FORD MOTOR COMPANY, No. 78205; reported below: 147 Mich App 337. Reconsideration denied March 24, 1987.

RILEY, C.J., would grant leave to appeal.

BOYLE, J., would grant reconsideration and, on reconsideration, grant leave to appeal on the issue of claimed error regarding rebuttal testimony only.

ADMIRAL MERCHANTS MOTOR FREIGHT, INC v DEPARTMENT OF LABOR, No. 78254; reported below: 149 Mich App 344. LEVIN and BOYLE, JJ., would grant leave to appeal.

PEOPLE v ROSE, No. 78317; Court of Appeals No. 85349.

LUTTIG v BRUSHER, No. 78329; Court of Appeals No. 79110. CAVANAGH, J., would grant leave to appeal.

KIRIN v RIISE ENGINEERING COMPANY, INC, No. 78401; reported below: 148 Mich App 278. BOYLE, J., would grant leave to appeal.

BUTLER v CITY OF DETROIT, No. 78407; reported below: 149 Mich App 708. ARCHER, J., would grant leave to appeal.

Reconsideration denied February 3, 1987.

MCDONALD PONTIAC-CADILLAC-GMC, INC v SAGINAW COUNTY PROSECUTING ATTORNEY, No. 78418; reported below: 150 Mich App 52. Reconsideration denied April 1, 1987.

CENTRAL ADVERTISING COMPANY v STANDARD FIRE INSURANCE COMPANY, Nos. 78489, 78490; Court of Appeals No. 79937. BOYLE and ARCHER, JJ., would grant leave to appeal.

In re PERRY, Nos. 78540, 78751; reported below: 148 Mich App 601.

PEOPLE v HAMACHER, No. 78557; reported below: 150 Mich App 671. BRICKLEY, CAVANAGH, and ARCHER, JJ., would grant leave to appeal.

Reconsideration granted April 1, 1987, 428 Mich —.

In re DRAPER, No. 78565; reported below: 150 Mich App 789. Reconsideration granted January 9, 1987, 428 Mich 851.

FORT GRATIOT CHARTER TOWNSHIP v KETTLEWELL, Nos. 78573, 78574; reported below: 150 Mich App 648.

SAGINAW COUNTY v JOHN SEXTON CORPORATION OF MICHIGAN, No. 78575; reported below: 150 Mich App 677.

LANGLOIS v MCDONALD'S RESTAURANTS OF MICHIGAN, INC, No. 78651; reported below: 149 Mich App 309. RILEY and ARCHER, JJ., would grant leave to appeal.

TRAVERSE CITY AREA CONVENTION AND VISITORS BUREAU v PARK PLACE MOTOR INN, INC, No. 78799; Court of Appeals No. 77103. BRICKLEY, BOYLE, and RILEY, JJ., would grant leave to appeal.

PEOPLE v HOOPER, No. 78806; reported below: 152 Mich App 243.

PEOPLE v GRIFFIN, No. 78855; Court of Appeals No. 83227. BOYLE, J., would grant leave to appeal.

PEOPLE v HUNT, No. 79051; Court of Appeals No. 79793. Reconsideration denied January 26, 1987.

Interlocutory Appeals

Leave to Appeal Denied October 22, 1986:

PEOPLE v HARAJLI, No. 78107; reported below: 148 Mich App 189. BRICKLEY and BOYLE, JJ., would grant leave to appeal.

LUBERSKI v NORTH, No. 78644; reported below: 148 Mich App 675. RILEY, J., would grant leave to appeal.

DIERICKX v COTTAGE HOSPITAL CORPORATION, No. 78724; reported below: 152 Mich App 162. BOYLE and RILEY, JJ., would grant leave to appeal.

Summary Dispositions October 27, 1986:

CITY OF ROCHESTER HILLS v SIX STAR, LTD, INC, No. 79140. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 92821.

POGONCHEFF v WASHINGTON FOODS, INC, No. 73686. In lieu of granting leave to appeal, the order of the Workers' Compensation Appeal Board dated June 7, 1985, is vacated and its order of September 20, 1983, is reinstated. MCR 7.302(F)(1). In all other respects leave to appeal is denied. Court of Appeals No. 74436.

DOLIN v K MART CORPORATION, No. 75919. In lieu of granting leave to appeal, the case is remanded to the Workers' Compensation Appeal Board for entry of an order consistent with *Gusler v Fairview Tubular Products,* 412 Mich 270 (1981), *Riley v Northland Geriatric Center,* 425 Mich 668 (1986), and *Michigan Mutual Ins Co v Allstate Ins Co,* 426 Mich 346 (1986). MCR 7.302(F)(1). Court of Appeals No. 80193.

DIVITO v TRANSAMERICA CORPORATION OF AMERICA, No. 76069. In lieu of granting leave to appeal, the judgments of the Court of Appeals and the Macomb Circuit Court are vacated, and the case is remanded to the Macomb Circuit Court for proceedings consistent with the decision in *Gregory v Transamerica Ins Co,* 425 Mich 625 (1986). MCR 7.302(F)(1). Reported below: 141 Mich App 29.

ANDERSON v GENERAL MOTORS CORPORATION, No. 76261. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated and the case is remanded to that Court for reconsideration in light of *Walker v Wolverine Fabricating & Mfg Co, Inc,* 425 Mich 586 (1986). MCR 7.302(F)(1). Jurisdiction is not retained. Reported below: 138 Mich App 581.

REDDISH v LAPEER COUNTY, No. 77229. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration, as on leave granted, of the retroactivity issue in accord with the Supreme Court's directions in *Riley v Northland Geriatric Center,* 425 Mich 668, 683 (1986). The parties are to brief this issue prior to consideration by the Court of Appeals. MCR 7.302(F)(1). In all other respects leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 85557.

CITRON v DEXTER AUTO WASH, No. 78000. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration, as on leave granted, of the retroactivity issue in accord with the Supreme Court's directions in *Riley v Northland Geriatric Center,* 425 Mich 668, 683 (1986). The parties are to brief this issue prior to

consideration by the Court of Appeals. MCR 7.302(F)(1). In all other respects leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 88666.

NGUY v FARMERS INSURANCE GROUP, No. 78778. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *Thornton v Allstate Ins Co,* 425 Mich 643 (1986). MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 81880.

Leave to Appeal Denied October 27, 1986:

TUCKER v KIRKMAN, No. 78945; Court of Appeals No. 78895.

PEOPLE v RANDLE, No. 78957; Court of Appeals No. 86039.

PEOPLE v FLEETWOOD, No. 78976; Court of Appeals No. 83099.

KALBFLEISCH v KALBFLEISCH, No. 78985; Court of Appeals No. 88101.

SOUVE v ROCKER, No. 78987; Court of Appeals No. 86211. Reconsideration denied April 1, 1987.

PEOPLE v BARKLEY, No. 78991; reported below: 151 Mich App 234.

LUCHIN v PACE, No. 78994; Court of Appeals No. 83558.

DAVIS v O'BRIEN, No. 79011; reported below: 152 Mich App 495.

GIANNETTI BROTHERS CONSTRUCTION COMPANY, INC v CITY OF PONTIAC, No. 79013; reported below: 152 Mich App 648.

PEOPLE v ABDALLA, No. 79031; Court of Appeals No. 89672.

NICHOLS v CLAYTON, No. 79040; Court of Appeals No. 85465.

MICHIGAN EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION v JENISON PUBLIC SCHOOLS, No. 79060; Court of Appeals No. 87170.

PEOPLE v TERRY JOHNSON, No. 79062; Court of Appeals No. 91834.

DOWNS v DOWNS, No. 79061; Court of Appeals No. 83473.

PEOPLE v MILLER, No. 79071; Court of Appeals No. 81433.

PEOPLE v MINOR, No. 79080; Court of Appeals No. 89265.

PEOPLE v TERRELL, No. 79089; Court of Appeals No. 84055.

PEOPLE v MCCONNICO #2, No. 79091; Court of Appeals No. 82696.

PEOPLE v BARRETT, No. 79093; Court of Appeals No. 89301.

SMITH v GRABELL TRUCK LINE, INC, No. 79097; Court of Appeals No. 92789.

PEOPLE v PARKER, No. 79106; Court of Appeals No. 79636.

WIGGINS v DEPARTMENT OF PUBLIC HEALTH, No. 79123; Court of Appeals No. 85431.

PEOPLE v ROTH, No. 79151; reported below: 154 Mich App 257.

ALSTON v CHRYSLER CORPORATION, No. 79154; Court of Appeals No. 92937.

NICHOLS v ARC CREDIT UNION, No. 79155; Court of Appeals No. 85725.

PEOPLE v STREET, No. 79167; Court of Appeals No. 81940.

NELSON v ED SCHMID FORD DEALERSHIP, No. 79175; Court of Appeals No. 84396.

STERN v CAVALIER SERVICE STATIONS, No. 79176; Court of Appeals No. 92951.

LAWRICK v KENDALL INDUSTRIAL SUPPLIES, INC, No. 79181; Court of Appeals No. 84620.

TURNER v EDWARDS, No. 79185; Court of Appeals No. 76865. Reconsideration denied January 26, 1987.

SWARTHOUT v MIDLAND COUNTY, No. 79190; Court of Appeals No. 87873.

PEOPLE v PARKS, No. 79196; Court of Appeals No. 79659.

In re HARGROVE, No. 79197; Court of Appeals No. 88795. Reconsideration denied February 24, 1987. LEVIN, J., would grant reconsideration and grant leave to appeal.

PEOPLE v RAMONEZ, No. 79203; Court of Appeals No. 88374.

PEOPLE v CHANNELS, No. 79204; Court of Appeals No. 90376.

PEOPLE v CUSENZA, No. 79207; Court of Appeals No. 90304.

PEOPLE v BURTON, No. 79209; Court of Appeals No. 89545.

PEOPLE v FOSTER, No. 79210; Court of Appeals No. 82742.

PEOPLE v PHILLIPS, No. 79235; Court of Appeals No. 84681.

CIRCLE C TRUCKING, INC v EADIE, No. 79237; Court of Appeals No. 89111.

LASKY v BAKER, No. 79238; Court of Appeals No. 82234.

PEOPLE v CROOKS, No. 79244; reported below: 151 Mich App 389.

PEOPLE v ISIAH WILLIAMS, No. 79352; Court of Appeals No. 81294.

KORN v BOARD OF CANVASSERS, No. 79391; Court of Appeals No. 93600.

INDUSTRIAL INSURANCE SERVICES, INC v ZICK, No. 79437; Court of Appeals No. 94044.

PEOPLE v ORR, No. 79508; Court of Appeals No. 95027.

TOWN & COUNTRY DODGE, INC v DEPARTMENT OF TREASURY, McINERNEY, INC v DEPARTMENT OF TREASURY, OAKLAND DODGE, INC v DEPARTMENT OF TREASURY, and STAR LINCOLN MERCURY, INC v DEPARTMENT OF TREASURY, Nos. 79136-79139; reported below: 152 Mich App 748.

PEOPLE v THORIN, No. 71990; reported below: 126 Mich App 293. Reconsideration denied January 26, 1987.

PEOPLE v HUNTER, No. 76166; reported below: 141 Mich App 225.

SHAW v ALLSTATE INSURANCE COMPANY, No. 76183; reported below: 141 Mich App 331.

PEOPLE v RAMIREZ, No. 76234; Court of Appeals No. 76154.

PEOPLE v DENMAN, Nos. 76888-76890; Court of Appeals No. 73085.

MOORE v ALLEN INDUSTRIES, INC, No. 77722; Court of Appeals No. 78607.

PEOPLE v HAMILTON, No. 78553; Court of Appeals No. 79712.

MGA, INC v LASALLE MACHINE TOOL, INC, No. 78638; reported below: 148 Mich App 350.

MARTIN HOMES, INC v BAILEY, No. 78719; Court of Appeals No. 79070.

OSHTEMO TOWNSHIP v CENTRAL ADVERTISING COMPANY, No. 78792; Court of Appeals No. 74908.

PEOPLE v RIVERS, No. 78824; Court of Appeals No. 88477.

PEOPLE v HOLMAN, No. 78832; Court of Appeals No. 84331.

SOLEY v TAYLOR BUILDING PRODUCTS, INC, No. 78856; Court of Appeals No. 86887.

EATON SALES, INC v DEPARTMENT OF TREASURY, No. 78884; Court of Appeals No. 84464.

MARTS v STATE TENURE COMMISSION, No. 78885; Court of Appeals No. 84849.

PEOPLE v HENDRICKS, No. 78898; Court of Appeals No. 80720.

POOK v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 78938; Court of Appeals No. 85184.

PEOPLE v PELTIER, No. 78942; Court of Appeals No. 83078.

PEOPLE v REDDY, No. 78943; Court of Appeals No. 91079.

Interlocutory Appeals

Leave to Appeal Denied October 27, 1986:

STACK v MARCUM, No. 79003; reported below: 147 Mich App 756.

PEOPLE v HOWARD WILLIAMS, No. 79187; Court of Appeals No. 88002.

ZDON v AMERICAN MOTORS CORPORATION, No. 79253; Court of Appeals No. 84381.

Summary Dispositions October 29, 1986:

PEOPLE v GOODWIN, No. 78893. In lieu of granting leave to appeal, the case is remanded to Detroit Recorder's Court for a hearing on the defendant's claim that he was denied the effective assistance of counsel. If that court determines that the defendant was denied the effective assistance of counsel, it shall grant the defendant a new trial. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 85743.

CAVANAGH, J., would deny leave to appeal.

LAMBERT v STATE OF MICHIGAN and COUCH v STATE OF MICHIGAN, Nos. 78918, 78919. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. This Court expresses no opinion on the correctness of the decision in *Nolan v Dep't of Licensing & Regulation,* 151 Mich App 641 (1986). MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals Nos. 89914, 89915.

Leave to Appeal Denied October 29, 1986:

JEMAA v MACGREGOR ATHLETIC PRODUCTS, No. 78779; reported below: 151 Mich App 273. ARCHER, J., would grant leave to appeal.

Reconsideration denied February 23, 1987.

GRAY v WAYNE COUNTY, No. 78642; reported below: 148 Mich App 247.

PEOPLE v GORDEN, No. 78668; Court of Appeals No. 80914.

GASTON v HALPERN, No. 78671; Court of Appeals No. 83037. BOYLE, J., would grant leave to appeal.

PEOPLE v SHARRIEFF, No. 78713; Court of Appeals No. 85789.

PEOPLE v CAMPBELL, No. 78821; Court of Appeals No. 82766.

MOORE v WICKS, No. 78854; Court of Appeals No. 88844.

YANSSENS v MUSU, No. 78811; Court of Appeals No. 87246.

OLD ORCHARD BRANDS, INC v DEPARTMENT OF AGRICULTURE, No. 78923; reported below: 152 Mich App 274.

PEOPLE v GAUNTLETT, No. 78972; reported below: 152 Mich App 397.

NOWAK v UNITED PARCEL SERVICE, INC, No. 79019; Court of Appeals No. 84263.

BSC INSURANCE COMPANY v COMMISSIONER OF INSURANCE, No. 79514; reported below: 154 Mich App 373.

Interlocutory Appeals

Leave to Appeal Denied October 29, 1986:

PEOPLE v COX, No. 78696; Court of Appeals No. 88024.

PEOPLE v COOK, No. 78997; reported below: 153 Mich App 89. LEVIN, CAVANAGH, and ARCHER, JJ., would grant leave to appeal.

Reconsideration denied January 26, 1987.

Leave to Appeal Denied October 31, 1986:

WOMBERLY v ROGERS, No. 79049; Court of Appeals No. 84369.

