Michigan. Court of Appeals.

# MICHIGAN APPEALS REPORTS

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CASES DECIDED

IN THE

# MICHIGAN COURT OF APPEALS

FROM

July 20, 1993 to October 4, 1993

WILLIAM F. HAGGERTY
REPORTER OF DECISIONS

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# TABLE OF CASES REPORTED

(For a list of cases released out of sequence see p xii).

---

A


| | PAGE |
|---|---|
| Ackerman v General Motors Corp | 658 |
| Allen, People v | 98 |
| Americana Superfood, Inc v City of Detroit | 54 |
| American Community Mutual Ins Co, Legel v | 617 |
| Apex Drug Stores, Inc, Simmons v | 250 |
| Auto Club Ins Ass'n, Katinsky v | 167 |
| Auto Club Ins Ass'n, Verbison v | 635 |
| Auto-Owners Ins Co v Hoadley | 555 |
| Auto-Owners Ins Co, Hoadley v | 555 |
| Auto-Owners Ins Co, Lee v | 39 |


B


| | |
|---|---|
| Biggies Wolf Den, Inc, Herron v | 599 |
| Blake, Simko v | 191 |
| Brandt, Pernick v | 293 |
| Bushnell, Gage, Reizen & Byington, Teodorescu v (On Remand) | 260 |
| Butterball Farms Co, Inc, Phillips v (On Second Remand) | 663 |
| Butzer v Camelot Hall Convalescent Centre, Inc (After Remand) | 275 |


C


| | |
|---|---|
| Cade, People v (After Remand) | 459 |
| Camelot Hall Convalescent Centre, Inc, Butzer v (After Remand) | 275 |

PAGE
Carney-Nadeau Public Schools, Jenkins v.... 142
Carter, Dep't of Social Services v..... 643
Carter Crompton Site Development Contractors, Inc, Vermilya v..... 467
Chandler, People v..... 611
Charles Murphy, MD, PC v City of Detroit... 54
Chevron Chemical Co, Moody v..... 232
Chrysler Corp, Mason v..... 17
Chrysler Corp, Weems v..... 309
Citizens Ins Co of America, United States Fidelity & Guaranty Co v..... 491
City Disposal Systems, Inc, Huron Twp v.... 210
City of Detroit, Charles Murphy, MD, PC v.. 54
City of Melvindale v Trenton Warehouse Co 497
Coldwell Banker Schweitzer Real Estate Services, Royal York of Plymouth Ass'n v.... 301
Coleman, Crego v..... 443
Comerica Bank, Dep't of Treasury v..... 318
Conservatorship of Halbeck, *In re*..... 387
Corrections (Dep't of), Martin v (On Remand) 331
Cottrell, People v..... 256
Cramer, People v..... 590
Crego v Coleman..... 443
Cunningham, People v..... 720

D

Dabrowski v Secretary of State..... 218
Davis v Wayne Co Sheriff..... 572
Dep't of Corrections, Martin v (On Remand) 331
Dep't of Social Services v Carter..... 643
Dep't of Social Services, Hardges v..... 24
Dep't of Transportation v Schultz..... 605
Dep't of Treasury v Comerica Bank..... 318
Deters, Otto v..... 387
Detroit (City of), Americana Superfood, Inc v 54
Detroit (City of), Charles Murphy, MD, PC v 54
Detroit Police Chief, Jackson v..... 173

PAGE

Douglas v General Motors Corp ..... 501

E

East Jackson Public School Dist, Knoke v ... 480
Eddie v Eddie ..... 509
Esber, Gerrish Twp v ..... 532

F

Fealk, Lemmerman v ..... 544
Fellows v Superior Products Co ..... 155
First of Chelsea Corp, Kleanthous v ..... 440
Frankenmuth Mutual Ins Co, Heniser v ..... 70

G

Garcia v McCord Gasket Corp ..... 697
Gelman, PC (Sandor M), George v ..... 474
General Motors Corp, Ackerman v ..... 658
General Motors Corp, Ypsilanti Twp v ..... 128
General Motors Corp, Douglas v ..... 501
George v Sandor M Gelman, PC ..... 474
Gerrish Twp v Esber ..... 532
Ginther v Ovid-Elsie Area Schools ..... 30
Girl Scout Council (Michigan Metro), Reed v 10
Glazer v Lampkin ..... 432
Grubor Enterprises, Inc v Kortidis ..... 625

H

Halbeck, *In re* Conservatorship of ..... 387
Hardges v Dep't of Social Services ..... 24
Harris v Harris ..... 65
Harris, People v ..... 147
Heniser v Frankenmuth Mutual Ins Co ..... 70
Herron v Biggies Wolf Den, Inc ..... 599
Hicks, People v ..... 197
Hoadley, Auto-Owners Ins Co v ..... 555
Hoadley v Auto-Owners Ins Co ..... 555
Holland Motor Express, Inc, McDonald v .... 285
Holland Motor Express, Ridge v ..... 505
Hunter, People v ..... 671

PAGE
Huron Twp v City Disposal Systems, Inc .... 210
Huron Twp v Inland Waters Pollution Control, Inc ..... 210

I

Inland Waters Pollution Control, Inc, Huron Twp v ..... 210
*In re* Conservatorship of Halbeck ..... 387
*In re* Loose ..... 361
*In re* Mensinger Estate ..... 290

J

Jackson v Detroit Police Chief ..... 173
Jackson, People v ..... 147
Jenkins v Carney-Nadeau Public Schools .... 142
Jones (Sean), People v (On Rehearing) ..... 449
Jones (Steve), People v ..... 687

K

Katinsky v Auto Club Ins Ass'n ..... 167
Keeth, Petraszewsky v (On Remand) ..... 535
Kleanthous v First of Chelsea Corp ..... 440
Knoke v East Jackson Public School Dist .... 480
Kortidis, Grubor Enterprises, Inc ..... 625

L

Lamb, People v (After Remand) ..... 178
Lampkin, Glazer v ..... 432
Larrabee v Sachs ..... 107
Lavearn, People v ..... 679
Lee v Auto-Owners Ins Co ..... 39
Legel v American Community Mutual Ins Co 617
LeMarbe, People v (After Remand) ..... 45
Lemmerman v Fealk ..... 544
Lester v Robinson ..... 290
Loose, *In re* ..... 361
Lucas, People v (After Remand) ..... 717

M

PAGE
Martin v Dep't of Corrections (On Remand).. 331
Mason v Chrysler Corp..... 17
Maurer v Oakland Co Parks & Recreation Dep't (On Remand)..... 223
McCord Gasket Corp, Garcia v..... 697
McCullum, People v..... 463
McDonald v Holland Motor Express, Inc..... 285
McDonald, People v..... 270
Melvindale (City of) v Trenton Warehouse Co 497
Mensinger Estate, *In re*..... 290
Merriweather, People v..... 383
Michigan Bell Telephone Co, Smith v (On Remand)..... 369
Michigan Metro Girl Scout Council, Reed v.. 10
Montrose, People v (On Remand)..... 378
Moody v Chevron Chemical Co..... 232
Murphy, MD, PC (Charles) v City of Detroit 54

N

Neal, People v..... 650
Nigro v Secretary of State..... 218
Norman v Norman..... 182

O

Oakland Co Parks & Recreation Dep't, Maurer v (On Remand)..... 223
Oatman, People v..... 402
Otto v Deters..... 387
Ovid-Elsie Area Schools, Ginther v..... 30
Oxendine, People v..... 372

P

People v Allen..... 98
People v Cade (After Remand)..... 459
People v Chandler..... 611
People v Cottrell..... 256
People v Cramer..... 590
People v Cunningham..... 720

PAGE
People v Harris ..... 147
People v Hicks ..... 197
People v Hunter ..... 671
People v Jackson ..... 147
People v Jones (Sean) (On Rehearing) ..... 449
People v Jones (Steve) ..... 687
People v Lamb (After Remand) ..... 178
People v Lavearn ..... 679
People v LeMarbe (After Remand) ..... 45
People v Lucas (After Remand) ..... 717
People v McCullum ..... 463
People v McDonald ..... 270
People v Merriweather ..... 383
People v Montrose (On Remand) ..... 378
People v Neal ..... 650
People v Oatman ..... 402
People v Oxendine ..... 372
People v Perry ..... 347
People v Powell ..... 516
People v Ratkov (After Remand) ..... 123
People v Rhinehardt ..... 1
People v Rosen ..... 621
People v Siebert ..... 402
People v Thew ..... 78
People v Thomas (Griel) ..... 111
People v Thomas (Mary Lee) ..... 111
People v Todd (On Remand) ..... 216
People v Wood ..... 58
Pernick v Brandt ..... 293
Perry, People v ..... 347
Petraszewsky v Keeth (On Remand) ..... 535
Phillips v Butterball Farms Co, Inc (On Second Remand) ..... 663
Powell, People v ..... 516

R

Ratkov, People v (After Remand) ..... 123
Reed v Michigan Metro Girl Scout Council .. 10

PAGE

Rhinehardt, People v ..... 1
Ridge v Holland Motor Express ..... 505
Robinson, Lester v ..... 290
Rosen, People v ..... 621
Roth v Roth ..... 563
Royal York of Plymouth Ass'n v Coldwell Banker Schweitzer Real Estate Services ... 301

S

Sachs, Larrabee v ..... 107
Schultz, Dep't of Transportation v ..... 605
Secretary of State, Dabrowski v ..... 218
Secretary of State, Nigro v ..... 218
Siebert, People v ..... 402
Simko v Blake ..... 191
Simmons v Apex Drug Stores, Inc ..... 250
Smith v Michigan Bell Telephone Co (On Remand) ..... 369
Social Services (Dep't of) v Carter ..... 643
Social Services (Dep't of), Hardges v ..... 24
Superior Products Co, Fellows v ..... 155

T

Teodorescu v Bushnell, Gage, Reizen & Byington (On Remand) ..... 260
Thew, People v ..... 78
Thomas (Griel), People v ..... 111
Thomas (Mary Lee), People v ..... 111
Thompson v TNT Overland Express ..... 336
TNT Overland Express, Thompson v ..... 336
Todd, People v (On Remand) ..... 216
Transportation (Dep't of) v Schultz ..... 605
Treasury (Dep't of) v Comerica Bank ..... 318
Trenton Warehouse Co, City of Melvindale v 497

U

United States Fidelity & Guaranty Co v Citizens Ins Co of America ..... 491

PAGE

University of Michigan Bd of Regents, Weaver v ..... 239

V

Verbison v Auto Club Ins Ass'n ..... 635
Vermilya v Carter Crompton Site Development Contractors, Inc ..... 467

W

Wayne Co Sheriff, Davis v ..... 572
Weaver v University of Michigan Bd of Regents ..... 239
Weems v Chrysler Corp ..... 309
Wertz v Western Golf & Country Club (On Rehearing) ..... 4
Western Golf & Country Club, Wertz v (On Rehearing) ..... 4
Wood, People v ..... 58

Y

Ypsilanti Twp v General Motors Corp ..... 128

93 CASES

## CASES RELEASED OUT OF SEQUENCE

*February 23, 1993*

*In re* Mensinger Estate ..... 290
Lester v Robinson ..... 290

*March 18, 1993*

Ginther v Ovid-Elsie Area Schools ..... 30

*March 22, 1993*

Mason v Chrysler Corp ..... 17

PAGE

*March 25, 1993*

United States Fidelity & Guaranty Co v Citizens Ins Co of America ..... 491

*March 31, 1993*

Legel v American Community Mutual Ins Co 617
McDonald v Holland Motor Express, Inc..... 285

*April 8, 1993*

Hardges v Dep't of Social Services ..... 24

*April 14, 1993*

Reed v Michigan Metro Girl Scout Council .. 10

*April 27, 1993*

Fellows v Superior Products Co ..... 155

*May 11, 1993*

City of Melvindale v Trenton Warehouse Co 497

*May 20, 1993*

Butzer v Camelot Hall Convalescent Centre, Inc (After Remand) ..... 275

*May 24, 1993*

Pernick v Brandt ..... 293

*May 26, 1993*

Knoke v East Jackson Public School Dist.... 480

*July 26, 1993*

People v Chandler ..... 611

COURT OF APPEALS CASES

PEOPLE v RHINEHARDT

Docket No. 131615. Submitted April 15, 1993, at Grand Rapids. Decided July 20, 1993, at 9:00 A.M.

Johnny Rhinehardt was convicted by a jury in the Macomb Circuit Court, George R. Deneweth, J., of assault and assault with intent to do great bodily harm less than murder. He appealed, alleging that the court erred in allowing the prosecution to introduce a rebuttal witness after both parties had rested and completed their closing arguments.

The Court of Appeals *held:*

The trial court erred in allowing the prosecution to introduce the rebuttal witness. Such an error is so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless.

Reversed and remanded.

MURPHY, J., concurring in the result, stated that the determination whether an error such as this warrants reversal should be made on the basis of the facts of each particular case. Because it cannot be concluded that the error in this case was harmless beyond a reasonable doubt, the court abused its discretion in permitting the admission of the evidence.

CRIMINAL LAW — TRIAL — WITNESSES — ERROR REQUIRING REVERSAL.

It is error for a trial court to permit the prosecution to introduce a rebuttal witness after the parties have rested and completed their closing arguments; such an error is so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Carl J. Marlinga,* Prosecuting Attorney, *Robert J. Berlin,* Chief Appellate Lawyer, and *Laura M. Zawisa,* Assistant Prosecuting Attorney, for the people.

REFERENCES

Am Jur 2d, Appeal and Error §§ 517, 798, 808; Trial §§ 368, 369, 379.

See ALR Index under Appeal and Error.