Summary Dispositions November 4, 1986:

PEOPLE v VANDIVER, No. 72388. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *People v Young (After Remand)*, 425 Mich 470 (1986), and review of defendant's issues not discussed by the Court of Appeals in defendant's appeal of right. MCR 7.302(F)(1). Court of Appeals No. 60371.

PEOPLE v ELAM, No. 78688. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 88791.

CALHOUN COUNTY CLERK v CALHOUN COUNTY BOARD OF COMMISSIONERS, No. 78741. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals to state the grounds on which it dismissed appellants' appeal. MCR 7.302(F)(1). Jurisdiction is retained. Court of Appeals No. 89438.

MICHIGAN BELL TELEPHONE COMPANY v BESTWAY RECYCLING, INC, No. 78914. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 89425.

Leave to Appeal Denied November 4, 1986:

PEOPLE v LESTER JACKSON, No. 78502; Court of Appeals No. 77750.

BRICKLEY and RILEY, JJ., would grant leave to appeal.

BOYLE, J., dissents and states as follows:

I would grant leave to appeal. The Court of Appeals has clearly erred by applying the two-thirds rule of *People v Tanner,* 387 Mich 683; 199 NW2d 202 (1972), to cases in which a defendant is charged and convicted as an habitual offender. By its terms, the indeterminate sentencing act applies to persons "convicted for the *first* time for the commission of a felony . . . ." (Emphasis added.) MCL 769.8; MSA 28.1080. The plain language of the statute indicates that the Legislature did not intend that the indeterminate sentencing statute apply to habitual offenders. Furthermore, the Legislature amended the habitual offender statutes in 1978 to make it clear that the *Tanner* rule should not apply to habitual offenders. MCL 769.11(2); MSA 28.1083(2), added by 1978 PA 77, provides that a "minimum and maximum sentence within any specified limits in terms of years or fraction thereof . . . shall be considered an indeterminate sentence." Thus, for habitual offenders, the Legislature specifically rejected the *Tanner* definition of "indeterminate sentence" as a sentence with a minimum of not more than two-thirds of the maximum.

Because the Court of Appeals has clearly erred by disregarding the will of the Legislature as set forth in the indeterminate sentencing act and the habitual offender statutes, I would grant leave to appeal.

In re TEDDER, No. 78576; reported below: 150 Mich App 688. BRICKLEY and BOYLE, JJ., would grant leave to consider (1) whether a finding of neglect under § 19a(e) of the Juvenile Code requires the element of culpability, and (2) whether there was clear and convincing evidence of an inability to properly parent due to mental illness or mental deficiency for a period in excess of two years under § 19a(c), and (3) whether, if so, termination was permissible.

BRAUN v WEBER, No. 78697; Court of Appeals No. 80468. WILLIAMS, C.J., and LEVIN and BRICKLEY, JJ., would grant leave to appeal.

DONLEY v EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, No. 78700; Court of Appeals No. 83935. LEVIN, J., would grant leave to appeal.

BAJIS v CITY OF DEARBORN, No. 78720; reported below: 151 Mich App 533.

DONEGAN v MICHIGAN MUTUAL INSURANCE COMPANY, No. 78729; reported below: 151 Mich App 540. LEVIN, J., would grant leave to appeal.

CANTILE v GRAND RAPIDS FIRE DEPARTMENT, No. 78740; Court of Appeals No. 89717. ARCHER, J., would grant leave to appeal.

FULKS v ROSHACK, No. 78748; Court of Appeals No. 87206.

ROBINS v KATZ, No. 78842; reported below: 151 Mich App 802. Reconsideration denied January 26, 1987.

AFSCME, COUNCIL 25 v WAYNE COUNTY, Nos. 78843, 78844. Leave to appeal as cross-appellants is also denied. Reported below: 152 Mich App 87.

PEOPLE v ERNEST MOORE, No. 78915; Court of Appeals No. 82143.

PEOPLE v DIXON, No. 78929; Court of Appeals No. 82498.

PEOPLE v WOODFORK, No. 78931; Court of Appeals No. 88332.

WASH v DAVIS, No. 78977; Court of Appeals No. 88906.

ZENITH INDUSTRIAL CORPORATION v DEPARTMENT OF TREASURY, No. 79012; reported below: 152 Mich App 476. RILEY, J., would grant leave to appeal.

Reconsideration denied January 26, 1987. BOYLE, J., would grant reconsideration and would grant leave to appeal.

POPE v ST CLAIR SHORES POLICE DEPARTMENT, No. 79283; Court of Appeals No. 93097. BRICKLEY and RILEY, JJ., would grant leave to appeal.

PEOPLE v MULKEY, No. 79330; reported below: 153 Mich App 737. BRICKLEY and BOYLE, JJ., would grant leave to appeal.

Interlocutory Appeals

Leave to Appeal Denied November 4, 1986:

RIMKA v GRACE HOSPITAL, No. 78721. Leave to appeal as cross-appellant is also denied. Court of Appeals No. 70894.

MELYNCHENKO v CLAY, No. 78936; reported below: 152 Mich App 193. ARCHER, J., would grant leave to appeal.

PEOPLE v FLEMMING, Nos. 79349, 79350; Court of Appeals No. 94253. ARCHER, J., would grant leave to appeal.

Summary Disposition November 6, 1986:

KRISTIN v SALO, No. 79705. In lieu of granting leave to appeal, the case is remanded to the Ingham Circuit Court for a further statement of the reasons for the protective order entered October 17, 1986, in light of the language of MCR 2.301(C), 2.302(B)(4)(d), and 2.308(A)(1)(c)(i). The statement of reasons shall be filed with the clerk of the Supreme Court. MCR 7.302(F)(1). Jurisdiction is retained. Court of Appeals No. 96046.

Summary Dispositions November 12, 1986:

PEOPLE v PROPHET, No. 78762. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 89219.

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE v MCMILLAN, Nos. 78963, 78964. In lieu of granting leave to appeal, the Court of Appeals judgment of February 19, 1986, is vacated and the case is remanded to that Court for consideration of the issues raised by defendant. The Court of Appeals erred in finding that questions concerning the award to Patricia McMillan were determined by the prior order of this Court. MCR 7.302(F)(1). Reported below: (*After Remand*) 149 Mich App 394.

CZUPRYNSKI v BAY CIRCUIT JUDGE, No. 79037. In lieu of granting leave to appeal, the Court of Appeals orders of May 6, 1986, and June 20, 1986, are reversed and the case is remanded to that Court for consideration of the merits of the plaintiff's complaint for superintending control. *In re Hague,* 412 Mich 532, 546-547 (1982). MCR 7.302(F)(1). Court of Appeals No. 91996.

PEOPLE v SAYKLLY, No. 79038. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *People v Standifer,* 425 Mich 543 (1986). MCR 7.302(F)(1). Leave to appeal as cross-appellant is also denied because the Court is not persuaded that it should now review the questions presented. Court of Appeals No. 78305.

Leave to Appeal Denied November 12, 1986:

PEOPLE v HAGGART, No. 76559; reported below: 142 Mich App 330. Reconsideration denied February 23, 1987.

BANNERS v STEWART, No. 78722; Court of Appeals No. 74950. ARCHER, J., would grant leave to appeal.

Reconsideration denied February 23, 1987.

COOK v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, No. 78764; reported below: 152 Mich App 603. BOYLE, J., would grant leave to appeal.

SANFORD v INSURANCE COMPANY OF NORTH AMERICA, No. 78820; reported below: 151 Mich App 747. LEVIN and ARCHER, JJ., would grant leave to appeal.

POTTS v SHEPARD MARINE CONSTRUCTION CO, No. 78877; reported below: 151 Mich App 19.

DAY v SEWARDS, No. 78921; Court of Appeals No. 83832. Reconsideration granted March 4, 1987, 428 Mich —.

PEOPLE v MCQUEEN, No. 78981; Court of Appeals No. 92281.

WOOD v DUCKWORTH, No. 78984; reported below: 156 Mich App 160.

PEOPLE v TILES, No. 79033; Court of Appeals No. 83570.

KANAZIZ v ROUNDS, No. 79092; reported below: 153 Mich App 180.

COLLINS v CROSS COMPANY, No. 79114; Court of Appeals No. 90871. ARCHER, J., would grant leave to appeal.

PEOPLE v TERRY JONES, No. 79124. Leave to appeal as cross-appellant is also denied. Court of Appeals No. 83120. BOYLE and RILEY, JJ., would grant leave to appeal.

COLE v DR L REYNOLDS AND ASSOCIATES, PC, No. 79146; Court of Appeals No. 89077. ARCHER, J., would grant leave to appeal.

OTTONI v HIXSON and OTTONI v WAYNE STATE UNIVERSITY BOARD OF GOVERNORS, Nos. 79178, 79179; Court of Appeals Nos. 80145, 80146. ARCHER, J., would grant leave to appeal.

Reconsideration denied February 23, 1987. ARCHER J., would grant leave to appeal.

HALL v LONG, No. 79198; Court of Appeals No. 78151. ARCHER, J., would grant leave to appeal.

CHEKERYLLA v CHAPMAN, No. 79223; Court of Appeals No. 84691.

PEOPLE v RANDALL, No. 79239; Court of Appeals No. 85992.

PEOPLE v ALLEN TANIS and PEOPLE v CLARINDA TANIS, Nos. 79281, 79282; reported below: 153 Mich App 806.

BERRA v HARTFORD ACCIDENT & INDEMNITY COMPANY, No. 79300; Court of Appeals No. 82506.

Interlocutory Appeals

Leave to Appeal Denied November 12, 1986:

BROWN v MERRIMACK MUTUAL FIRE INSURANCE COMPANY, No. 78829; Court of Appeals No. 89215.

PEOPLE v JONATHON SMITH, No. 79131; reported below: 152 Mich App 756.

Leave to Appeal Denied November 24, 1986:

IONIA COUNTY ROAD COMMISSION EMPLOYEES ASSOCIATION v IONIA COUNTY ROAD COMMISSION, No. 77431. The cause having been briefed and orally argued, the order of April 22, 1986, 425 Mich 852, granting leave to appeal is vacated and leave to appeal is denied because the Court is no longer persuaded that it should review the questions presented. Court of Appeals No. 78969.

Reconsideration denied February 23, 1987.

Summary Dispositions November 26, 1986:

RAGAN v CITY OF DETROIT, No. 77789. In lieu of granting leave to appeal, the Wayne Circuit Court's grant of summary judgment in the plaintiff's favor and the Court of Appeals judgment upholding the Wayne Circuit Court are vacated and the case is remanded to the Wayne Circuit Court for reconsideration in light of *Thornton v Allstate Ins Co,* 425 Mich 643 (1986). MCR 7.302(F)(1). The certification by the Court of Appeals pursuant to Administrative Order No. 1984-2 that its decision in this case conflicts with its decision in *Ciaramitaro v State Farm Ins Co,* 107 Mich App 68 (1981), is also considered and in light of the resolution of that conflict in *Thornton v Allstate Ins Co, supra,* the Court deems it unnecessary to order further consideration of the questions presented. Jurisdiction is not retained. Court of Appeals No. 79697.

BAY v WILLIAMS, No. 79386. In lieu of granting leave to appeal, the Court of Appeals orders of June 27, 1986 and August 13, 1986, to the extent that they provided for a stay of enforcement, without bond, of any judgment entered by the trial court pending appeal are reversed. The circuit court judgment may not be enforced until twenty-one days after November 26, 1986. MCR 7.302(F)(1). Court of Appeals No. 92169.

CAVANAGH and BOYLE, JJ., would deny leave to appeal.

Leave to Appeal Denied November 26, 1986:

PEOPLE v BURNS, No. 78833; Court of Appeals No. 79470. LEVIN and ARCHER, JJ., would grant leave to appeal.

HAMTRAMCK FIREFIGHTERS ASSOCIATION v CITY OF HAMTRAMCK, No. 79079; Court of Appeals No. 84383. LEVIN and BOYLE, JJ., would grant leave to appeal.

LYND v CHOCOLAY TOWNSHIP, No. 79122; reported below: 153 Mich App 188.

PEOPLE v BOYNTON, No. 79162; reported below: 154 Mich App 245. LEVIN and ARCHER, JJ., would grant leave to appeal.

Reconsideration denied March 31, 1987. LEVIN, J., would grant reconsideration and leave to appeal.

FORD v WAGNER, No. 79227; reported below: 153 Mich App 466. ARCHER, J., would grant leave to appeal.

OM-EL EXPORT COMPANY, INC v NEWCOR, INC, No. 79395. The certification by the Court of Appeals pursuant to Administrative Order No. 1984-2 that its decision in this case conflicts with its decision in *Central Michigan University Faculty Ass'n v Stengren,* 142 Mich App 455; 370 NW2d 383 (1985), is considered and the Court is not persuaded that there is a conflict that needs to be resolved or that the questions presented should be reviewed by this Court. Reported below: 154 Mich App 471.

Interlocutory Appeal

Leave to Appeal Denied November 26, 1986:

PEOPLE v SELLARS, No. 79086; reported below: 153 Mich App 22. ARCHER, J., would grant leave to appeal.

Summary Dispositions December 3, 1986:

PEOPLE v MOSES, No. 79304. In lieu of granting leave to appeal, the Recorder's Court shall provide for the transcription of the record, if any, of the May 6, 1983 proceeding. *Griffin v Illinois,* 351 US 12; 76 S Ct 585; 100 L Ed 891 (1956); *Mayer v Chicago,* 404 US 189; 92 S Ct 410; 30 L Ed 2d 372 (1971); *People v Cross,* 386 Mich 237 (1971). MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 90403.

PEOPLE v DABNEY, No. 77859. In lieu of granting leave to appeal, the case is remanded to the Delta Circuit Court with directions that that court enter a minimum sentence of 6 years, 8 months. MCR 7.302(F)(1). In all other respects leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 80651.

BOYLE, J., concurs in this disposition because plaintiff has indicated affirmatively that it has no objection.

Reconsideration Granted December 3, 1986:

PERRY v DETROIT BANK & TRUST COMPANY #1, No. 78742. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration, as on leave granted, of the retroactivity issue in accord with *Riley v Northland Geriatric Center,* 425 Mich 668 (1986). The parties are to brief this issue prior to consideration by the Court of Appeals. MCR 7.302(F)(1). In all other respects leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 91164.

Leave to Appeal Denied December 3, 1986:

PEOPLE v COLEY, No. 79233; Court of Appeals No. 84794. Reconsideration denied February 23, 1987.

PEOPLE v FLADGER, No. 79241; Court of Appeals No. 77582.

PEOPLE v FERNANDEZ, No. 79243; reported below: 153 Mich App 743.

PEOPLE v SANFORD, No. 79247; Court of Appeals No. 77647.

PEOPLE v MULLINS, No. 79248; Court of Appeals No. 82734.

WILTSIE v WILTSIE, No. 79266; Court of Appeals No. 91632.

PEOPLE v GABRAIL, No. 79270; Court of Appeals No. 83556.

PEOPLE v ROBERT JONES, No. 79272; Court of Appeals No. 81062.

PEOPLE v INGLE, No. 79276; Court of Appeals No. 89671.

PEOPLE v WEINER, No. 79289; Court of Appeals No. 87268.

PEOPLE v TONY RICHARDSON, No. 79299; Court of Appeals No. 78954.

PEOPLE v WHITE, No. 79303; Court of Appeals No. 85126.

PEOPLE v WHIGHAM, No. 79305; Court of Appeals No. 89646.

PEOPLE v HASKINS, No. 79307; Court of Appeals No. 90426.

PEOPLE v BEASLEY, No. 79314; Court of Appeals No. 84201.

PEOPLE v MAIN, No. 79316; Court of Appeals No. 88823.

BANKS v GENERAL MOTORS CORPORATION, No. 79318; Court of Appeals No. 93052.