*Ronald E. Kaplovitz,* for the defendant on appeal.

Before: NEFF, P.J., and MCDONALD and MURPHY, JJ.

PER CURIAM. Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and assault, MCL 750.81; MSA 28.276. Defendant appeals as of right. We reverse and remand.

Defendant claims that reversal is required because the prosecutor intentionally violated his right to a fair trial by introducing a rebuttal witness after both parties had rested and completed their closing arguments. We agree. Such an error is so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless. *People v Robinson,* 386 Mich 551, 563; 194 NW2d 709 (1972). We therefore reverse defendant's convictions and remand this case to the trial court for further proceedings.

In light of our resolution of this case, we need not address defendant's remaining arguments.

Reversed and remanded. We do not retain jurisdiction.

MURPHY, J. *(concurring).* I concur in the result reached by the majority opinion reversing defendant's convictions and remanding for further proceedings. However, I disagree with the view expressed by the majority that the trial court's error could never be regarded as harmless. Permitting the prosecution to call a witness after both parties had rested and completed closing arguments was highly unusual and inappropriate, to say the least. I would decline to establish a bright-line test that

such an error can never be regarded as harmless and would instead conclude that the determination whether an error such as this warrants reversal should be made on the basis of the facts of each particular case. In this case, the testimony of the witness related to the circumstances of the charged offense that belonged in the prosecution's case in chief, and was therefore improper rebuttal. See *People v Leo,* 188 Mich App 417, 422; 470 NW2d 423 (1991). Because I would not conclude that this error was harmless beyond a reasonable doubt, I would hold that the trial court abused its discretion in permitting the admission of this evidence. *Id.,* 424.

WERTZ v WESTERN GOLF & COUNTRY CLUB (ON REHEARING)

Docket Nos. 135759, 136170. Submitted October 13, 1992, at Lansing. Decided February 2, 1993, at 9:15 A.M. Submitted on rehearing April 5, 1993. Decided on rehearing July 20, 1993, at 9:05 A.M.

Etta M. Wertz sought workers' compensation for an injury she sustained during the course of her employment as a waitress with Western Golf & Country Club. A hearing referee found that Wertz' condition was aggravated more by her subsequent work for Western than by her subsequent work for Mark of Excellence Catering, where she held a second, similar job. Eventually, she became disabled from both jobs. The referee, applying the dual employment provision of the Workers' Disability Compensation Act, MCL 418.372; MSA 17.237(372), found Western liable for sixty-six percent of Wertz' benefits and the Second Injury Fund the remainder. The Workers' Compensation Appeal Board modified the referee's decision, finding that Wertz had sustained separate injuries during the course of her employment with Western and Mark of Excellence, that § 372 did not apply, and that the Second Injury Fund was relieved of liability. The WCAB ordered Western and Mark of Excellence to pay compensation based on their proportionate liabilities. Western and its workers' compensation insurer, Firemen's Fund Insurance Company, and Mark of Excellence and its workers' compensation insurer, Employers Insurance of Wausau, appealed by leave granted. The appeals were consolidated. The Court of Appeals, MURPHY, P.J., and GRIBBS and FITZGERALD, JJ., reversed the decision of the WCAB, finding that the evidence showed that Wertz sustained only one injury, during the course of her employment with Western, and that the injury eventually disabled her from both jobs. The Court also determined that § 372 applied in this case. As a result, liability was placed on Western and the Second Injury Fund instead of on Western and Mark of Excellence. Following revision of the opinion released by the Court of Appeals, the revised opinion was published. 198 Mich App 189 (1993). The Court of Appeals subsequently granted motions for rehearing brought by Wertz and the Second Injury Fund.

On rehearing, the Court of Appeals *held:*

The plaintiff sustained an initial injury on December 30,

1981, while in Western's employ. Her subsequent work for Western, and Western only, resulted in a disability date of June 2, 1983. Because § 372 has prospective effect from January 1, 1982, § 372 was applied properly in this case. Liability for the plaintiff's benefits rests with Western and the Second Injury Fund. The plaintiff is entitled to an enforceable order specifying the amount of benefits to which she is entitled and defining the liability of Western and the Second Injury Fund. The action must be remanded to the Workers' Compensation Appellate Commission, the successor of the WCAB, for entry of an order applying the law as found by the Court of Appeals and specifying the benefits to which the plaintiff is entitled.

Reversed and remanded.

*Sachs, Waldman, O'Hare, Helveston, Hodges & Barnes, P.C.* (by *Granner S. Ries*), for the plaintiff.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, and *Morrison Zack,* Assistant Attorney General, for the Second Injury Fund.

*Conklin, Benham, Ducey, Listman & Chuhran, P.C.* (by *Martin L. Critchell*), for Western Golf & Country Club and Firemen's Fund Insurance Company.

*Law Offices of Marvin H. Gadd* (by *Michael J. Barney*), for Mark of Excellence Catering and Employers Insurance of Wausau.

ON REHEARING

Before: MURPHY, P.J., and GRIBBS and FITZGERALD, JJ.

PER CURIAM. Plaintiff and the Second Injury Fund sought and were granted rehearing of this Court's opinion per curiam in *Wertz v Western Golf & Country Club,* 198 Mich App 189; 497 NW2d 567 (1993). We now clarify and expand that opinion.

In this case, a hearing referee found that plaintiff sustained an injury during the course of her employment as a waitress for Western Golf & Country Club. The referee found that plaintiff's condition was aggravated more by her subsequent work for Western than by her subsequent work for Mark of Excellence Catering, where plaintiff held a second, similar job. Plaintiff was ultimately disabled from both jobs. Applying MCL 418.372; MSA 17.237(372), the dual employment provision, the referee found that Western was liable for sixty-six percent of the benefits to which plaintiff was entitled, and that the Second Injury Fund was liable for the remainder of the benefits.

The Workers' Compensation Appeal Board modified the referee's decision. The WCAB found that plaintiff had sustained an injury during the course of her employment with Western, and had sustained a separate injury during the course of her employment with Mark of Excellence. The WCAB found that § 372 did not apply in this case because that provision applies when one of two concurrent employers can be held liable for benefits. The WCAB applied *Hairston v Firestone Tire & Rubber Co,* 404 Mich 104; 273 NW2d 400 (1978). In that case, the plaintiff sustained separate injuries, one at each employer. Each injury disabled the plaintiff from the job on which it occurred. The plaintiff was found to be entitled to benefits from both employers. In the instant case, the WCAB ordered Western and Mark of Excellence to pay compensation based on their proportionate liabilities. The Second Injury Fund was relieved of liability.

In *Wertz, supra,* we reversed the decision of the WCAB. This Court found that the evidence showed that plaintiff sustained only one injury, during the course of her employment for Western, and that that injury eventually disabled plaintiff from both

jobs. We concluded that § 372 applied in this case, and that this case was distinguishable from *Hairston, supra.*

Originally, the last three lines of this Court's opinion read as follows: "The WCAB's decision is reversed and the hearing referee's application of § 372 and decision is reinstated. Reversed."

Subsequently, this Court, on its own motion, revised its published opinion. The last sentence of the first paragraph, which originally read "We reverse and reinstate the hearing referee's decision," was stricken and in its place was substituted the line "We reverse the decision of the WCAB." The last three lines of the opinion, quoted above, were stricken and in their place was substituted the line "The WCAB's decision is reversed."

In its motion for rehearing, the Second Injury Fund argues that this Court erred in holding that § 372 was applicable because that statute became effective January 1, 1982, and has been held to have prospective application only. *Finkbiner v ITT Building Service,* 189 Mich App 560; 474 NW2d 148 (1991). The Second Injury Fund asserts that because this Court found that plaintiff's only injury date was December 30, 1981, § 372 could not be applied in this case.

Plaintiff moved for rehearing of this Court's revised opinion. This Court's decision did not have the effect of denying plaintiff benefits; rather, it had the effect of placing liability on Western and the Second Injury Fund instead of on Western and Mark of Excellence. The hearing referee's decision had the same effect as that of this Court. Plaintiff argues that this Court erred in entering the order revising its original opinion, which omitted the reinstatement of the referee's decision, because the omission leaves the rights and responsibilities of the parties undefined.

As noted, the WCAB found that plaintiff sustained two injuries on two dates, June 2 and June 19, 1983, the last days on which she worked for Western and Mark of Excellence, respectively. A fair reading of the WCAB's opinion indicates that the WCAB did not find a sole injury date of December 30, 1981. In this case, the evidence supports a finding that plaintiff sustained an initial injury on December 30, 1981, and that her subsequent work for Western, and Western only, resulted in a disability date of June 2, 1983. Because plaintiff sustained an injury on December 30, 1981, but returned to her regular duties, her date of disability should be considered to be June 2, 1983. That was the last day on which she was subjected to the conditions that resulted in disability. MCL 418.301(1); MSA 27.237(301)(1). Although § 372 did not become effective until January 1, 1982, and has been interpreted as having prospective effect only, *Finkbiner, supra,* because plaintiff's date of injury and disability was June 2, 1983, § 372 was properly applied in this case. As stated in this Court's original opinion, liability for benefits due plaintiff rests with Western and the Second Injury Fund.

This Court's original opinion, as revised, leaves the parties' rights and responsibilities undefined. Plaintiff is entitled to an enforceable order specifying the amount of benefits to which she is entitled and defining the liability of Western and the Second Injury Fund. This case is remanded to the Workers' Compensation Appellate Commission, the successor of the WCAB, for entry of an order consistent with the instant opinion. The WCAC's function is limited to entry of an order applying the law as found by this Court and specifying the benefits to which plaintiff is entitled.

The WCAB's decision is reversed, and this case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

REED v MICHIGAN METRO GIRL SCOUT COUNCIL

Docket No. 139537. Submitted March 3, 1993, at Detroit. Decided April 14, 1993; approved for publication July 21, 1993, at 9:00 A.M.

Gregory J. Reed and others brought an action in the Wayne Circuit Court against Michigan Metro Girl Scout Council and Penelope Bailer, the council's executive director and chief executive officer, after the council rejected the plaintiffs' offer to purchase a camp owned by the council. The plaintiffs alleged tortious interference with economic relations by Bailer, defamation by both defendants concerning statements about Reed, negligence by both defendants, and racial discrimination by Bailer in violation of the Civil Rights Act. The court, William Leo Cahalan, J., summarily dismissed all claims except the civil rights claim against Bailer. The plaintiffs appealed, and Bailer cross appealed the denial of summary disposition of the civil rights claim.

The Court of Appeals *held:*

1. The trial court properly dismissed the claim of tortious interference with economic relations. Bailer, as an agent of the council, was not a third party against whom tortious interference in the relationship between the plaintiffs and the council can be established. Also, a corporate agent, such as Bailer, who does not act for personal benefit without benefit to the corporation may not be held liable for tortious interference with the corporation's contractual or business relationship.

2. The trial court correctly dismissed the claim of defamation. The defendants conceded that the statements about Reed were subject to a qualified privilege.

3. The trial court did not err in dismissing the claim of negligence in view of the plaintiffs' failure to cite authority for the proposition that a seller of realty must adhere to a standard of ordinary care in deciding to whom the property is sold

REFERENCES

Am Jur 2d, Civil Rights §§ 249, 250; Interference §§ 1, 54.

Liability of corporate director, officer, or employee for tortious interference with corporation's contract with another. 72 ALR4th 492.

and that a seller is liable for negligence for a breach of that standard.

4. The trial court properly refused to dismiss the civil rights claim. A factual question exists regarding whether Bailer can be considered a person "engaging" in a real estate transaction who, under the Civil Rights Act, may not refuse to sell to, or otherwise discriminate against, a purchaser on the basis of race.

Affirmed.

1. TORTS — INTERFERENCE WITH CONTRACTS.

A plaintiff must establish a breach of contract caused by the defendant and that the defendant was a third party to the contract or business relationship in order to maintain a cause of action for tortious interference with a contract.

2. TORTS — INTERFERENCE WITH CONTRACTS — CORPORATE AGENTS.

A corporate agent is not liable for tortious interference with the corporation's contracts unless the agent acted solely for personal benefit with no benefit to the corporation.

3. CIVIL RIGHTS — REAL ESTATE TRANSACTIONS — CORPORATE OFFICERS.

With respect to an officer of a corporation selling its own realty, the provision of the Civil Rights Act that prohibits a person from refusing to engage in a real estate transaction with another on the basis of religion, race, color, national origin, age, sex, or marital status is not restricted in application to those with an ownership interest in the property or actual authority to approve a sale (MCL 37.2502[1]; MSA 3.548[502][1]).

*Edwards & Jennings, P.C.* (by *Carl R. Edwards*), for the plaintiffs.

*Hill Lewis* (by *Kevin S. Hendrick, Donna R. Milhouse,* and *Margaret C. Alli*), for the defendants.

Before: CAVANAGH, P.J., and GRIFFIN and JANSEN, JJ.

PER CURIAM. Plaintiffs appeal as of right a circuit court order of partial summary disposition in

favor of defendants. Defendant, Penelope Bailer, cross appeals the circuit court's failure to grant summary disposition in her favor with regard to count four of plaintiffs' complaint, which charges Bailer with racial discrimination in violation of the Civil Rights Act. MCL 37.2101 *et seq.*; MSA 3.548(101). We affirm.

This appeal involves a bitter dispute arising from the sale of a girl scout camp. Plaintiffs are a group of southeast Michigan businessmen who in the spring of 1989 unsuccessfully attempted to purchase a girl scout camp known as Camp Holly. Defendant Michigan Metro Girl Scout Council owned the camp, and defendant Penelope Bailer is the council's executive director and chief executive officer.