STRUBLE v LACKS INDUSTRIES, INC, No. 79334; Court of Appeals No. 89286.

FISHER v FORD MOTOR COMPANY, No. 79337; Court of Appeals No. 93277.

MAZILIAUSKAS v AXTELL, No. 79342; Court of Appeals No. 90179.

MARTIN v GENERAL MOTORS CORPORATION, No. 79355; reported below: 156 Mich App 557.

PEOPLE v KIRK SMITH, Nos. 79356, 79357; Court of Appeals Nos. 82075, 85583.

KENYON v KENYON, No. 79385; Court of Appeals No. 84741.

WILLIAMS v LEAGUE GENERAL INSURANCE COMPANY, No. 79398; Court of Appeals No. 86591.

SIEGEL v BERRY, No. 79401; Court of Appeals No. 86318.

MYERS v GENERAL MOTORS CORPORATION, No. 79404; Court of Appeals No. 93513.

PEOPLE v POTTS, No. 79409; Court of Appeals No. 81944.

MEYER v MOBERG, No. 79420; Court of Appeals No. 88137.

MCCLAIN v GENERAL MOTORS CORPORATION, No. 79421; Court of Appeals No. 91840.

BIRD v GENERAL MOTORS CORPORATION, No. 79422; Court of Appeals No. 93928.

PEOPLE v GREGORY JOHNSON, No. 79424; Court of Appeals No. 90740.

PABIS v GENERAL MOTORS CORPORATION, No. 79425; Court of Appeals No. 92085.

LOPEZ v RUSH LAKE HOMEOWNERS ASSOCIATION, No. 79429; Court of Appeals No. 89378. Reconsideration denied February 23, 1987.

PEOPLE v WALLACE STEWART, No. 79433; Court of Appeals No. 90264.

PEOPLE v ALVIN MOORE, No. 79444; Court of Appeals No. 86351.

CARTER v CHRYSLER CORPORATION, No. 79450; Court of Appeals No. 93201.

MATTHEWS v SUPREME COURT CLERK, No. 79454; Court of Appeals No. 92422.

VAN EVERY v JACK ANGLIN CONSTRUCTION COMPANY, No. 79470; Court of Appeals No. 94128.

PEOPLE v WALEN #2, No. 77196; Court of Appeals No. 70024. Reconsideration denied March 31, 1987.

PEOPLE v ROBERSON, No. 77360; Court of Appeals No. 73207.

MILLER v GRAND HAVEN BOARD OF EDUCATION, No. 78739; reported below: 151 Mich App 412.

PETTIS v NALCO CHEMICAL COMPANY, No. 78962; reported below: 150 Mich App 294.

PEOPLE v GRZEGORCZYK, No. 78978; Court of Appeals No. 71995. Reconsideration denied March 4, 1987. LEVIN, J., would remand to the Court of Appeals for the appointment by the trial court of counsel for the defendant, if indigent; and for reconsideration, after briefing, whether the Court of Appeals had jurisdiction to grant affirmative relief to the people increasing the defendant's sentence absent the filing by the people of a cross-appeal and of other issues the defendant's counsel may raise.

FRANKENMUTH MUTUAL INSURANCE COMPANY, INC v EURICH, No. 79014; reported below: 152 Mich App 683.

ELGIN BUILDERS v SEMTA, No. 79023; Court of Appeals No. 83796.

PEOPLE v HUFFMAN, Nos. 79025, 79026; Court of Appeals Nos. 79710, 86155.

PEOPLE v WAMBAUGH, No. 79032; Court of Appeals No. 87317.

BEZTAK ASSOCIATES, LTD v SISTERS OF MERCY—PROVINCE OF DETROIT, INC, No. 79048; Court of Appeals No. 81009.

PEOPLE v MORENO, No. 79055; Court of Appeals No. 80787.

PEOPLE v SEATON, Nos. 79067, 79068; Court of Appeals No. 87310.

GOOLEY v GENERAL MOTORS CORPORATION, No. 79069. The case is remanded to the Workers' Compensation Appeal Board for the assessment of interest pursuant to MCL 418.801; MSA 17.237(801). In all other respects leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 90562.

Reconsideration denied April 27, 1987.

PEARSON v CHRYSLER CORPORATION, Nos. 79094, 79095; Court of Appeals Nos. 92210, 92189.

PEOPLE v URBINA, No. 79102; Court of Appeals No. 84608.

PEOPLE v SHERMAN, No. 79145; Court of Appeals No. 80206.

POWELL v WAYNE COUNTY GENERAL HOSPITAL, No. 79166; Court of Appeals No. 87156.

PEOPLE v KILLIAN, No. 79184; Court of Appeals No. 86224. Reconsideration denied April 1, 1987.

PIERCE v PIERCE, No. 79205; Court of Appeals No. 87933. Reconsideration denied February 23, 1987.

KINSEL v M & G CONVOY, INC, No. 79206; Court of Appeals No. 83240.

Interlocutory Appeals

Leave to Appeal Denied December 3, 1986:

STAMP v MILL STREET INN, Nos. 78916, 78920, 78937; reported below: 152 Mich App 290.

PEOPLE v HOFFA, No. 79262; Court of Appeals No. 85075.

CALLADINE v HYSTER COMPANY, Nos. 79321, 79323, 79324; reported below: 155 Mich App 175.

PEOPLE v WILLIAM JONES, No. 79416; Court of Appeals No. 93645.

Summary Dispositions December 16, 1986:

DAVIDSON v K MART CORPORATION, No. 77972. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 87812.

PEOPLE v DANDRIDGE, No. 79374. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals for reconsideration of the other issues raised by defendant's appeal of right. The prosecutor showed

good cause for the delay in conducting defendant's preliminary examination. MCR 7.302(F)(1). Court of Appeals No. 75691.

Leave to Appeal Denied December 15, 1986:

In re BROSSEIT, No. 76700. The cause having been briefed and orally argued, the order of February 5, 1986, 424 Mich 877, granting leave to appeal is vacated and leave to appeal is denied because the Court is no longer persuaded that it should review the questions presented. Court of Appeals No. 78747.

LEVIN, J., dissents and says:

Dixie Jones and Michael Brosseit were married in 1968. A child was born in 1971 and another in 1972. The Brosseits separated in 1974 and were divorced in Illinois in April, 1975. The decree of divorce reserved the questions of child support and custody. In March, 1976, an order was entered by the Illinois court granting "permanent care, custody, control and education" to Dixie Jones. Michael Brosseit was "enjoined and estopped from visitation with said children or in interfering with [Dixie Jones'] custody in any manner, except upon petition and subsequent order of this Court." The order stated that "the question of child support" from Michael Brosseit was "reserved."

The former Dixie Brosseit married Gerald Jones, and Michael Brosseit also remarried. In November, 1982, Dixie Jones petitioned the Oakland County Probate Court, seeking termination of Michael Brosseit's parental rights so that Gerald Jones could adopt the children, one of whom is now fifteen and the other fourteen. In March, 1984, the petition was granted. The Court of Appeals affirmed in an unpublished opinion, one judge dissenting.

This Court granted leave to appeal. Briefs were filed. After oral argument, the Court has now concluded that leave was improvidently granted. In my opinion, the Court should decide this appeal on its merits.

The statute provides that if the parents of a child are divorced, and the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the parental rights of the other parent may be terminated if the other parent, "for a period of 2 years or more before the filing of the petition," failed or neglected *both* (i) to provide "regular and substantial support," and (ii) to "visit, contact or communicate" with the child although he had the *"ability"* to do so. MCL 710.51(6); MSA 27.3178(555.51)(6).

Michael Brosseit did indeed fail to provide financial support for the children or to visit, contact, or communicate with them for over two years. He claims, however, that he did not have the ability to do so because Dixie Jones had moved, in 1976, with the children from the last Chicago, Illinois address known to him and had concealed from him all her addresses from the time she moved until after she filed the petition for termination of parental rights.

The probate judge rejected Michael Brosseit's claim that he did not know where Dixie Jones and the children were living and could not

locate them despite his efforts to do so, stating that the claim was "specious" for the following reasons:

> 1) The father was notified of the custody proceedings by personal service and he failed to appear;
> 2) The father, mother and children all lived in Michigan from 1977 to 1983 and the mother testified that all their addresses and phone numbers have been listed with the exception of their most recent California address; and
> 3) Mr. Brosseit testified that on different occasions he would sit outside the Jones' residence and watch she and the children but would never speak to them. From this evidence this Court can only conclude that the father could have contacted, visited, and supported the children but he chose not to do so.

On rehearing, the judge amended his findings of fact to state that Dixie Jones, "[i]ndicating that she was afraid of Mr. Brosseit," had testified that "she *didn't inform him* of her changes in address, but that her address and phone have been *unlisted* with the exception of her most recent California address." (Emphasis supplied.) The judge deleted the second of the three reasons given for finding that Michael Brosseit's claim was "specious."

Michael Brosseit disputed Dixie Jones' claim that he was notified of the custody proceedings. Even if he was notified, as the probate judge found, those proceedings were in March, 1976, within less than a year after Michael Brosseit last had custody of and supported the children.

Michael Brosseit did testify that he sat outside the 921 North LaSalle, Chicago, Illinois, residence and watched Dixie Jones and the children, but did not speak to them. This was in late 1975, within six months of the time, May, 1975, that Dixie Jones physically removed the children from Brosseit's custody and support in Michigan.

Dixie Jones acknowledged that she concealed, for whatever reason, her and the children's whereabouts from Michael Brosseit, and, in answer to interrogatories, that she moved from the LaSalle Street address in May, 1976, within one year of the time that Michael Brosseit last had custody of and supported the children. There is no evidence that he knew where the children were located after that date, and thus the probate judge clearly erred in finding that Michael Brosseit could have contacted, visited, and supported the children, but chose not to do so.

The record not supporting the judge's finding, there is no need to discuss or consider the conflicting claims of the parties regarding Michael Brosseit's and his present wife's efforts to locate the children, or their other factual claims.

There is no finding by the probate judge that if Michael Brosseit had communicated with Dixie Jones' attorney or had petitioned the Illinois court that relief or assistance would have been granted by her attorney or the court, and it does not appear that the record would support such a finding. In all events, Michael Brosseit did not have the burden of establishing that he was not able to learn the whereabouts of the children; it was Dixie Jones' obligation to establish by

clear and convincing evidence. See *In re Moore,* 134 Mich App 586, 593 (1984). Cf. *Santosky v Kramer,* 455 US 745 (1982), that Michael Brosseit was aware of the children's address and thus "able" both to communicate with and support them.

Dixie Jones apparently did not desire that Michael Brosseit support the children, and neither the decree of divorce nor the permanent custody order provide that he should do so. No doubt a parent has a duty to provide support without regard to whether a court order has been entered requiring him to do so. But unless the parent knows where the children are, he cannot discharge that obligation. When Michael Brosseit learned, after the filing of the petition for termination of parental rights, that the children were in California, he visited with them and offered to pay for their support, which offer was refused by Dixie Jones.

Both the probate court and the Court of Appeals erred fundamentally in regarding the best interests of the children as a factor to be considered in deciding whether to terminate parental rights. The statute provides the grounds for termination of parental rights. The probate court is not empowered to terminate parental rights on the basis that the best interests of the children would be served thereby.

It may very well be in the best interests of the children that Gerald Jones adopt them. It is perhaps unfortunate that his ability to do so depends on terminating the parental rights of Michael Brosseit. But that possible deficiency in the law does not justify terminating Michael Brosseit's rights absent clear and convincing evidence that the statutory grounds have been satisfied.

Because there is no evidence whatsoever that Michael Brosseit knew where the children were living at any time after May, 1976—one year after they were last in his custody—there is no evidence, within the meaning of the statute, that he failed or neglected, although he had the ability, either to support them or to visit, contact, or communicate with them for two years or more.

Leave to Appeal Denied December 16, 1986:

PEOPLE v NIMMONS, No. 77089; Court of Appeals No. 76185.

BRICKLEY and BOYLE, JJ., would remand to the Court of Appeals for reconsideration in light of *People v Collier,* 426 Mich 23 (1986).

Reconsideration granted March 4, 1987, 428 Mich —.

PEOPLE v MORGAN, No. 78709; Court of Appeals No. 81833. ARCHER, J., would grant leave to appeal.

LONG v COASTAL TANK LINES, INC, No. 78853; Court of Appeals No. 89426. RILEY, J., would grant leave to appeal.

REETZ v KINSMAN MARINE TRANSIT COMPANY, No. 79009; Court of Appeals No. 78339.

GRAVES v WAYNE COUNTY, No. 79052; Court of Appeals No. 81437. ARCHER, J., would grant leave to appeal.

CALIFORNIA v ELECTRO ARC MANUFACTURING COMPANY, No. 79143; Court of Appeals No. 81375. ARCHER, J., would grant leave to appeal.

MINISTRELLI CONSTRUCTION COMPANY, INC v MONROE COUNTY ROAD COMMISSION, No. 79306; reported below: 153 Mich App 144. ARCHER, J., would grant leave to appeal.

HARTSELL v RICHMOND LUMBER COMPANY, No. 79471; reported below: 154 Mich App 523.

RILEY, J., would grant leave to appeal for the reasons stated in Judge MACKENZIE's dissenting opinion in this case.

PEOPLE v GUILIANO, No. 79481; Court of Appeals No. 82893.

BOYLE and RILEY, JJ., would grant leave to appeal.

PEOPLE v COLLINS, No. 79494; Court of Appeals No. 83077. BOYLE, J., would grant leave to appeal.

Interlocutory Appeal

Leave to Appeal Denied December 16, 1986:

SCOTT v ANGIE'S, INC, Nos. 79296-79298, 79575-79577. Leave to appeal as cross-appellant is also denied. Reported below: 153 Mich App 652.

SPECIAL ORDERS

In this section are orders of the Court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

Order Entered September 10, 1986:

PEOPLE v HARDIMAN, No. 78548. The certification by the Court of Appeals pursuant to Administrative Order No. 1984-2 that its decision in this case conflicts with its decision in *People v Garcia,* 81 Mich App 260; 265 NW2d 115 (1978) is considered and, in the absence of an application for leave to appeal, the Court declines to take further consideration of the question presented. Court of Appeals No. 84173.

Rehearing Granted September 12, 1986:

KENT COUNTY PROSECUTOR v KENT COUNTY SHERIFF, No. 74055. Reported at 425 Mich 718.

Rehearing Denied September 12, 1986:

BUTCHER v DEPARTMENT OF TREASURY, No. 75282. Reported at 425 Mich 262.

Ordered to be Published September 12, 1986:

PROPOSED AMENDMENTS OF MCR 9.101, 9.104, 9.106, 9.111-9.116, 9.118-9.128, and PROPOSED NEW MCR 9.132. On order of the Court, this is to advise that the Court is considering whether to amend MCR 9.101, 9.104, 9.106, 9.111-9.116, and 9.118-9.128 and whether to adopt proposed MCR 9.132. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

[New language underscored and deleted language striken.—REPORTER.]

RULE 9.101. DEFINITIONS.

As used in subchapter 9.100:

(1)-(11) (Unchanged.)

(12) "investigation" means fact-finding on alleged misconduct under the administrator's direction;

(13) "disbarment" means revocation of the license to practice law.

RULE 9.104. GROUNDS FOR DISCIPLINE IN GENERAL; ADJUDICATION ELSEWHERE.

The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

(1)-(5) (Unchanged.)

(6) knowing misrepresentation of any facts or circumstances surrounding a ~~grievance~~ request for investigation or complaint;

(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D); ~~and~~

(8) contempt of the board or a hearing panel; or

(9) violation of an order of discipline.

Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is ~~evidence~~ conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.

Staff Comment: The amendment of MCR 9.104(6) extends the subrule by treating an answer to a request for investigation the same as an answer to a formal complaint.

The amendments of the final paragraph give foreign adjudications of misconduct full faith and credit by recognizing them as conclusive proof of misconduct. The additional language is taken from the American Bar Association Standards for Disciplinary Proceedings, Standard No. 10.2.

RULE 9.106. TYPES OF DISCIPLINE; MINIMUM DISCIPLINE.

(A) Discipline or Admonishment. Misconduct is grounds for:

(1) (Unchanged.)

(2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds ~~119~~ 179 days, until the further order of ~~the Supreme Court,~~ a hearing panel, or the board, or the Supreme Court;

(3) reprimand ~~by a hearing panel, the board, or the Supreme Court;~~ with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose; ~~or~~

(4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C). ;

(5) requiring restitution, in an amount set by a hearing panel, the board, or the Supreme Court, as a condition of an order of discipline; or

(6) with the respondent's consent, ~~the administrator may admonish the respondent~~ admonishment by the commission without filing a complaint. An admonition does not constitute discipline and shall be

confidential under MCR 9.126 except as provided by MCR 9.115(J)(3). ~~A hearing panel may require restitution, in an amount it sets, as a condition of an order of discipline.~~ The administrator shall notify the respondent of the provisions of this rule and the respondent may, within 21 days of service of the admonition, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint.

(B) Habitual Disciplinary Offender.

(1) A respondent who has been disciplined previously for misconduct shall, upon a second finding of misconduct arising from a subsequent complaint, be suspended from the practice of law for at least 180 days.

(2) A respondent who has previously been disciplined on two separate occasions shall, upon a third finding of misconduct arising from a subsequent complaint, be suspended from the practice of law for at least 3 years.

(3) A respondent who has previously been disciplined on three separate occasions shall, upon a fourth finding of misconduct arising from a subsequent complaint, be disbarred.

Staff Comment: The expansion of MCR 9.106(2) and (3) will allow the adjudicative bodies greater discretion to impose temporary restrictions or requirements on the disciplined attorney such as continuing legal education, reformation of law office operations, personal counseling, and other conditions relevant to the established misconduct and the causes thereof. These conditions would be in addition to those restrictions already mandated in the case of a suspension.

As amended, MCR 9.106(2) provides that all suspensions must be for a period of at least 30 days.

Amendment of MCR 9.106(A)(6) conforms the rule to the present practice under which the commission, rather than the administrator, exercises the power to admonish. It also details the admonishment procedure.

New MCR 9.106(B) specifies minimum disciplines for repeat offenders.

RULE 9.111. HEARING PANELS.

(A) Composition; Quorum. The board must annually appoint ~~3~~ 2 attorneys and 1 nonattorney to each hearing panel and must fill a vacancy as it occurs. A vacancy occasioned by the absence of an attorney must be filled by another attorney. A vacancy occasioned by the absence of a nonattorney must be filled by another nonattorney. The chairman, who shall make all rulings on evidence, must be a lawyer. A hearing panel must elect a chairperson, vice-chairperson, and secretary, whose duties are the same as those officers of the board. A hearing panel must convene at the time and place designated by its chairperson or the board. Two members constitute a quorum. ~~A~~ The hearing panel acts by majority vote.

(B) (Unchanged.)

RULE 9.112. REQUESTS FOR INVESTIGATION.

(A) Availability to Public. The administrator shall furnish a form for a request for investigation to a person who alleges misconduct against an attorney. Forms must be available to the public through each state bar office and county clerk's office. Use of the form is not required for filing a request for investigation.

(B) (Unchanged.)

(C) Handling by Administrator.

(1) Request for Investigation of Attorney. After making a preliminary investigation, the administrator shall either

(a) (Unchanged.)

(b) serve a copy of the request for investigation on the respondent by ordinary mail, at the respondent's address on file with the State Bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. Service is effective at the time of mailing and non-delivery does not affect the validity of service. If a respondent has not filed an answer, no formal complaint shall be filed with the board unless the administrator has served the request for investigation by registered or certified mail return receipt requested.

(2)-(3) (Unchanged.)

Staff Comment: The change in MCR 9.112(A) codifies an Attorney Discipline Board decision.

RULE 9.113. ANSWER BY RESPONDENT.

(A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1), the respondent shall file with the administrator a signed, written answer in duplicate fully and fairly ~~disclose~~ disclosing all the facts and circumstances pertaining to the alleged misconduct. The administrator may allow further time to answer. Misrepresentation in the answer is grounds for discipline.

(B) Refusal or Failure to Answer.

(1)-(2) (Unchanged.)

(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted to a hearing panel for adjudication.

(C) (Unchanged.)

Staff Comment: The addition to MCR 9.113(A) clarifies the requirement that answers to requests for investigation must be in writing.

MCR 9.114(A)(2) has been moved and renumbered MCR 9.113(B)(3) because it more properly belongs in this rule. The submission to a hearing panel is permissive rather than mandatory since, in most cases, the administrator will not contest the propriety of respondent's exercise of a privilege, and submission to a hearing panel in such circumstances would be unnecessary.

RULE 9.114. ACTION BY ADMINISTRATOR OR COMMISSION AFTER ANSWER.

(A) Action After Investigation. After an answer is filed or the time for filing expires, the administrator may assign the request and answer for further investigation or informal hearing. When investigation is complete, the administrator shall ~~either~~

~~(1) admonish the respondent, or~~

~~(2)~~ refer the request to the commission for its review. The commission may direct that a complaint be filed, ~~or~~ that the request be dismissed, or that the respondent be admonished with his or her consent. ~~If a respondent refuses to answer under MCR 9.113(B)(1), the refusal must be submitted to a hearing panel for adjudication.~~

(B) (Unchanged.)

(C) Subpoenas.

(1) (Formerly [C]; redesignated but otherwise unchanged.)

(2) A person who without just cause, after being commanded by a subpoena, fails or refuses to appear and give evidence, to be sworn or affirmed, or to answer a proper question after being ordered to do so is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

(D)-(E) (Unchanged.)

Staff Comment: The change in MCR 9.114(A) transfers the power to admonish from the grievance administrator to the grievance commission, in conformity with present practice and amended MCR 9.106(6). The last sentence of MCR 9.114(A) has been moved to a new section, MCR 9.113(B)(3). New subrule MCR 9.114(C)(2) provides for enforcement of the subpoena in the same manner as provided for hearing panel subpoenas in MCR 9.115(I)(2).

RULE 9.115. HEARING PANEL PROCEDURE.

(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100. The original of the formal complaint and all other pleadings must be filed with the board. The formal complaint must be served on the respondent. All other pleadings must be served on the opposing party and each member of the hearing panel. Proof of service of the formal complaint may be filed at any time prior to the date of the hearing. Proof of service of all other pleadings must be filed with the original pleadings.

(B) Complaint. Except as provided by MCR 9.120, ~~A~~ a complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and, if the respondent is a member of or is associated with a law firm, on the firm ~~14 days later~~. The unwillingness of a complainant to prosecute, or a settlement between the complainant and the respondent, does not itself affect the right of the administrator to proceed.

(C) Service. Service ~~under these rules~~ of the complaint and all subsequent pleadings and orders must be made by personal service or by registered or certified mail addressed to the person at the person's last known address. ~~An attorney may be served at the address he or she files with the state bar.~~ An attorney's last known address is the address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. A respondent's attorney of record must also be served, but service may be made under MCR 2.107. Service is effective at the time of mailing, and nondelivery does not affect the validity of the service.

(D) Answer.

(1) Within 21 days after the complaint is served, ~~on~~ the respondent~~, he or she~~ shall file and serve a signed answer as provided in subrule (A) ~~with the board and serve a copy on the administrator and the hearing panel~~.

(2) (Unchanged.)

(E) (Unchanged.)

(F) Prehearing Procedure.

(1) Extensions. If good cause is shown, the hearing panel may grant one extension of time per party for filing pleadings or may grant one adjournment per party of a hearing. Additional requests may be granted by the board. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint ~~does not require~~ is not necessarily grounds for an adjournment.

(2) (Unchanged.)

(3) (Unchanged.)

(4) Discovery. Pretrial or discovery proceedings are not permitted, except as follows:

(a) ~~Within 14 days after the answer to the complaint is filed, the administrator shall, on the respondent's written demand, make available for inspection or copying by the respondent documentary evidence in the administrator's possession that is to be introduced as evidence at the hearing.~~ Within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the administrator need not comply prior to the filing of the respondent's answer; in such case, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.

(b) ~~Within the same time, the administrator shall give the respondent written notification of the name and address of any person to be~~

~~called as a witness. The administrator shall give supplemental notice to the respondent within 7 days after any additional witness has been identified and at least 14 days before a scheduled hearing.~~ Within 21 days of the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness. Within 14 days after the service of a written demand, the notification shall be supplied. However, the administrator need not comply prior to the filing of the respondent's answer to the formal complaint; in such cases, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer to the formal complaint. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Except for good cause shown, a party who is required to give said notification must give supplemental notice to the adverse party within 7 days after any additional witness has been identified, and must give the supplemental notice immediately if the additional witness is identified less than 14 days before a scheduled hearing.

(c)-(d) (Unchanged.)

If ~~the administrator~~ a party fails to comply with subrule (F)(4)(a) or (b), the hearing panel or the board may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

(5) Discipline by Consent. A respondent may offer to plead nolo contendere or to admit all essential facts contained in the complaint or any of its ~~contents~~ allegations in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel. If approved, the hearing panel shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not binding on the respondent or the administrator; ~~and~~ the matter ~~is to~~ must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline.

(G) Hearing Time and Place; Notice. The board or the chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served by the board or the chairperson of the hearing panel on the administrator, the respondent, ~~and~~ the complainant, and any attorney of record at least ~~14~~ 21 days before the initial hearing. Unless the chairperson otherwise directs, the hearing must be in the county in which the respondent has or last had his or her office or residence. If the hearing panel fails to convene or complete its hearing within a reasonable time, the board may reassign the complaint to another panel or to a master.

(H) (Unchanged.)

(I) Hearing; Contempt.

(1) A hearing panel may issue subpoenas (including subpoenas for production of documents and other tangible things), cause testimony

to be taken under oath, and rule on the admissibility of evidence under the Michigan Rules of Evidence. The oath or affirmation may be administered by a panel member. A subpoena must be issued in the name and under the seal of the board. It must be signed by a panel or board member, by the administrator, or by the respondent or the respondent's attorney. A subpoenaed witness must be paid the same fee and mileage as a witness subpoenaed to testify in the circuit court. Parties must notify their own witnesses of the date, time, and place of the hearing.

(2) (Unchanged.)

(J) Decision.

(1) The hearing panel must file ~~a~~ separate reports~~;~~ of its decisions on the misconduct charges and, if applicable, the resulting discipline. The reports must ~~including~~ include a certified transcript ~~of the testimony~~, pleadings, exhibits, briefs, ~~a summary of all previous misconduct for which respondent was disciplined,~~ and ~~its~~ findings of fact. The discipline report must also include a summary of all previous misconduct for which the respondent was disciplined.

~~(1) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it must enter an order dismissing the complaint.~~

(2) No aggravating or mitigating evidence shall be considered by the panel in determining whether the misconduct of the respondent alleged in the formal complaint has been proved by a preponderance of the evidence. Upon a finding of misconduct, the hearing panel shall conduct a separate hearing, as soon thereafter as practicable, to determine the appropriate discipline.

(23) If the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline to take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect earlier. In determining the discipline to be imposed, any and all relevant evidence of aggravation or mitigation shall be admissible, including previous admonitions and orders of discipline.

(4) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it must enter an order dismissing the complaint.

(5) The report and order must be signed by the panel chairperson and filed with the board and the administrator. A copy must be served on the parties as required by these rules.

(K) Stay of Discipline. ~~If the respondent petitions the board for a 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.~~ If a discipline order is a suspension of 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a petition for review. The stay remains effective until further order of the board. The respondent may petition the board for a stay pending review or reconsideration of other discipline orders.

(L) (Unchanged.)

(M) Resignation by Respondent; Admission of Charges. An attorney's request that his or her name be stricken from the official register of attorneys may not be accepted while a request for investigation ~~of his or her misconduct~~ or a complaint ~~against him or her~~ is pending, ~~unless the attorney admits the misconduct in writing or by default. The attorney's request entitles the hearing panel to find that the misconduct charge is true and to enter an order revoking his or her license.~~ except pursuant to an order of revocation.

Staff Comment: MCR 9.115(A) specifies service and filing requirements, and adds a requirement that hearing panel members be served with copies of the pleadings.

MCR 9.115(B) is amended to acknowledge the different procedure employed in MCR 9.120 (attorney convicted of a crime). Additionally, deletion of the phrase "14 days later" incorporates an intervening amendment to former GCR 1963, 964.2, the predecessor of this rule.

MCR 9.115(F)(4)(a) and (b) are amended to provide for reciprocal discovery.

MCR 9.115(G) is amended to provide for service of notices of hearing on the grievance administrator and the attorneys of record. It also authorizes the board to refer a complaint to a master if the hearing panel fails to act within a reasonable time.

MCR 9.115(J) is amended to provide for a bifurcated hearing procedure. The first phase determines misconduct if any; the second phase determines the discipline. Subrule (J)(3) provides that prior discipline, if any, should be a factor considered by a hearing panel in the assessment of discipline. This is consistent with board decisions regarding mitigation and aggravation of proven misconduct.

MCR 9.115(K) is amended to conform with MCR 9.122(C). Both rules will now provide for an automatic stay pending appeal when the discipline order imposes a suspension of less than 180 days. This rule governs appeals to the board. MCR 9.122(C) governs appeals to the Supreme Court.

MCR 9.115(M) is amended to eliminate past uncertainty regarding the effect of a resignation while charges were still pending.

RULE 9.116. HEARING PROCEDURE; JUDGES.

(A)-(C) (Unchanged.)

(D) Decision. Within 28 days after the hearing is concluded, the panel must file with the Supreme Court clerk and the board a report and order conforming with MCR 9.115(J) and serve them on the administrator~~,~~ and the respondent~~, and the board~~. If the Judicial Tenure Commission has recommended discipline or suspension, the panel may not impose a sanction greater than that recommended by the Judicial Tenure Commission.

(E) Appeal. The respondent judge may file a petition for review under MCR 9.118.

Staff Comment: MCR 9.116(E) is added to clarify present board practice.

RULE 9.118. REVIEW OF ORDER OF HEARING PANEL.

(A) Review of Order; Time.

(1) The administrator, the complainant, or the respondent may ~~move~~ petition the board in writing to review the order of the hearing panel filed under MCR 9.115(J). ~~The motion~~ A petition for review must set forth the reasons and the grounds on which review is sought and must be filed with the board within 21 days after the order is served. The petitioner must serve copies of the petition on the other party and file a proof of service with the board.

(2) A cross-petition for review may be filed within 21 days after the petition for review is served on the cross-petitioner.

(3) A delayed petition for review may be considered by the board under the guidelines of MCR 7.205(F).

(B) Order to Show Cause. On timely filing of a ~~motion~~ petition for review, the board shall issue an order to show cause, at a date and time specified, why the order of the hearing panel should not be affirmed. The board must serve the order to show cause on the administrator, complainant, and respondent at least 21 days before the hearing. Failure to comply with the order to show cause, including but not limited to a requirement for briefs, may be grounds for dismissal of a petition for review. Dismissal of a petition for review shall not affect the validity of a cross-petition for review.

(C) Hearing.

(1) A hearing on the order to show cause must be heard by a subboard of at least 3 board members, ~~including a lay member,~~ assigned by the chairperson. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard and the subboard's recommendation. The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D).

(2) (Unchanged.)

(D) Decision; Motion for Reconsideration; Stay. After the hearing on the order to show cause, the board may affirm, amend, reverse, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 21 days after it is served on the respondent unless the board finds good cause for the order to take effect earlier. The board may grant a stay pending its decision on a motion for reconsideration, which may be filed at any time before the board's order takes effect. If the board grants a stay, the stay remains effective for 21 days after the board enters its order granting or denying reconsideration.

(E) (Unchanged.)

Staff Comment: MCR 9.118(A)(3) is added to codify existing practice regarding delayed petitions. New subrule (A)(2) provides for cross-petitions.

MCR 9.118(B) is amended to provide for dismissal of petitions for review that are not timely prosecuted.

MCR 9.118(C) is amended to require a respondent to appear at a review hearing. This is a codification of language now routinely included in board orders to show cause.

MCR 9.118(D) is amended to codify present practice allowing motions for reconsideration and provide that the board may stay an order of discipline while it considers a motion for reconsideration. See also MCR 9.122(A)(1).

RULE 9.119. (The present text is deleted and the following text is substituted.) CONDUCT OF DISBARRED, SUSPENDED, OR INACTIVE ATTORNEYS.

(A) Notification to Clients. An attorney whose license is revoked or suspended, or who is transferred to inactive status, or who is suspended for nondisciplinary reasons pursuant to Rule 4 of the Supreme Court Rules Concerning the State Bar of Michigan, shall, within 7 days of the effective date of the order of discipline, the transfer to inactive status or the nondisciplinary suspension, notify all of his or her active clients, in writing, by registered or certified mail, return receipt requested, of the following:

(1) the nature and duration of the discipline imposed, the transfer to inactive status, or the nondisciplinary suspension;

(2) the effective date of such discipline, transfer to inactive status, or nondisciplinary suspension;

(3) the attorney's inability to act as an attorney after the effective date of such discipline, transfer to inactive status, or nondisciplinary suspension;

(4) the location and identity of the custodian of the clients' files and records, which will be made available to them or to substitute counsel;

(5) that the clients should seek legal advice and counsel elsewhere; provided that, if the disbarred, suspended or inactive attorney was a member of a law firm, the firm may continue to represent each client with the client's express written consent;

(6) the address to which all correspondence to the attorney may be addressed.

(B) Conduct in Litigated Matters. In addition to the requirements of subsection (A) of this rule, the affected attorney must, by the effective date of the order of revocation, suspension, or transfer to inactive status, in every matter in which the attorney is representing a client in litigation, file with the tribunal and all parties a notice of the attorney's disqualification from the practice of law and withdrawal from the matter.

(C) Filing of Proof of Compliance. Within 14 days after the effective date of the order of revocation, suspension, or transfer to inactive status, the disbarred, suspended, or inactive attorney shall file with the administrator and the board an affidavit showing full compliance

with this rule. The affidavit must include as an appendix copies of the disclosure notices and mailing receipts required under subrules (A) and (B) of this rule. A disbarred, suspended, or inactive attorney shall keep and maintain records of the various steps taken under this rule so that, in any subsequent proceeding instituted by or against him or her, proof of compliance with this rule and with the disbarment or suspension order will be available.

(D) Conduct After Entry of Order Prior to Effective Date. A disbarred or suspended attorney, after entry of the order of revocation or suspension and prior to its effective date, shall not accept any new retainer or engagement as attorney for another in any new case or legal matter of any nature, unless specifically authorized by the board chairperson upon a showing of good cause and a finding that it is not contrary to the interests of the public and profession. However, during the period between the entry of the order and its effective date, the suspended or disbarred attorney may complete, on behalf of any existing client, all matters that were pending on the entry date.

(E) Conduct After Effective Date of Order. An attorney who is disbarred or suspended is, during the period of disbarment or suspension, forbidden from:

(1) practicing law in any form;

(2) appearing as an attorney before any court, judge, justice, board, commission, or other public authority; and

(3) holding himself or herself out as an attorney by any means.

(F) Compensation of Disbarred, Suspended, or Inactive Attorney. A disbarred, suspended, or inactive attorney may not share in any legal fees for legal services performed by another attorney during the period of disqualification from the practice of law. A disbarred, suspended, or inactive attorney may be compensated on a quantum meruit basis for legal services rendered and expenses paid by him or her prior to the effective date of the revocation, suspension, or transfer to inactive status.

(G) Inventory. If the disbarred, suspended, or inactive attorney was a member of a firm, the firm may continue to represent each client with the client's express written consent. If an attorney is transferred to inactive status or is disbarred or suspended and fails to give notice under the rule, or disappears or dies, and there is no partner, executor or other responsible person capable of conducting the attorney's affairs, the administrator may ask the chief judge in the judicial circuit in which the attorney maintained his or her practice to appoint a person to inventory the attorney's files and to take any action necessary to protect the interests of the attorney and the attorney's clients. The person appointed may not disclose any information contained in any inventoried file without the client's written consent. The person appointed is analogous to a receiver operating under the direction of the circuit court.

Staff Comment: The new MCR 9.119 is a complete revision of the present rule.

RULE 9.120. CONVICTION OF ~~CRIME~~ A CRIMINAL OFFENSE.

(A) Suspension.

~~(1) Whenever an attorney licensed in Michigan is convicted in a court of record in the United States or its territories of an offense punishable by more than 92 days' imprisonment, the attorney shall file with the administrator, within 28 days after the conviction, a certified copy of the judgment of the conviction. The attorney's failure to file is professional misconduct unless the board's chairperson, on the attorney's motion, grants an extension for good cause.~~

(21) On conviction of a felony, an attorney is automatically suspended until the effective date of an order filed by a hearing panel under MCR 9.115(J). A conviction occurs upon the return of a verdict of guilty or upon the acceptance of a plea of guilty or nolo contendere. The board may, on the attorney's motion, set aside the interim suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public, and the interests of justice.

(32) In a disciplinary proceeding instituted against an attorney based on the attorney's conviction of a ~~crime~~ criminal offense, a certified copy of the judgment of conviction is conclusive ~~evidence~~ proof of the commission of the ~~crime~~ criminal offense.

(43) On the filing by the administrator with the board of a judgment of conviction showing that an attorney has ~~been convicted of an offense punishable by imprisonment~~ violated a criminal law of a state or of the United States, the board shall order the attorney to show cause why a final order of discipline should not be entered, and the board shall refer the proceeding to a hearing panel for hearing. At the hearing, questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies shall not be considered. After the hearing, the panel shall issue an order under MCR 9.115(J).

(B) (Unchanged.)

Staff Comment: The amendment deletes the often overlooked requirement that the convicted attorney report the conviction to the grievance administrator. See former subrule (A)(1).

The amendment to subrule (A)(3) limits the issues to be considered by the hearing panel. The panel is not to relitigate issues that have been or will be litigated in the criminal trial court or the appellate courts.

RULE 9.121. ATTORNEY DECLARED TO BE INCOMPETENT OR ALLEGED TO BE INCAPACITATED OR ASSERTING IMPAIRED ABILITY.

(A) (Unchanged.)

(B) (Unchanged.)

(C) Assertion of Impaired Ability; Probation.

(1) If, in response to a formal complaint filed under subrule 9.115(B), the respondent asserts in mitigation and thereafter demonstrates by ~~satisfactory proof~~ a preponderance of the evidence that

(a)-(d) (Unchanged.)

the hearing panel, the board, or the Supreme Court may enter an order placing the respondent on probation for a specific period not to exceed 2 years if it specifically finds that an order of probation is not contrary to the public interest.

(2) If the respondent alleges physical or psychiatric disability pursuant to subrule (C)(1), the hearing panel shall order the respondent to submit to a physical or mental examination by a physician selected by the hearing panel or board, which physician shall report to the hearing panel or board. The parties may obtain a psychiatric and/or medical evaluation at their own expense by an examiner of their own choice. No physician-patient privilege shall apply under this rule. The respondent's attorney may be present at an examination. If the respondent fails or refuses to comply with an examination order, he or she shall not be eligible for probation.

(3)-(5) (Formerly [2]-[4]; renumbered but otherwise unchanged.)

(D)-(F) (Unchanged.)

Staff Comment: Subrule (C)(2) provides for examination of the respondent by an independent expert selected by the hearing panel or the board.

RULE 9.122. REVIEW BY SUPREME COURT.

(A) Kinds Available; Time for Filing.

(1) A party aggrieved, including the person who made a request for investigation, by a final order of discipline or dismissal entered by the board on review under MCR 9.118, may apply for leave to appeal ~~in~~ to the Supreme Court under MCR 7.302 within 21 days after the order is entered. If a motion for reconsideration is filed before the board's order takes effect, the application for leave to appeal to the Supreme Court may be filed within 21 days after the board enters its order granting or denying reconsideration.

(2) (Unchanged.)

(B) (Unchanged.)

(C) Stay of Order. If the discipline order is a suspension of ~~119~~ 179 days or less, a stay of the order will automatically issue on the timely filing of an appeal by the respondent. The stay remains effective until conclusion of the appeal or further order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board.

(D)-(E) (Unchanged.)

Staff Comment: Amended MCR 9.122(A)(1) eliminates uncertainty by stating that the filing of a motion for reconsideration extends the deadline for filing an application for leave to appeal to the Supreme Court. See also MCR 9.118(D).

RULE 9.123. ELIGIBILITY FOR REINSTATEMENT.

(A) Suspension, ~~119~~ 179 Days or Less. An attorney whose license has been suspended for ~~119~~ 179 days or less is automatically reinstated by filing with the Supreme Court clerk and the administrator an affidavit showing that the attorney has fully complied with the

terms and conditions of the suspension order. A false statement contained in the affidavit is ground for disbarment.

(B) Revocation or Suspension More Than ~~119~~ 179 Days. An attorney whose license to practice law has been revoked or suspended for more than ~~119~~ 179 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124 and has established by clear and convincing evidence that:

(1)-(9) (Unchanged.)

(C) (Unchanged.)

(D) Petition for Reinstatement; Filing Limitations.

(1) A petition for reinstatement may not be filed until the term of suspension ordered has fully elapsed or 5 years have elapsed since revocation of the license.

(2) An attorney whose license to practice law has been revoked or suspended and who has been denied reinstatement may not file a new petition for reinstatement until at least 180 days from the effective date of the most recent order denying reinstatement.

Staff Comment: New subrule (D)(1) codifies the present policy.

New subrule (D)(2) precludes refiling a petition for reinstatement immediately after the denial of a prior petition.

RULE 9.124. PROCEDURE FOR REINSTATEMENT.

(A) Filing of Petition. An attorney shall file the original petition for reinstatement with the Supreme Court clerk and a copy with ~~the commission and~~ the board and the commission. If the petition ~~is in proper form,~~ alleges a sufficient basis for reinstatement, and if the petitioner is in compliance with subrules 9.124(B)(1) and (2), the board must assign ~~it~~ the petition to a hearing panel. If the petition is facially insufficient or if the petitioner is not in conformity with subrules 9.124(B)(1) and (2), the board must dismiss the petition without prejudice.

(B) Petitioner's Responsibilities.

(1) The petitioner must file, contemporaneous with and as a part of the petition for reinstatement, a personal history affidavit containing the following information:

(a) every residence address since the date of disqualification from the practice of law;

(b) employment history since the time of disqualification, including the nature of employment, the name and address of every employer, the duration of such employment, and the name of the petitioner's immediate supervisor at each place of employment;

(c) a copy of a current driver's license;

(d) any continuing legal education in which the petitioner participated during the period of disqualification from the practice of law;

(e) bank account statements, from the date of disqualification until the filing of the petition for reinstatement for each and every bank account in which petitioner is named in any capacity;

(f) any and all professional or occupational licenses obtained or maintained during the period of disqualification and whether any were suspended or revoked;

(g) any and all names used by petitioner since the time of disqualification;

(h) petitioner's place and date of birth;

(i) petitioner's social security number;

(j) whether, since the time of disqualification, petitioner was a party or a witness in any civil case, and the title, docket number, and court in which such case occurred;

(k) whether there are any outstanding judgments against the petitioner;

(l) whether petitioner was a defendant or a witness in any criminal case, and the title, docket number, and court in which such case occurred.

(2) The petitioner must, contemporaneous with the filing of the petition for reinstatement and personal history affidavit, remit to the administrator the fee for publication of a reinstatement notice in the Michigan Bar Journal.

(3) The petitioner must cooperate fully in the investigation by the administrator into his or her eligibility for reinstatement by promptly providing any information requested. If requested, the petitioner must participate in a recorded interview and answer fully and fairly under oath all questions about eligibility for reinstatement.

(~~B~~C) Administrator's Responsibilities. The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report ~~his or her~~ the findings in writing to the hearing panel within 3 months of the date the board assigns the petition to the hearing panel, and serve a copy on the petitioner. The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. The report is not a pleading and does not serve to restrict the administrator in the presentation of evidence at the hearing. Any evidence omitted from the report or received by the administrator subsequent to the filing of the report must be disclosed promptly to the hearing panel and the petitioner. At least 28 days before the hearing, the administrator shall publish in the Michigan Bar Journal a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be proved for reinstatement.

(~~C~~D) Hearing ~~Panel's Responsibility~~ on Petition. A reinstatement hearing may not be held earlier than ~~56~~ 28 days after the ~~petition was served on the~~ administrator files the investigative report with the hearing panel. The proceeding on a petition for reinstatement must conform as nearly as practicable to ~~a proceeding for hearing on a complaint~~ subrule 9.115(A). The petitioner shall appear personally before the hearing panel for cross-examination ~~before~~ by the administrator and the hearing panel and answer fully and fairly under oath

all questions on his or her eligibility for reinstatement. The administrator and the petitioner may call witnesses or introduce evidence bearing upon the petitioner's eligibility for reinstatement. The hearing panel must enter an order granting or denying reinstatement ~~or conditioning reinstatement on compliance with MCR 9.123(B)(8) or (9)~~ and make a written report signed and certified by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. The report and order must be filed and served under MCR 9.118(E).

(E) (Formerly [D]; redesignated but otherwise unchanged.)

RULE 9.125. IMMUNITY.

A person is absolutely immune from suit for statements ~~made without malice and intended for transmittal~~ and communications transmitted solely to the administrator, ~~or~~ the commission, or the commission staff, or given in an investigation or proceeding on alleged misconduct or reinstatement. The administrator, ~~the staff~~, legal counsel, investigators, and members of hearing panels, the commission, ~~and~~ the board, and their staffs are absolutely immune from suit for conduct arising out of the performance of their duties.

Staff Comment: The amendments of MCR 9.125 provide for absolute immunity for complainants, disciplinary officials and staff acting within the scope of their duties. The rule is patterned after the Standards for Lawyer Discipline and Disability Proceedings promulgated by the American Bar Association.

RULE 9.126. OPEN HEARINGS; CONFIDENTIAL FILES AND RECORDS.

(A)-(D) (Unchanged.)

(E) Disclosure~~; Judicial Tenure Commission~~. Notwithstanding any prohibition against disclosure set forth in this rule or elsewhere, the commission may disclose the substance of information concerning attorney or judicial misconduct to the Judicial Tenure Commission, the State Bar of Michigan Client Security Fund, the State Bar of Michigan Committee on Judicial Qualifications, and any court-authorized attorney disciplinary or admissions agency.

RULE 9.127. ENFORCEMENT~~; CONTEMPT~~.