Although the allegations in this case are extensive, the essence of plaintiffs' lawsuit is simple. Plaintiffs contend that Camp Holly would have been sold to them as the highest bidder were it not for the fact that defendant Bailer allegedly made various false and derogatory statements to the council's finance committee regarding plaintiff Gregory J. Reed. According to plaintiffs, Bailer wrongfully characterized Reed as a "flake" and an "unethical attorney" who was "difficult to work with." Plaintiffs further contend that Bailer falsely represented that Reed was acting as an agent for Detroit Mayor Coleman Young, who intended to transform Camp Holly into a "boot camp" for inner-city black youths. Finally, plaintiffs allege that these and various other defamatory comments by Bailer indicate that race was improperly made a factor in the council's ultimate decision not to sell Camp Holly to plaintiffs.

For their first argument on appeal, plaintiffs contend that the circuit court erred in dismissing their claim of tortious interference with economic

relations. We disagree. To maintain a cause of action for tortious interference, the plaintiffs must establish that the defendant was a "third party" to the contract or business relationship. *Dzierwa v Michigan Oil Co,* 152 Mich App 281, 287; 393 NW2d 610 (1986). As noted above, defendant Bailer is the executive director and chief executive officer of the Michigan Metro Girl Scout Council. It is now settled law that corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the corporation. *Bradley v Philip Morris, Inc,* 194 Mich App 44, 50-51; 486 NW2d 48 (1992); *Feaheny v Caldwell,* 175 Mich App 291, 305-306; 437 NW2d 358 (1989). Here, plaintiffs have not shown that Bailer was acting strictly for her own personal benefit when she allegedly persuaded the council not to sell Camp Holly to plaintiffs. Although plaintiffs allege that Bailer personally disliked Reed and was out to "punish" him, these allegations stem from a prior real estate transaction in which Reed ultimately sued the council. Bailer's motives therefore cannot be said to be strictly personal, and defendants were properly awarded summary disposition of count one of plaintiffs' complaint.

For their second issue, plaintiffs contend that the trial court erred in granting summary disposition to defendants with regard to plaintiffs' claim of defamation. We disagree. We agree with defendants that the statements at issue were subject to a qualified privilege, see *Hollowell v Career Decisions, Inc,* 100 Mich App, 561, 575-576; 298 NW2d 915 (1980), and plaintiffs appear to concede as much in their brief. Furthermore, we reject plaintiffs' apparent contention that the statements themselves give rise to an inference of actual malice sufficient to abrogate the privilege. General

allegations that privileged statements were false and malicious are not sufficient to create a genuine issue of material fact with respect to the issue of actual malice. *Prysak v RL Polk Co,* 193 Mich App 1, 14-15; 483 NW2d 629 (1992); *Gonyea v Motor Parts Federal Credit Union,* 192 Mich App 74, 79-80; 480 NW2d 297 (1991). Accordingly, the circuit court did not err in dismissing count two of plaintiffs' complaint.

For their third and final issue, plaintiffs argue that the trial court erred in dismissing their claim of negligence. We disagree. There is no quarreling with plaintiffs' observation that "negligence is a legally recognized cause of action in Michigan." However, it is well settled that in the absence of a legal duty there is no actionable negligence. *Balcer v Forbes,* 188 Mich App 509, 512; 470 NW2d 453 (1991). Only if the law recognizes a duty to act with due care arising from the relationship of the parties does it subject the defendant to liability for negligent conduct. *Friedman v Dozorc,* 412 Mich 1, 22; 312 NW2d 585 (1981). Here, plaintiffs cite no authority, and we are aware of none, that holds that a private seller of real property must adhere to a standard of ordinary care in deciding to whom the property will be sold. We find no error in the dismissal of count three of plaintiffs' complaint.

We turn now to the sole issue raised by defendant Bailer on cross appeal. She contends that she is entitled to summary disposition of count four of plaintiffs' complaint, which charges her with racial discrimination. We disagree.

At issue is § 502 of the Civil Rights Act. MCL 37.2502; MSA 3.548(502) provides in relevant part as follows:

> (1) A person engaging in a real estate transaction, or a real estate broker or salesman, shall not

> on the basis of religion, race, color, national origin, age, sex, or marital status of a person or a person residing with that person:
>
> (a) Refuse to engage in a real estate transaction with a person.
>
> (b) Discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith.
>
> (c) Refuse to receive from a person or transmit to a person a bona fide offer to engage in a real estate transaction.

Bailer argues that she cannot be considered "a person engaging in a real estate transaction" because she did not own Camp Holly and had no authority to vote on its sale. We find this argument disingenuous and accordingly reject it. The Civil Rights Act is remedial and must be liberally construed to effectuate its ends. *Eide v Kelsey-Hayes Co,* 431 Mich 26, 34; 427 NW2d 488 (1988). We see nothing in MCL 37.2502; MSA 3.548(502) that restricts its applicability in the corporate context to only those with an ownership interest in the property or the actual authority to approve a sale. Indeed, this argument makes little sense in the context of the present appeal. Bailer makes the rather specious claim that "she had no more to do with the sale of Camp Holly than a neighbor, friend, or family member who opines about the advisability of the sale of one's home." Not only does this argument directly contradict Bailer's previous assertion that she cannot be considered a third party to the transaction, but it also largely ignores many significant facts. There is evidence on this record that Bailer herself solicited the bids for Camp Holly in her capacity as executive director. Furthermore, Bailer's own appellate brief quotes a provision in the council's bylaws that

specifically charges her with the responsibility of providing advice and assistance to the board of directors and committees. In short, we agree with the trial court that a factual question exists regarding whether Bailer can be considered a person "engaging" in the real estate transaction at issue in this lawsuit. Bailer's motion for summary disposition was properly denied.

Affirmed.

MASON v CHRYSLER CORPORATION

Docket No. 146861. Submitted January 7, 1993, at Detroit. Decided March 22, 1993; approved for publication July 21, 1993, at 9:05 A.M. In lieu of granting leave to appeal, the judgment of the Court of Appeals is modified, 444 Mich —.

Willie Mason retired in 1985 from his employment with Chrysler Corporation, receiving nondisability pension benefits. He thereafter sought workers' compensation benefits, claiming he was totally disabled because of a 1983 wrist injury that had prevented him from continuing his employment as a welder, but that had not prevented him from doing favored work until he retired. A hearing officer found that Mason was totally disabled as a result of the wrist injury. The Workers' Compensation Appeal Board affirmed, finding that Mason was not disqualified from benefits by reason of the statutory presumption that arose from his nondisability retirement because he was unable to perform work suitable to his qualifications. Chrysler appealed by leave granted.

The Court of Appeals *held:*

Retirement with nondisability pension or retirement benefits results in a statutory presumption that the retiree suffered no loss of earnings or earning capacity as a result of a compensable injury or disease. The presumption can be rebutted by demonstrating by a preponderance of the evidence that a work-related impairment precludes performance of any other work for which the retiree is qualified by virtue of prior training or experience and to which the retiree can transfer, adapt, or utilize job skills and knowledge previously acquired. Because the appeal board clearly found, and the record supports, that Mason was able to and did perform favored work after the wrist injury, he failed to rebut the statutory presumption that he was not entitled to disability benefits.

Reversed.

WORKERS' COMPENSATION — PRESUMPTIONS — NONDISABILITY PENSIONS.

A retired employee who terminated active employment and is

REFERENCES

Am Jur 2d, Workers' Compensation §§ 566, 574.

See ALR Index under Workers' Compensation.

receiving nondisability pension or retirement benefits is presumed to have suffered no loss of earnings or earning capacity as a result of a compensable injury or disease for the purposes of the Workers' Disability Compensation Act; the presumption can be rebutted by demonstrating by a preponderance of the evidence that a work-related impairment precludes performance of any other work for which the retiree is qualified by virtue of prior training or experience and to which the retiree can transfer, adapt, or utilize job skills and knowledge previously acquired (MCL 418.373[1]; MSA 17.237[373][1]).

*Pianin, Paull, Sugar & Brandon* (by *Michael Sugar*), for the plaintiff.

*Lacey & Jones* (by *Michael T. Reinholm*), for the defendant.

Before: REILLY, P.J., and GRIBBS and TAYLOR, JJ.

PER CURIAM. Defendant appeals by leave granted an October 31, 1991, order of the Workers' Compensation Appeal Board, which affirmed a magistrate's decision granting plaintiff an open award of benefits. We reverse.

I

Plaintiff began working for defendant in 1955, and since 1968 worked as a welder. The job involved constant, repetitive use of his hands and arms. Plaintiff testified that soon after he began the welding work he noticed chronic swelling of his right hand. He testified that by September 1983, the problem had become so bad that he had to leave work.

Plaintiff was hospitalized from November 4 to November 7, 1983, for carpal tunnel relief surgery. He was allowed to return to work on June 7, 1984, but with restrictions regarding the use of his right wrist. Plaintiff never returned to the welding position, but instead worked as a "floater."

Plaintiff admitted that he had medical problems not connected with work, including a thyroid condition and diabetes. He did not work for several weeks beginning August 26, 1985, because of his diabetes. He testified that, when he returned to work after Labor Day, someone in the employment office told him that he should apply for retirement. Plaintiff took a nondisability retirement effective September 30, 1985.

On October 4, 1985, plaintiff filed a petition for a hearing claiming a variety of disabilities. The parties stipulated that plaintiff had received a personal injury at work on September 1, 1983, and also stipulated that plaintiff had been engaged in common labor. Defendant, however, did not, stipulate any continuing disability from that injury or the nature of that injury.

In a decision mailed on June 6, 1988, the magistrate found plaintiff totally disabled as a result of his 1983 wrist injury, but denied all his other claims. Defendant appealed, and, in a decision and order dated October 31, 1991, the WCAB affirmed. The WCAB found, as fact, that plaintiff was given favored work as a result of the work-related injury of September 1983 and that this status continued up through his last day of employment, when he took a regular retirement. The WCAB found that although plaintiff suffered from medical problems that were not work-related, he was disabled from regular employment because of the lingering effects of his work-related wrist injury.

On appeal to the WCAB, defendant argued that plaintiff was not entitled to benefits because he could not defeat the retiree presumption of § 373(1) of the Workers' Disability Compensation Act, MCL 418.373(1); MSA 17.237(373)(1), which provides:

> An employee who terminates active employment

> and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the social security act, 42 USC 301 to 1397f, that was paid by or on behalf of an employer from whom weekly benefits under this act are sought shall be presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under either this chapter or chapter 4. This presumption may be rebutted only by a preponderance of the evidence that the employee is unable, because of work related disability, to perform work suitable to the employee's qualifications, including training or experience. This standard of disability supersedes other applicable standards used to determine disability under either this chapter or chapter 4.

The WCAB disagreed, finding, as fact, that "plaintiff is unable to perform work suitable to his qualification, inasmuch as his only experience was that of a fourth grade educated common laborer."

II

Findings of fact made by the WCAB are conclusive in the absence of fraud and may not be set aside if supported by any competent record evidence. Const 1963, art 6, § 28; MCL 418.861; MSA 17.237(861). Questions regarding injury, disability, and causation, as well as the credibility of medical and lay witnesses, are for the WCAB to decide. *Nezdropa v Wayne Co,* 152 Mich App 451, 461; 394 NW2d 440 (1986). Legal questions, however, are fully reviewable by this Court. *Aquilina v General Motors Corp,* 403 Mich 206, 213; 267 NW2d 923 (1978).

Defendant argues that the WCAB erred as a matter of law in holding that plaintiff defeated the retiree presumption of § 373(1). We agree for the following reasons.

Plaintiff does not dispute that he is in receipt of nondisability pension benefits. Although plaintiff argues that he did not "terminate active employment" within the meaning of § 373(1) because he was on medical leave at the time he applied for his pension, we disagree. Plaintiff testified that he was on medical leave because of his diabetes. Plaintiff admitted that his diabetes was not work-related. Plaintiff did not apply for a nondisability pension only after being away from work for an extended period of time and while receiving workers' compensation benefits. Therefore, this case is distinguishable from *Frasier v Model Coverall Service, Inc,* 182 Mich App 741; 453 NW2d 301 (1990), and *Dezwaan v Holland Motor Express,* 189 Mich App 575; 473 NW2d 788 (1991).

Accordingly, plaintiff is not entitled to benefits unless he can defeat the statutory presumption. The nature of plaintiff's burden was analyzed by this Court in *Peck v General Motors Corp,* 164 Mich App 580, 592-593; 417 NW2d 547 (1987):

> Relevant inquiries under § 373(1) are: What is the retired employee's residual physical capacity after his work-related injury? What skills and knowledge has he acquired through training or experience? Are these skills transferable to other types of occupations? Are there other jobs to which his skills and knowledge can be transferred within his physical capacity to perform? Under this analytical framework, the retired claimant's burden of rebutting the presumption is twofold: (1) he must establish that he has physical restrictions resulting from a work-related injury or disease, and (2) that these restrictions render him unable to perform work, within or without his field of skill, that is otherwise "suitable to his qualifications." In other words, a retired worker must demonstrate by a preponderance of the evidence that the work-related impairment precludes him from perform-

> ing any other work, either within or without his field of skill, for which he is qualified by virtue of his prior training or experience and to which he can transfer, adapt or utilize job skills and such knowledge previously acquired.

The parties stipulated that plaintiff was employed at common or unskilled labor. The WCAB found that after his return to work from carpal tunnel surgery on June 7, 1984, until his last day of work, plaintiff did not return to his old welding job but performed restricted work, being in the nature of a floater. Although plaintiff testified that some of the jobs available on any given day did not fall within his medical restrictions, he was able to perform most of the jobs and, in one case, took the place of an employee who was on vacation for a week. Plaintiff also testified that there were many jobs he knew he could do when he retired and that he wished defendant had given him such a job instead of forcing him to retire.