(A) Interim Suspension. The Supreme Court, the board, or a hearing panel may order the interim suspension of a respondent who fails to comply with its lawful order. The suspension shall remain in effect until the respondent complies with the order or no longer has the power to comply. If the respondent is ultimately disciplined, the respondent shall not receive credit against the disciplinary suspension or disbarment for any time of suspension under this rule. All orders of hearing panels under this rule shall be reviewable immediately under MCR 9.118. All orders of the board under this rule shall be appealable immediately under MCR 9.122. The reviewing authority may issue a stay pending review or appeal.

(B) Contempt. The administrator ~~shall initiate a proceeding to enforce a discipline order. When the administrator seeks to~~ may

enforce a discipline order or an order granting or denying reinstatement by proceeding against a respondent for contempt of court. The proceeding must ~~be in conformity with~~ conform to MCR 3.606. The petition must be filed by the administrator in the circuit court in the county in which the alleged contempt ~~offense~~ took place, or in which the respondent resides, or has or had an office. Enforcement proceedings under this rule do not bar the imposition of additional discipline based upon the same noncompliance with the discipline order.

Staff Comment: New subrule (A) provides a vehicle for prompt enforcement of preliminary orders, e.g., orders requiring a psychiatric examination.

Amended subrule (B) codifies the current rule that the administrator is not compelled to make an election of remedies in enforcing an order of discipline.

RULE 9.128. COSTS.

An itemized statement of the expenses allocable to a hearing must be made a part of the report in all matters of discipline and reinstatement. The hearing panel and the board in the order for discipline or for reinstatement must direct the attorney to reimburse the state bar for the expenses of that hearing, review, and appeal, if any. Reimbursement must be a condition in a reinstatement order. If the respondent fails to reimburse the state bar for the expense within the time prescribed, a certified report of the nonpayment must be filed with the Supreme Court, and the respondent shall be suspended automatically until the respondent pays the costs, or until a hearing panel or the board approves a suitable plan for payment, and until fulfillment of the requirements of Rule 9.123.

Staff Comment: The amendment provides for automatic suspension in cases where a respondent fails to pay costs. This is designed to avoid the current cumbersome procedures requiring an entirely new proceeding. It is similar to the practices in other jurisdictions.

RULE 9.132. ATTORNEY TRUST ACCOUNTS.

(A) Required Bank Accounts.

(1) All funds belonging to clients or otherwise entrusted to an attorney's care must be deposited into trust accounts maintained in Michigan financial institutions in the attorney's own name, the name of a partnership of attorneys or professional corporation of which the attorney is a member, or the name of the partnership of attorneys or professional corporation by whom the attorney is employed.

(2) All trust account documents must be clearly designated "Attorney Trust Account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account. All business account documents must be clearly designated "Attorney Business Account," "Attorney Professional Account," or "Attorney Office Account."

(3) The identification numbers and financial institution name for each account must be recorded on the annual registration form filed

with the annual payment of dues. The information shall be available to the Attorney Grievance Commission and the Client Security Fund of the State Bar of Michigan.

(4) Attorney trust accounts shall be maintained only in Michigan financial institutions approved by the Supreme Court, which shall annually publish a list of approved institutions. A financial institution shall be approved if it files with the Supreme Court an agreement, in a form approved by the Court, to report to the Attorney Grievance Commission any trust account instrument that is presented against insufficient funds, irrespective of whether the instrument is honored. The agreement shall apply to all branches of the financial institution and may not be cancelled except upon 30 days notice in writing to the Attorney Grievance Commission. The agreement shall further provide that all reports made by said financial institution must be in the following format: (a) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (b) in the case of an instrument that is presented against insufficient funds but is honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. The report of a dishonored instrument must be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report must be made within 5 banking days of the date of presentation for payment against insufficient funds. In addition to the reports specified above, approved financial institutions must agree to cooperate fully with the Attorney Grievance Commission and to produce any attorney trust account or attorney business account records upon receipt of a subpoena therefor. Nothing herein shall preclude a financial institution from charging an attorney or law firm for the reasonable cost of producing the reports and records required by this rule. Every attorney or law firm in this state shall be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(B) Required Bookkeeping Records.

(1) All attorneys and law firms in Michigan shall maintain for 7 years after the events which they record:

(a) the records of all deposits in and withdrawals from the accounts specified in subrule 9.132(A);

(b) a ledger book or similar record for all trust accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds were held, the amount of the funds, the charges or withdrawals from such accounts, and the names of all persons to whom the funds were disbursed;

(c) copies of all retainer or compensation agreements with clients;

(d) copies of all statements to clients showing the disbursement of funds to them or on their behalf;

(e) copies of all bills rendered to clients;

(f) copies of all records showing payment to attorneys, investigators, or other persons, not in their regular employ, for services rendered or performed;

(2) All attorneys and firms must make accurate entries of all financial transactions in their records kept by them in the regular course of their practice, which entries must be made at or near the time of the event recorded.

(3) Upon the dissolution of any firm of attorneys the former partners or shareholders shall make appropriate arrangements for the maintenance by one of them or a successor firm of the records specified in subrule 9.132(B)(1).

(4) All of the records required to be kept by this rule must be produced in response to a subpoena duces tecum issued in connection with an investigation, pursuant to MCR 9.114(C), or hearing pursuant to MCR 9.115(I). The records must also be produced at the direction of the Supreme Court. When so produced, the records shall remain confidential except for purposes of the particular proceeding. Their contents shall not be disclosed to anyone except the Attorney Grievance Commission, the administrator, the administrator's staff, hearing panels, the Attorney Discipline Board, the board's staff, and the Supreme Court if further disclosure would violate the attorney-client privilege.

(5) Any attorney who does not cause to be maintained and kept the accounts and records required by this rule, or who does not produce the records pursuant to these rules, shall be subject to disciplinary proceedings.

Staff Comment: New MCR 9.132 seeks to insure the integrity of client trust fund accounts by imposing regulations on those accounts and providing for prompt reports, by banks to the AGC, of any overdrafts or NSF returns.

Other provisions require attorneys to create and save records of financial transactions that affect client funds.

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

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may

be sent to the Supreme Court clerk within 60 days after it is published in the Michigan Bar Journal.

Ordered to be Published September 15, 1986:

PROPOSED ADMINISTRATIVE ORDER. RECOMMENDATIONS OF THE CASEFLOW MANAGEMENT COORDINATING COMMITTEE. The Court has received a report and recommendations from the Caseflow Management Coordinating Committee with regard to the adoption of time guidelines for the disposition of cases in our trial courts.

In order to further our consideration of these recommendations it has been decided to publish them, as submitted, for comment. Comments on these recommendations may be sent to the Supreme Court clerk within 60 days after they are published in the Michigan Bar Journal.

The report and recommendations provide as follows:

I. CASEFLOW MANAGEMENT AND DELAY REDUCTION: GENERAL PRINCIPLE.

From the commencement of litigation to its resolution, whether by trial or settlement, any elapsed time other than reasonably required for pleadings, discovery and court events, is unacceptable and should be eliminated. To enable just and efficient resolution of cases, the court, not the lawyers or litigants, should control the pace of litigation. A strong judicial commitment is essential to reducing delay and, once achieved, maintaining a current docket.

II. CASE MANAGEMENT.

Essential elements which the trial court should use to manage its cases are:

A. Court supervision and control of the movement of all cases from the time of filing of the first document invoking court jurisdiction through final disposition.

B. Promulgation and monitoring of time goals for the overall disposition of cases.

C. By rules, conferences or other techniques, establishment of times for conclusion of the critical steps in the litigation process, including the discovery phase.

D. Procedures for early identification of cases that may be protracted, and for giving them special administrative attention where appropriate.

E. Adoption of a trial setting policy which schedules a sufficient number of cases to ensure efficient use of judge time while minimizing resettings caused by overscheduling.

F. Commencement of trials on the original date with adequate advance notice.

G. A firm, consistent policy for minimizing continuances.

III. GUIDELINES OF TIMELY DISPOSITION.

A. *Probate Court Guidelines.*

1. *Delinquency and Neglect Proceedings.*

a. IN-CUSTODY—Where a minor is being detained or is held in court custody, 75% of all petitions or complaints should have adjudication and disposition completed within 63 days from the authorization of the petition; 90% within 77 days and 100% within 91 days.

b. NON-CUSTODY—Where a minor is not being detained or held in court custody, 75% of all petitions or complaints should have adjudication and disposition completed within 119 days from authorization of the petition; 90% within 6 months and 100% within 7 months.

2. *Probate Proceedings.*

Seventy-five percent of all contested probate matters should be resolved within 6 months from the time the issue is joined; 90% within 9 months and 100% within 12 months.

B. *District Court Guidelines.*

1. *Civil Proceedings.*

a. GENERAL CIVIL—90% of all civil cases should be settled, tried or otherwise concluded within 6 months from the date of case filing; 98% within 9 months and 100% within 12 months except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur.

b. SUMMARY CIVIL—Proceedings using summary hearing procedures, as in small claims, landlord/tenant and claim and delivery actions should be concluded within 35 days from the date of service. In those cases where a jury is demanded, actions should be concluded within 63 days from the date of service.

2. *Criminal and Traffic Proceedings.*

a. MISDEMEANOR—90% of all misdemeanors, civil infractions, and other nonfelony cases should be adjudicated or otherwise concluded within 63 days from the date of first appearance; 98% within 91 days and 100% within 126 days.

b. FELONIES—100% of preliminary examinations to be concluded within 14 days of arraignment unless good cause is shown.

c. PERSONS IN PRETRIAL CUSTODY—Persons detained should have a determination of custodial status or bail set within 24 hours of arrest. Persons incarcerated before trial should be afforded priority for trial.

C. *Circuit and Recorder's Court Guidelines.*

1. *Civil Proceedings.*

Ninety percent of all civil cases should be settled, tried or otherwise concluded within 12 months from the date of case filing; 98% within 18 months and 100% within 24 months except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur.

2. *Domestic Relations Proceedings.*

Recommendation:

Abolish the distinction between divorce with children and divorce without children.

Ninety percent of all divorce cases should be settled, tried or otherwise concluded within 7 months from the date of case filing; 98% within 10 months and 100% within 12 months.

In the event the distinction between the categories is not abolished:

a. DIVORCE WITHOUT CHILDREN—90% of all divorce cases without children should be settled, tried or otherwise concluded within 91 days from the date of case filing; 98% within 9 months and 100% within 12 months.

b. DIVORCE WITH CHILDREN—90% of all divorce cases with children should be settled, tried or otherwise concluded within 7 months of the date of case filing; 98% within 10 months and 100% within 12 months.

c. PATERNITY—90% of all paternity cases should be settled, tried or otherwise concluded within 7 months of the date of case filing; 98% within 12 months and 100% within 18 months.

d. INITIATING URESA—100% of all URESA orders should be forwarded to the court of the responding state having reciprocal legislation within 24 hours of the filing of the Certificate of Support.

e. CHILD SUPPORT/RESPONDING URESA—90% of all child support/responding URESA cases should be adjudicated or otherwise concluded within 91 days from the date of case filing or receipt of order from initiating state; 98% within 6 months and 100% within 12 months.

f. CHILD CUSTODY ISSUES—100% of all child custody issues should be adjudicated or otherwise concluded within 91 days from notice of request for custody hearing.

3. *Criminal Proceedings.*

Ninety percent of all felony cases should be adjudicated or otherwise concluded within 91 days from the date of entry of order binding the defendant over to circuit court; 98% within 154 days and 100% within 10 months. Persons incarcerated before trial should be afforded priority for trial.

4. *Appeals to Circuit Court.*

a. APPEALS FROM COURTS OF LIMITED JURISDICTION—100% of all appeals to the circuit court from courts of limited jurisdiction should be settled or otherwise concluded within 154 days from the filing of the Claim of Appeal.

b. APPEALS FROM ADMINISTRATIVE AGENCIES—100% of all appeals to the circuit court from administrative agencies should be settled or otherwise concluded within 154 days from the filing of the Claim of Appeal.

c. EXTRAORDINARY WRITS—98% of all extraordinary writ requests should be adjudicated within 35 days from the date of filing and 100% within 91 days.

5. *Matters Submitted to the Judge.*

Matters under submission to a judge or judicial officer should be promptly determined. Short deadlines should be set for party presentation of briefs and affidavits and for production of transcripts.

Decisions where possible should be made from the bench or within a few days of submission; except in extraordinarily complicated cases, a decision should be rendered not later than 35 days after submission.

IV. COURT DELAY REDUCTION PROGRAM.

Each court should have a program to reduce and prevent delay.

A. Essential ingredients of the program are:

1. A strong continuing judicial commitment to delay reduction, expressed in written goals and objectives to guide court operations.

2. A published case management plan detailing the delay reduction techniques, ultimate time goals and a transition program for reaching those goals where there is a backlog problem.

3. A system to furnish prompt and reliable information concerning the status of cases and case processing.

B. The program should be enhanced by:

1. Bar support and lawyer cooperation.

2. Adequate resources.

3. Utilization of special expertise.

4. Consideration of alternative methods of dispute resolution which would facilitate an earlier termination of actions.

C. Where unacceptable delay exists, there should be a published transition program designed to achieve these time goals. The transition program should include:

1. Assessment of the current caseload including backlog identification.

2. Analysis of productivity.

3. A conscious effort to use internal resources.

4. Utilization of special expertise.

5. Revision of rules and practices to implement the transition program.

6. A scheduled termination of the transition program with interim goals ultimately resulting in full implementation of the Section III time guidelines.

V. FIRM ENFORCEMENT.

The court should firmly and uniformly enforce its caseflow management and delay reduction procedures.

A. Continuance of a hearing or trial should be granted only by a judge for good cause shown. Extension of time for compliance with deadlines not involving a court hearing should be permitted only on a showing to the court that the extension will not interrupt the scheduled movement of the case.

B. Requests for continuances and extensions, and their disposition, should be recorded in the file of the case. Where continuances and extensions are requested with excessive frequency or insubstantial grounds, the court should adopt one or a combination of the following procedures:

1. Cross-referencing all requests for continuances and extensions by the name of the lawyer requesting them;

2. Requiring that requests for continuances and stipulations for extensions be endorsed in writing by the litigants as well as the lawyer.

3. Summoning lawyers who persistently request continuances and extensions to warn them of the possibility of sanctions and to encourage them to make necessary adjustments in management of their practice. Where such measures fail, restrictions may properly be imposed on the number of cases in which the lawyer may participate at one time.

C. Where a judge is persistently and unreasonably indulgent in granting continuances or extensions, the chief judge should take appropriate corrective action.

Order Entered September 16, 1986:

In re HAMMONS, No. 79133. This Court has received the decision and recommendation of the Judicial Tenure Commission in this matter together with the respondent's consent to the recommendation of the commission that he be publicly censured. After due consideration of this matter, this Court adopts as its own the findings of the commission, set forth as follows:

"(1) That respondent is now a magistrate of the 36th District Court, but at all times hereinafter mentioned was an attorney engaged in the private practice of law in the State of Michigan.

"(2) That on January 11, 1983, respondent was retained by Fredricko Campbell to represent him in a divorce action brought by Jennifer Campbell in Wayne County Circuit Court, Case No. 82-244295-DM.

"(3) That on January 11, 1983, respondent informed Mr. Campbell that his total fee for the litigation would be $450.00 and that he accepted a $200.00 retainer at that time.

"(4) That Mr. Campbell subsequently paid respondent an additional $225.00 in accordance with their agreement.

"(5) That despite respondent's retention by Mr. Campbell to represent him and his payment to respondent for that representation, respondent failed to appear for several noticed proceedings in the matter and in several instances failed to file responsive pleadings to plaintiff's motions.