In light of the WCAB's findings and plaintiff's testimony, we hold that plaintiff did not rebut the retiree presumption in this case. Although plaintiff remains restricted from certain two-handed jobs and may not use his right hand and wrist in a repetitive manner or to do strenuous labor, he admitted that there were many jobs in an automobile assembly plant that he could do. It follows that his work-related injury did not render him unable to perform work within his field of unskilled labor. Therefore, plaintiff failed to rebut the retiree presumption and he is not entitled to benefits.

Defendant also argues that the WCAB erred in failing to explain its reasons for rejecting defendant's contention that plaintiff's wrist condition

was not work-related at all, but rather was a complication of plaintiff's diabetes, and that the WCAB failed to draw the proper adverse inference from plaintiff's failure to depose his own treating physician. Because we hold that plaintiff is not entitled to benefits on other grounds, we do not address these issues.

Reversed.

HARDGES v DEPARTMENT OF SOCIAL SERVICES

Docket No. 130316. Submitted February 10, 1993, at Detroit. Decided April 8, 1993; approved for publication July 21, 1993, at 9:10 A.M.

Ruby Hardges petitioned the Genesee Circuit Court for review of a decision by the Department of Social Services and its director to terminate her food stamp privileges. The court, Donald R. Freeman, J., affirmed. The Court of Appeals, GRIBBS, P.J., and MICHAEL J. KELLY and MARILYN KELLY, JJ., reversed, ruling that the petitioner was denied due process of law because she was not given proper notice of the reasons for termination. 177 Mich App 698 (1989). The petitioner then sought in the circuit court an award of attorney fees under 42 USC 1988, contending that she was a prevailing party in a proceeding under 42 USC 1983 to enforce her constitutional rights. The circuit court denied the petition for attorney fees. The petitioner appealed.

The Court of Appeals *held:*

Attorney fees are awardable under 42 USC 1988 to a party who prevails in an action or proceeding against a person for enforcement of rights protected by 42 USC 1983. A state agency is not a "person" to whom liability can attach under 42 USC 1983, because Congress, in enacting 42 USC 1983, did not intend to abrogate states' immunity from suit as provided in the Eleventh Amendment. Such immunity is avoided by a plaintiff whose complaint seeks only prospective injunctive relief against a state official acting in an official capacity.

In this case, the circuit court correctly denied the petition for attorney fees, because the Department of Social Services cannot be considered a person for purposes of 42 USC 1983 and the petitioner's judicial review proceeding under the Administrative Procedures Act is not an action or proceeding that seeks

REFERENCES

Am Jur 2d, Civil Rights § 278; Costs § 79.

Construction and application of Civil Rights Attorney's Fees Awards Act of 1976 (amending 42 USCS sec. 1988), providing that court may allow prevailing party, other than United States, reasonable attorney's fee in certain civil rights actions. 43 ALR Fed 243.

only prospective injunctive relief against a state official acting in an official capacity.

Affirmed.

ADMINISTRATIVE LAW — AGENCY DECISIONS — JUDICIAL REVIEW — ATTORNEY FEES — CIVIL RIGHTS.

A person who, upon judicial review pursuant to the Administrative Procedures Act, prevails against a state agency with respect to a decision by the agency that is determined to have violated a constitutional right of the person is not entitled to an award of attorney fees under 42 USC 1988; such judicial review is not a proceeding for the enforcement of a constitutional right within the meaning of 42 USC 1983 for which attorney fees are allowed under 42 USC 1988 (MCL 24.301 *et seq.*; MSA 3.560[201] *et seq.*).

*Dean, Dean, Segar, Hart & Shulman, P.C.* (by *Sherri L. Katz*), and Legal Services of Eastern Michigan (by *Terri L. Stangl*), for the petitioner.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, and *Morris J. Klau,* Assistant Attorney General, for the respondent.

Before: JANSEN, P.J., and CAVANAGH and P. D. SCHAEFER,* JJ.

PER CURIAM. Petitioner appeals a June 8, 1990, Genesee Circuit Court order denying her petition for attorney fees under 42 USC 1988. Petitioner alleges that because her petition was properly filed in the circuit court and because her constitutional rights had been violated in a prior agency proceeding, she must be considered a prevailing party under 42 USC 1983, thereby entitling her to fees under 42 USC 1988. We disagree and affirm.

This case appears before this Court for the second time. Previously, this Court concluded that respondents denied petitioner due process of law when they failed to give her proper notice of the reasons for termination of her food stamp privi-

* Circuit judge, sitting on the Court of Appeals by assignment.

leges.[1] See *Hardges v Dep't of Social Services,* 177 Mich App 698; 442 NW2d 752 (1989). On remand, petitioner filed a petition for attorney fees under 42 USC 1988. The trial court denied her request and dismissed the petition because it did not believe that petitions for review of an administrative decision were the type of "proceedings" contemplated in § 1988.

In order to be entitled to an award of attorney fees under § 1988, a party must prevail in one of the causes of action enumerated in the statute. *Mitchell v Cole (After Remand),* 196 Mich App 675, 679; 493 NW2d 427 (1992). The relevant portion of § 1988 provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

One of the enumerated claims is an action to enforce rights recognized under 42 USC 1983, which states:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

[1] The opinion does not specify whether respondents violated petitioner's due process rights as protected under the federal or the state constitution. While it is true that the opinion referred to federal regulations in regard to the notice requirements for termination of food stamp benefits, it appears that the Court did so only in an effort to determine what was required under the Michigan notice requirements.

> injured in an action at law, suit in equity, or other proper proceeding for redress. [42 USC 1983. Emphasis added.]

Thus, a party who prevails in an action brought to enforce the rights guaranteed under § 1983 may be awarded attorney fees under § 1988 as part of the costs.

The United States Supreme Court has limited the applicability of § 1983 to "persons" and has expressly held that a state agency is not a "person" for purposes of the statute. *Howlett v Rose,* 496 US 356; 110 S Ct 2430; 110 L Ed 2d 332 (1990); *Will v Michigan Dep't of State Police,* 491 US 58, 66; 109 S Ct 2304; 105 L Ed 2d 45 (1989). As such, the use of "person" in the statute was not meant to create a separate cause of action against states in state courts. *Id.* The rationale behind the Court's decision in *Will* was that because the Court had previously determined that Congress did not intend to abrogate the states' Eleventh Amendment immunity from suit in enacting § 1983 (see *Quern v Jordan,* 440 US 332; 99 S Ct 1139; 59 L Ed 2d 358 [1979]), it could not be said that Congress intended to abrogate governmental immunity and create a separate cause of action against states in state courts.