"(6) That instances of the conduct described in paragraph (5) above include but are not limited to the following:

"(a) That on July 12, 1983, respondent failed to appear for the scheduled deposition of his client advising his client not to appear as well;

"(b) That in August, 1983, plaintiff filed a motion for order to show cause regarding certain wage matters. That an order to show cause was subsequently issued and a hearing noticed on the matter for

August 25, 1983, at 8:30 A.M. Further, that respondent failed to file a response to plaintiff's petition or to appear for the proceeding which resulted in a wage assignment being issued against his client;

"(c) That on November 11, 1983, respondent failed to appear for the rescheduled deposition of his client and again advised his client not to appear as well;

"(d) That on November 30, 1983, plaintiff's motions to compel discovery and to remove the defendant from the marital home were filed. That respondent failed to file a responsive pleading to these motions or to appear for the hearing on these matters noticed for December 8, 1983, at 8:30 A.M.

"(e) That on December 14, 1983, an order was entered compelling defendant to submit to discovery. That, accordingly, the court-ordered deposition of respondent's client was scheduled for December 29, 1983. Further, that respondent failed to appear for the deposition and despite the court order, also advised his client not to appear assuring him that he was going to file a motion to quash the deposition which he never did;

"(f) That the hearing on the motion to remove the defendant from the marital home was adjourned until January 12, 1984, but that respondent again failed to file a responsive pleading to this motion or to appear to represent his client at the hearing on January 12; and

"(g) That on January 18, 1984, plaintiff filed a motion for order to show cause and contempt for failure to make discovery and for violation of court order and that an order to show cause was entered at a hearing on January 30, 1984, at which time the hearing on the matter was noticed for February 16, 1984. That, further, respondent again failed to file a responsive pleading or to appear for either proceeding, the latter of which resulted in a bench warrant being issued for his client's arrest.

"(7) That the conduct described in paragraphs 6(a) through (g) above constitutes:

"(a) Conduct clearly prejudicial to the administration of justice as defined by Const 1963, art 6, § 30, as amended and MCR 9.205;

"(b) Misconduct and grounds for disciplinary action within the meaning of MCR 9.104(1)-(4) in that such conduct constitutes the following:

"(1) conduct prejudicial to the administration of justice;

"(2) conduct that exposes the legal profession to obloquy, contempt, censure, and reproach;

"(3) conduct that is contrary to justice, ethics, honesty and good morals; and

"(4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court.

"(c) Conduct contrary to DR 1-102(A)(1), (4), and (6) of the Code of Professional Responsibility in that respondent has:

"(1) violated disciplinary rules;

"(2) engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation; and

"(3) engaged in other conduct that adversely reflected on his fitness to practice law.

"(d) Handling a legal matter without preparation adequate in the circumstances and neglect of a legal matter entrusted to him in violation of Canon 6 and DR 6-101(A)(2) and (3) of the Code of Professional Responsibility.

"(e) Failure to represent a client zealously within the bounds of the law and a failure to carry out a contract of employment causing prejudice or damage to a client contrary to Canon 7 and DR 7-101(A)(1), (2), and (3) of the Code of Professional Responsibility.

"(f) Disregard of a standing rule of the Court made in the course of a proceeding and advising a client to disregard a court order in violation of DR 7-106(A) of the Code of Professional Responsibility.

"(g) Conduct involving impropriety and the appearance of impropriety in violation of the Code of Professional Responsibility, Canon 9.

"(8) That on September 15, 1983, respondent was retained by Pamela Stinson through the payment of a $200 retainer, to represent her and her sister, Lynnese Taylor, in the probate of the estate of their deceased father, Robert Cairgle, Wayne County Case No. 755806.

"(9) That to assist respondent in his representation, Ms. Stinson and Ms. Taylor placed in his possession three insurance policies, a title to a truck and some rental income receipts.

"(10) That on September 16, 1983, respondent succeeded in having Ms. Stinson appointed as the temporary personal representative of the estate and promised her he would file the necessary petition to have the appointment made permanent. Further, that respondent failed to file the necessary documents or to appear for the hearing on the matter resulting in the appointment going to someone else on October 31, 1983.

"(11) That immediately following the hearing on October 31, 1983, Ms. Stinson and Ms. Taylor went to respondent's office demanding to see him and had him return with them to the probate court where the clerk informed respondent he would have to file a petition for Ms. Stinson's appointment as personal representative. Further, that although respondent assured Ms. Stinson he would file the petition within a week, one was never filed.

"(12) That subsequent to the October 31, 1983, hearing, Ms. Stinson placed numerous telephone calls to respondent at his office, but respondent failed to return these calls.

"(13) That although respondent represented he would file the necessary petition to resolve that Ms. Stinson and Ms. Taylor were the beneficiaries of a certain John Hancock Life Insurance Policy, respondent failed to do so.

"(14) That due to respondent's neglect Ms. Stinson and Ms. Taylor were forced to hire another attorney to act on their behalf. That

accordingly, Ms. Stinson requested that respondent return to her the papers which she and her sister had entrusted to him. Further, that although respondent made several promises to relinquish these items, he failed to do so and failed to return subsequent phone calls of both Ms. Stinson and the successor attorney.

"(15) That the conduct described in Paragraphs (8) through (14) above, if true, constitutes the following:

"(a) Conduct clearly prejudicial to the administration of justice as defined by Const 1963, art 6, § 30, as amended, and MCR 9.205;

"(b) Conduct violative of MCR 9.104(1)-(4) in that such conduct:

"(1) is prejudicial to the administration of justice;

"(2) exposes the legal profession and courts to obloquy, contempt, censure and reproach;

"(3) is contrary to justice, ethics, honesty and good morals, and;

"(4) violates the standards or rules of professional responsibility adopted by the Court.

"(c) Conduct contrary to DR 1-102(A)(1), (4), and (6) of the Code of Professional Responsibility in that respondent has:

"(1) violated disciplinary rules;

"(2) engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; and

"(3) engaged in other conduct that adversely reflected on respondent's fitness to practice law.

"(d) Failure to properly withdraw from employment contrary to DR 2-110(A)(2) in that respondent:

"(1) failed to take reasonable steps to avoid foreseeable prejudice to the rights of his client;

"(2) failed to give due notice to his client of his intent not to represent her; and

"(3) failed to deliver to the client all papers and property to which the client was entitled.

"(e) Handling a legal matter without preparation adequate in the circumstances and neglect of a legal matter entrusted to him in violation of Canon 6 and DR 6-101(A)(2) and (3) of the Code of Professional Responsibility.

"(f) Failure to represent a client zealously within the bounds of the law and a failure to carry out a contract of employment causing prejudice or damage to a client contrary to Canon 7 and DR 7-101(A)(2) and (3) of the Code of Professional Responsibility.

"(g) Failure to identify properties of a client and to place them in safekeeping and failure to maintain complete records of all properties of the client in his possession or to promptly deliver the properties back to a client in violation of DR 9-102(B)(2), (3), and (4).

"(h) Conduct involving impropriety and the appearance of impropriety in violation of the Code of Professional Responsibility, Canon 9.

"(16) In the course of its preliminary inquiry, as required by MCR 9.207(C), the commission gave written notice of the nature of the

charges being made in its letter of December 5, 1985, and considered respondent's reply letter of January 27, 1986, as well as respondent's answer to Formal Complaint No. 36 which was received on May 30, 1986.

"(17) The commission concludes that the appropriate sanction in this matter is public censure.

"(18) Respondent has agreed to and acquiesced in the commission's recommended disposition. This is evidenced by his signature on the document entitled "Acknowledgment, Stipulation, Consent and Concurrence of Respondent" which is attached to the commission's decision and recommendation for order of discipline."

This order shall stand as our public censure of the respondent. It is our expectation .that the conduct which gave rise to this complaint and subsequent proceedings will not be repeated.

It is further ORDERED that this file be maintained as a public record.

Ordered to be Published October 1, 1986:

PROPOSED AMENDMENTS OF MCR 2.108, 2.109, 2.114, 2.116, 2.625, 3.604, and PROPOSED NEW MCR 2.224. On order of the Court, this is to advise that the Court is considering whether to amend MCR 2.108, 2.109, 2.114, 2.116, 2.625, and 3.604 and whether to adopt proposed MCR 2.224. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

RULE 2.108. TIME.

(A) Time for Service and Filing of Pleadings.

(1)-(5) (Unchanged.)

(6) In an action alleging medical malpractice, unless the defendant has responded as provided in subrule (A)(1) or (2), the defendant must serve and file an answer within 21 days after being served with the notice of filing the security for costs or the affidavit in lieu of such security required by MCL 600.2912d; MSA 27A.2912(4).

(B)-(F) (Unchanged.)

RULE 2.109. SECURITY FOR COSTS.

(A) (Unchanged.)

(B) Medical Malpractice Actions. In an action alleging medical malpractice, the parties must file security for costs or an affidavit in lieu of such security as provided in MCL 600.2912d, 600.2912e; MSA 27A.2912(4), 27A.2912(5). Notice of filing the security or the affidavit must be promptly served on the opposing party. If the opposing party has appeared in the action, the notice may be served in the manner provided by MCR 2.107. If the opposing party has not appeared, the notice must be served in the manner provided by MCR 2.105. Proof of service of the notice must be promptly filed with the court.

(C)-(D) (Formerly [B]-[C]; redesignated, but otherwise .unchanged.)

RULE 2.114. SIGNATURES OF ATTORNEYS AND PARTIES; VERIFICATION; EFFECT; SANCTIONS.

(A)-(E) (Unchanged.)

(F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs under MCR 2.625.

RULE 2.116. SUMMARY DISPOSITION.

(A) (Unchanged.)

(B) Motion.

(1) A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule. A party against whom a defense is asserted may move under this rule for summary disposition of the defense. A request for dismissal without prejudice under MCL 600.2912c; MSA 27A.2912(3) must be made by motion under MCR 2.116 and MCR 2.119.

(2) (Unchanged.)

(C)-(J) (Unchanged.)

RULE 2.224. CHANGE OF VENUE IN TORT ACTIONS.

(A) Applicability of Other Rules. MCR 2.221-2.223 and 2.225-2.226 apply to tort actions except where they are inconsistent with this rule.

(B) Motion Required. The court may change venue only on motion of a party.

(C) County to Which Venue May Be Changed.

(1) If venue is changed because of hardship or inconvenience, the action may be transferred only to the county in which the moving party resides.

(2) If venue is changed because the action was brought where venue was not proper, the action may be transferred only to a county in which venue would have been proper.

(D) Costs. Costs are recoverable under this rule as provided in MCL 600.1629(2); MSA 27A.1629(2), and MCL 600.1653; MSA 27A.1653.

(E) Discretion to Retain Action. When a motion for change of venue is based on a claim that venue is improper, the court may retain the action for the convenience of the parties and witnesses.

RULE 2.625. TAXATION OF COSTS.

(A) Right to Costs.

(1) In General. Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

(2) Frivolous Claims and Defenses. If the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591; MSA 27A.2591.

(B)-(I) (Unchanged.)

RULE 3.604. BONDS.

(A)-(C) (Unchanged.)

(D) Affidavit of Surety; Notice of Bond.

(1)-(3) (Unchanged.)

(4) In an action alleging medical malpractice, notice of the filing of security for costs or the affidavit in lieu of such security, required by MCL 600.2912d, 600.2912e; MSA 27A.2912(4), 27A.2912(5), shall be given as provided in MCR 2.109(B).

(E)-(L) (Unchanged.)

Staff Comment: The proposed amendments of MCR 2.108, 2.109, 2.114, 2.116, 2.625, 3.604 and proposed new MCR 2.224 are related to certain of the provisions of 1986 PA 178.

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

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court clerk within 30 days after it is published in the Michigan Bar Journal.

Rehearings Denied October 3, 1986:

CARR v GENERAL MOTORS CORPORATION, No. 74825. Reported at 425 Mich 313.

LEVIN and ARCHER, JJ., would grant rehearing upon the basis of the meritorious arguments made in the briefs filed by amici curiae Michigan Civil Rights Commission and Michigan Department of Civil Rights; Michigan Trial Lawyers Association; Easter Seal Society of Michigan, Inc.; Women Lawyers Association of Michigan; Asbestos Victims of America; Michigan Association of Human Rights; Michigan Lupus Foundation; and Michigan Protection and Advocacy Service.

COBURN v FOX, No. 74502. Reported at 425 Mich 300.

Ordered to be Published November 17, 1986:

PROPOSED AMENDMENT OF MCR 7.215. On order of the Court, this is to advise that the Court is considering whether to amend MCR 7.215. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

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

RULE 7.215. OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FROM COURT OF APPEALS.

(A)-(C) (Unchanged.)

(D) Requesting Publication.

(1) Any person may request publication of an opinion not designated for publication by

(a) filing with the clerk 4 copies of a letter stating why the opinion should be published, and

(b) mailing a copy to each party to the appeal not joining in the request.

(2) Any party served with a copy of the request may file a response within 14 days in the same manner as provided in subrule (D)(1).

(3) Promptly after the expiration of the time provided in subrule (D)(2), the clerk shall submit the request, and any response that has been received, to the panel that filed the opinion, which shall decide whether to direct that the opinion be published.

(4) The Court of Appeals may not decide to grant a request for publication

(a) more than 182 days after release of the unpublished opinion, or

(b) if the Supreme Court has denied an application for leave to appeal or a request for review under MCR 7.303 in the case.

(E)-(H) (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 MCR 1.201. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the Michigan Bar Journal.

Ordered to be Published December 2, 1986:

PROPOSED AMENDMENT OF MCR 9.205. On order of the Court, this is to advise that the Court is considering whether to amend MCR 9.205. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

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

RULE 9.205. STANDARDS OF JUDICIAL CONDUCT.

(A) (Unchanged.)

(B) Grounds for Discipline. A judge is subject to censure, suspension, retirement, or removal for misconduct in office as defined by subrule (C) or because of disability as defined in subrule (D)

(C) (Unchanged.)

(D) Disability. A judge is subject to suspension, retirement, or removal from office for physical or mental disability which significantly interferes with the capacity to perform his or her judicial duties.

(E) (Unchanged.)

Staff Comment: The proposed changes in MCR 9.205 would permit greater flexibility in responding to the problems caused by a judge's disability.

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

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the Michigan Bar Journal.

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1. The rules articulated in *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567 (1984), apply to all cases commenced after January 22, 1985, and to those cases pending either in trial or appellate courts on January 22, 1985, in which a governmental immunity issue was properly raised and preserved. *Hyde v Univ of Michigan Regents,* 426 Mich 223.
2. Activities conducted by a governmental agency primarily for the purpose of producing a pecuniary profit and which are not normally supported by taxes or fees are proprietary functions to which governmental immunity does not apply (MCL 691.1413; MSA 3.996[113]). *Hyde v Univ of Michigan Regents,* 426 Mich 223.

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3. In cases commenced after January 22, 1985, invoking causes of action accruing prior to July 1, 1986, and cases pending in trial or appellate courts on January 22, 1985, in which a governmental immunity issue was properly raised and preserved, a public general hospital or medical facility is engaged in the exercise or discharge of a governmental function and thus immune from liability in tort to the extent that the diagnosis, treatment, and care of its patients were activities expressly or impliedly mandated or authorized by constitution, statute, or other law (MCL 691.1407; MSA 3.996[107]). *Hyde v Univ of Michigan Regents,* 426 Mich 223.
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the claim with reasonable diligence (MCL 500.3145; MSA 24.13145). *Lewis v DAIIE,* 426 Mich 93.

5. *A person who brings an action to recover personal protection benefits may not recover benefits for any portion of the loss incurred more than one year prior to the commencement of the suit (MCL 500.3145[1]; MSA 24.13145[1]). Lewis v DAIIE,* 426 Mich 93.

6. An out-of-state vehicle not required to be registered in Michigan and not operated within the state for more than thirty days in a calendar year is not subject to the security or payment priority provisions of the no-fault act; where an employee is injured while an occupant of such a vehicle owned by an employer, the personal automobile insurer of the employee is liable to pay personal protection benefits (MCL 500.3101[1], 500.3102[1], 500.3114; MSA 24.13101[1], 24.13102[1], 24.13114). *Parks v DAIIE,* 426 Mich 191.

7. Entry by the state into a reciprocal compact with another state regarding the operation and registration of trailers in interstate commerce rendered a trailer which was not required to be registered in Michigan under the compact not subject to the mandatory security requirement of the no-fault act (MCL 500.3101[1]; MSA 24.13101[1]). *Parks v DAIIE,* 426 Mich 191.

8. Owners or registrants of motor vehicles required to be registered in Michigan must maintain security for payment of personal protection benefits; nonresident owners or registrants of motor vehicles not registered in the state may not operate or permit such vehicles to be operated within the state for more than thirty days in any calendar year unless security for payment of benefits is continuously maintained (MCL 500.3101[1], 500.3102[1]; MSA 24.13101[1], 24.13102[1]). *Parks v DAIIE,* 426 Mich 191.

9. A person entitled to no-fault benefits may obtain benefits from the Assigned Claims Facility where no personal protection insurance is applicable to the injury, no such insurance can be identified, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of one or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed (MCL 500.3172; MSA 24.13172). *Parks v DAIIE,* 426 Mich 191.

10. *Where an employer's vehicle is not insured the no-fault insurer of an injured employee's personal automobile is liable for payment of personal protection insurance benefits; however, where an employer's vehicle is insured, including situations in which the vehicle is self-insured, the employer's insurer is liable to pay such benefits (MCL 500.3114; MSA 24.13114). Parks v DAIIE,* 426 Mich 191.

11. *An employee need only show that an injury occurred while occupying a motor vehicle owned or registered by the employer to recover personal protection insurance benefits from the employer's insurer; the employer's vehicle is not required to be registered in the state or subject to the state's no-fault manda-*

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tory security provisions (MCL 500.3114[1], [3]; MSA 24.13114[1], [3]). Parks v DAIIE, 426 Mich 191.

12. An insurer of the spouse of an injured person and the insurer of a relative in whose household the injured person, who is not named in either policy, is domiciled are in the same order of priority to pay personal protection insurance benefits; an insurer that pays benefits under such circumstances is entitled to partial recoupment from the other (MCL 500.3114[1], 500.3115; MSA 24.13114[1], 24.13115). *Michigan Mutual Ins v Allstate,* 426 Mich 346.

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13. Good-faith denials, offers of compromise, or other honest errors of judgment by an insurer made in attempts to settle a claim are not sufficient to establish bad faith with respect to an insured; nor can claims of bad faith by the insurer be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment; however, bad faith can exist without actual dishonesty or fraud. *Comm Union v Liberty Mutual,* 426 Mich 127.

14. In determining whether liability exists for bad faith in an attempt by an insurer to settle a claim, a trial court may supplementally instruct the jury, where applicable in a given case, to consider whether the insurer failed to keep the insured fully informed of all developments in the claim or suit that could reasonably have affected the interests of the insured, failed to inform the insured of all settlement offers that did not fall within policy limits, failed to solicit a settlement offer or initiate settlement negotiations when warranted by the circumstances, failed to accept a reasonable compromise offer of settlement where the facts of the case or claim indicated obvious liability and serious injury, rejected a reasonable offer of settlement within policy limits, unduly delayed in accepting a reasonable offer to settle a potentially dangerous case within policy limits where the verdict potential was high, attempted to coerce or obtain an involuntary contribution from the insured in order to settle within the policy limits, failed to make a proper investigation of the claim prior to refusing an offer of settlement within policy limits, disregarded advice or recommendations of an adjuster or attorney, was seriously and recurrently negligent, refused to settle a case within policy limits following an excessive verdict when the chances of reversal on appeal were slight or doubtful, and failed to take an appeal following a verdict in excess of the policy limits where there were reasonable grounds for such an appeal, especially where recommended by trial counsel. *Comm Union v Liberty Mutual,* 426 Mich 127.

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15. A primary insurer did not owe a direct duty to an excess insurer to act in good faith to defend or settle a claim against a common insured; the excess insurer's cause of action against the primary insurer for loss as a result of the primary insurer's

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INTERSTATE COMPACTS—*See*
INSURANCE 7

INVALIDATION—*See*
TAXATION 1

JONES ACT—*See*
ADMIRALTY 1-3

JUDICIAL DISCRETION—*See*
NEGLIGENCE 2

JUDICIAL REVIEW—*See*
ARBITRATION 2

JURY INSTRUCTIONS—*See*
DAMAGES 1
INSURANCE 2
NEGLIGENCE 1, 2

LAND CONTRACTS—*See*
MORTGAGES 1
PROPERTY 1

LAYOFF—*See*
SCHOOLS 3, 4

LICENSES.
GAMING DEVICES.
1. A draw poker machine which required insertion of money to play, employed chance in the random distribution of playing cards, and provided a reward in the form of free replays, and which did not qualify as an exempt amusement device because it allowed the accumulation of more than fifteen replays, allowed free replays to be discharged without actually being played, and kept a permanent record of the number of free replays awarded was an illegal gaming device (MCL 750.303[1], [2]; MSA 28.535[1], [2]). *Automatic Music v Liquor Comm,* 426 Mich 452.

LIFE INSURANCE—*See*
INSURANCE 3

LIMITATION OF ACTIONS—*See*
INSURANCE 4, 5

MALICIOUS PROSECUTION.

PROBABLE CAUSE.

1. In an action for malicious prosecution, absent a dispute of fact, the question of probable cause is a question of law to be determined by the court. *Koski v Vohs,* 426 Mich 424.

TREBLE DAMAGES.

2. An award of treble damages for malicious prosecution under § 2907 of the Revised Judicature Act may be had only in actions in which a party brings suit against a person who had instituted proceedings against that party in another's name, without the named person's consent, or where no such person is known (MCL 600.2907; MSA 27A.2907). *Camaj v S S Kresge Co,* 426 Mich 281.

3. *Where an action underlying an action for malicious prosecution was brought by a prosecutor in the name of the people without a knowing, intelligent, and informed decision, free from false assertions by the giver of information, there was no consent on the part of the people, and the plaintiff should be entitled to recover treble damages (MCL 600.2907; MSA 27A.2907). Camaj v S S Kresge Co,* 426 Mich 281.

MANDATORY SECURITY—*See*
INSURANCE 7, 8

MEDICAL MALPRACTICE—*See*
ESTOPPEL 1

MOBILE HOMES—*See*
ZONING 3.

MORTGAGES.

LAND CONTRACTS.

1. A provision in a due-on-sale clause of a mortgage instrument that liens or encumbrances subordinate to the mortgage would not amount to a sale or transfer of the security property, and thus not trigger acceleration provisions of the clause, was not intended to apply to liens created only as a result of the execution by the mortgagor of a land contract which had as its primary purpose the transfer or sale of the property. *Darr v First Federal S & L,* 426 Mich 11.

MOTORCYCLES—*See*
NEGLIGENCE 1

MUNICIPAL CORPORATIONS—*See*
TAXATION 3

NEGLIGENCE.

See, also, ADMIRALTY 2.

JURY INSTRUCTIONS.

1. Where evidence is presented which raises an issue regarding a driver's incompetence or inexperience as a causal factor in an

NEGLIGENCE—Cont'd
accident, the jury may be instructed that it may draw an inference of negligence from the violation of a licensing statute and to decide whether such negligence was in fact a proximate cause of the accident. *Klanseck v Anderson Sales,* 426 Mich 78.
2. The use of a statutory violation to establish negligence is a matter of judicial discretion; however, the relevance of the violation must be specifically established; factors which the court may apply in determining relevance are whether the statute is intended to protect against the result of the violation, the plaintiff is within the class intended to be protected by the statute, and the evidence will support a finding that the violation was a proximate contributing cause of the occurrence. *Klanseck v Anderson Sales,* 426 Mich 78.
VIOLATION OF PENAL STATUTE.
3. Evidence of violation of a penal statute creates a presumption of negligence which may be rebutted by evidence of a legally sufficient excuse for the violation; absent such excuse, a jury may infer negligence on the basis of the violation and then determine whether the violation was a proximate cause of an accident. *Klanseck v Anderson Sales,* 426 Mich 78.

NO-FAULT—*See*
INSURANCE 4-12

OUT-OF-STATE VEHICLES—*See*
INSURANCE 6-8, 11

PAROCHIAL SCHOOLS—*See*
CONSTITUTIONAL LAW 3

PATERNITY—*See*
DIVORCE 1

PERSONAL INJURY—*See*
DAMAGES 2, 3
WORKERS' COMPENSATION 1

PREARREST SILENCE—*See*
CRIMINAL LAW 1-4

PREFABRICATED DWELLINGS—*See*
ZONING 3

PRESUMPTION OF NEGLIGENCE—*See*
NEGLIGENCE 3

PRIMARY INSURERS—*See*
INSURANCE 15, 16

PRIORITY OF INSURERS—*See*
INSURANCE 12

PROBABLE CAUSE—*See*
MALICIOUS PROSECUTION 1

PROPERTY.
REALTY.
1. The primary purpose of a land contract is the sale and purchase of land. *Darr v First Federal S & L,* 426 Mich 11.

PROPRIETARY FUNCTION—*See*
GOVERNMENTAL IMMUNITY 2

PUBLIC HOSPITALS—*See*
GOVERNMENTAL IMMUNITY 3-5

PUBLIC UTILITIES.
HIGHWAYS.
1. The determination of the question whether a private utility company which placed a utility pole in the median of a highway owed a duty of reasonable care to the occupant of a vehicle which left the traveled portion of the highway and struck the pole depended in part on the resolution of the question of foreseeability; where reasonable minds may differ regarding the application of the reasonableness of the risk of harm, the question is best left to the jury. *McMillan v State Hwy Comm,* 426 Mich 46.
2. *A utility should be held to have acted reasonably in light of the risk of harm in erecting utility poles in or near a public highway where it is shown that with public authorization and specific approval it erected the poles without dangerously and unreasonably obstructing highway travel in the ordinary course. McMillan v State Hwy Comm,* 426 Mich 46.

QUESTIONS OF FACT—*See*
PUBLIC UTILITIES 1

QUESTIONS OF LAW—*See*
MALICIOUS PROSECUTION 1

REALTY—*See*
PROPERTY 1

REASONABLE USE OF LAND—*See*
ZONING 1, 2

RECALL—*See*
SCHOOLS 3, 4

REDUCTION TO PRESENT VALUE—*See*
DAMAGES 2

REINSTATEMENT—*See*
SCHOOLS 2

RELEVANCE—*See*
NEGLIGENCE 2

REMEDIES—*See*
ZONING 1

RES JUDICATA—*See*
DIVORCE 1

REZONING—*See*
ZONING 2

SCHOOLS.
See, also, ARBITRATION 1-3.
ADMINISTRATIVE LAW.
1. Review of all questions of fact and law regarding the discharge of a tenured teacher must be made de novo by the Teacher Tenure Commission (MCL 38.139; MSA 15.2039). *Ferrario v Escanaba Bd of Ed,* 426 Mich 353.
2. The Teacher Tenure Commission should neither order the reinstatement of nor award back pay to a discharged tenured teacher until it reaches a decision on the merits; should either party appeal the decision of the commission, an award of back pay or an order of reinstatement will be held in abeyance pending the completion of all appeals. *Ferrario v Escanaba Bd of Ed,* 426 Mich 353.
TEACHER TENURE ACT.
3. Neither the teacher tenure act nor due process requires a full evidentiary hearing by a school board before the board may remove from a recall list the name of a laid-off teacher who has abandoned the right to recall (US Const, Am XIV, Const 1963, art 1, § 17, MCL 38.105; MSA 15.2005). *Tomiak v Hamtramck School Dist,* 426 Mich 678.
4. At the time of layoff, a tenured teacher has a right to recall; tenure rights in the original school district are entirely dependent upon the right to recall, and an abandonment of the right to recall is a resignation of the dependent tenure rights in the original school district (MCL 38.105, 38.111; MSA 15.2005, 15.2011). *Tomiak v Hamtramck School Dist,* 426 Mich 678.

SERVICE OF PROCESS—*See*
ESTOPPEL 1

SETTLEMENT OF CLAIMS—*See*
INSURANCE 13, 14

SPECIAL ASSESSMENTS—*See*
TAXATION 1-5

SPECIAL BENEFITS—*See*
TAXATION 4, 5

SUBROGATION—*See*
INSURANCE 15, 16

TAXATION.

SPECIAL ASSESSMENTS.

1. Decisions by municipalities with respect to special assessment of property generally will be upheld; however, assessments will be invalidated where a substantial or unreasonable disproportionality exists between the amount assessed and the value which accrues to the land as a result of improvement. *Dixon Road Group v Novi,* 426 Mich 390.
2. A special assessment must be supported by a showing of an increase in the market value of the assessed property reasonably proportional to the cost incurred; it is insufficient to show only that the property was relieved of a burden or was made specially adaptable to a purpose which would enhance its value. *Dixon Road Group v Novi,* 426 Mich 390.
3. *The creation of a special assessment district by a municipality enjoys a presumption of validity; whether any benefit will accrue, or the amount of benefit, is best decided by the body imposing the assessment, and where a municipality acts in good faith, has good reason to believe that benefits will accrue as a result of an assessment, and there is no showing of fraud, mistake, discrimination, or a clear absence of benefits, courts will be reluctant to interfere. Dixon Road Group v Novi,* 426 Mich 390.
4. *Special assessments for improvements of property should be based on special benefits to the land assessed; a municipality's determination of the existence and extent of special benefits is presumed valid and may be based upon an increase in value, relief of burdens to the land, or creation of special adaptabilities in the land which enhance the value of the land. Dixon Road Group v Novi,* 426 Mich 390.
5. *Inquiry whether certain property will be benefited by a particular improvement resulting from a special assessment should not be limited to present use of the property, but should extend to potential use, including use rendered more feasible by the improvement. Dixon Road Group v Novi,* 426 Mich 390.

TEACHER CERTIFICATION—*See*
CONSTITUTIONAL LAW 3

TEACHER TENURE ACT—*See*
SCHOOLS 3, 4

TEACHER TENURE COMMISSION—*See*
SCHOOLS 1, 2

TOLLING—*See*
INSURANCE 4

TREBLE DAMAGES—*See*
MALICIOUS PROSECUTION 2, 3

UTILITY POLES—*See*
PUBLIC UTILITIES 1, 2

VAGUENESS—*See*
CONSTITUTIONAL LAW 1

VALUE ACCRUING TO LAND—*See*
TAXATION 1, 2

VIOLATION OF PENAL STATUTE—*See*
NEGLIGENCE 1-3

WORKERS' COMPENSATION.
PERSONAL INJURY.
1. *Gacioch v Stroh Brewery Co,* 426 Mich 612.

WRONGFUL DEATH—*See*
DAMAGES 2, 3

ZONING.
CONSTITUTIONAL LAW.
1. A court, after declaring a zoning ordinance to be unconstitutional, additionally may declare a proposed land use reasonable and enjoin interference with the use, where the plaintiff has shown the use to be reasonable by a preponderance of the evidence. *Schwartz v City of Flint,* 426 Mich 295.
2. A zoning authority is free to rezone upon a declaration that an existing ordinance is unconstitutional; where a proposed use additionally has been shown to be reasonable, rezoning must be consistent with the limiting conditions of the proposed use. *Schwartz v City of Flint,* 426 Mich 295.
MOBILE HOMES.
3. *Tyrone Twp v Crouch,* 426 Mich 642.