While it is generally true that a state is not considered a person within the meaning of 42 USC 1983, a plaintiff may avoid Eleventh Amendment immunity (and presumably statutory immunity) where the complaint seeks only prospective injunctive relief against a state official acting in an official capacity. See *Edelman v Jordan,* 415 US 651, 676; 94 S Ct 1347; 39 L Ed 2d 662 (1974); *Ford Motor Co v Dep't of Treasury,* 323 US 459, 464; 65 S Ct 347; 89 L Ed 389 (1945); *Ex parte Young,* 209 US 123; 28 S Ct 441; 52 L Ed 714 (1908). The

Supreme Court recently made it clear that the exception for prospective injunctive relief was limited to suits against state officials in their official capacities and did not apply to states as named defendants. *Alabama v Pugh,* 438 US 781; 98 S Ct 3057; 57 L Ed 2d 1114 (1978).

In this case, the petition for review, although alleging certain violations of those rights protected under 42 USC 1983, cannot properly be classified as an action or proceeding to enforce rights protected by 42 USC 1983 because it was not against a "person" and was not a request for prospective injunctive relief against a state official acting in an official capacity. Rather, it was a petition for relief from an administrative agency action that was taken in contravention of her rights. Petitioner's attempt to convince us that the Legislature of this state sought to consent to suit under 42 USC 1983 by providing remedial methods to set aside agency decisions that are violative of rights protected under the state or federal constitutions is unpersuasive.

Petitioner admits in her brief that she need not have exhausted her administrative remedies before commencing a suit under 42 USC 1983. See *Patsy v Florida Bd of Regents,* 457 US 496; 102 S Ct 2557; 73 L Ed 2d 172 (1982), and 42 USC 1997e. It is true that petitioner was arguably a prevailing party under § 1983 insofar as her right to due process of law is protected by the federal constitution. However, she chose to pursue the enforcement of those rights in a proceeding solely within the provisions of the Administrative Procedures Act, MCL 24.301 *et seq.*; MSA 3.560(201) *et seq.,* and the Social Welfare Act, MCL 400.37; MSA

16.437, and did not file an action to vindicate those rights under 42 USC 1983.[2]

Inasmuch as this proceeding was a voluntary choice by petitioner to enforce her rights under Michigan law through statutory review of the administrative agency's action, it cannot be considered as one brought to enforce her rights arising under 42 USC 1983. Where, as here, a petition for review under state administrative law is filed on the basis of an agency's failure to comply with state administrative procedures, we do not believe that attorney fees under § 1988 would be appropriate. Accordingly, the trial court properly denied petitioner's request for fees under 42 USC 1988.

Affirmed.

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[2] We are similarly unpersuaded by petitioner's argument that her reference to 42 USC 1983 in the petition constituted a sufficient pleading for an action under 42 USC 1983. In the context of petitioner's petition in the circuit court, 42 USC 1983 was merely a reason to invalidate the agency action and did not give rise to a separate action for enforcement of her rights under § 1983.

GINTHER v OVID-ELSIE AREA SCHOOLS

Docket No. 131978. Submitted December 2, 1992, at Lansing. Decided March 18, 1993; approved for publication July 21, 1993, at 9:15 A.M. Leave to appeal sought.

Janice Ginther brought an action in the Clinton Circuit Court against the Ovid-Elsie Area Schools, alleging that she was not hired for a full-time custodian position as a result of sex discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* The court, Timothy M. Green, J., granted summary disposition for the defendant. The plaintiff appealed.

The Court of Appeals *held:*

1. The plaintiff established a prima facie case of sex discrimination by showing that she applied for an available position for which she was qualified but was rejected under circumstances giving rise to an inference of unlawful discrimination.

2. A question of fact for the jury's determination arose with regard to whether a supervisor stated that he would not hire any more women.

3. The plaintiff presented evidence indicating that the defendant's reason for hiring the man for the position was a pretext. A genuine issue of material fact exists with regard to this matter.

4. The defendant's argument that the school board was the ultimate decision maker is without merit. Although the school board made the ultimate employment decision, it simply approved the supervisor's choice.

Reversed and remanded.

CIVIL RIGHTS — SEX DISCRIMINATION — PRIMA FACIE CASE — BURDEN OF PROOF.

A prima facie case of sex discrimination is established where it is

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REFERENCES

Am Jur 2d, Civil Rights §§ 161, 184-186; Job Discrimination §§ 146, 587.

Construction and application of provisions of Title VII of Civil Rights Act of 1964 (42 USCS secs. 2000e et seq.) making sex discrimination in employment unlawful. 12 ALR Fed 15.

proven by a preponderance of the evidence that the plaintiff applied and was qualified for an available position but was rejected under circumstances giving rise to an inference of unlawful discrimination; the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its action; if the defendant meets this burden, the plaintiff then has the burden of proving by a preponderance of the evidence that the reason offered by the defendant was a pretext.

*Rapaport, Pollok, Farrell & Sablich, P.C.* (by *Mark S. Farrell*), for the plaintiff.

*Miller, Canfield, Paddock & Stone* (by *Charles S. Mishkind, Diane M. Soubly,* and *Lewis B. Reinwasser*), for the defendant.

Before: HOLBROOK, JR., P.J., and FITZGERALD and D. A. ROBERSON,* JJ.

PER CURIAM. Plaintiff appeals as of right from the trial court's order dismissing her claim of sex discrimination pursuant to MCR 2.116(C)(10). We reverse.

Plaintiff's claim of sex discrimination was based on defendant's refusal to hire her as a full-time custodian. In December of 1985, plaintiff began working as a substitute custodian in the Ovid-Elsie school system. In June of 1988, a full-time custodian retired. Initially, the school district did not hire someone for the custodian position, but eventually the building maintenance and grounds supervisor, Michael Lewis, requested that the position be filled. After a discussion at a school board meeting, the school board decided to hire a full-time custodian.

The school district posted the position pursuant to a collective bargaining agreement. A member of

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

the collective bargaining unit bid for and received the position and another member bid on and received the position vacated by that member, which then created an opening for a custodian at the E. E. Knight Elementary School. No member bid on this vacancy, and the position became open for outside hiring. On October 6, 1988, plaintiff submitted a handwritten letter to Lewis, stating she would like to bid on the custodian position. Lewis approached the school superintendent, David Porrell, informing him that several people had heard about the position. Lewis and Porrell decided to advertise the position in a local newspaper. The advertisement appeared after October 10, 1988.

After reviewing the applications, Lewis recommended hiring Harry Price. Price had submitted an application in 1986 and updated it on September 22, 1988. Porrell recommended Price to the school board. On November 21, 1988, the school board approved the decision to hire Price.

On February 3, 1989, plaintiff filed a lawsuit against the school district, alleging that she was not hired for the custodian position because she was a woman. In support of her claim, plaintiff alleged that the school system's past practice was to give priority to part-time custodians if a permanent custodian position became available. Plaintiff also claimed that Price was less qualified than her.

Alfred Bywater, an employee of the school district for eighteen years, testified at his deposition that he had heard Lewis state "it would be a cold day in hell before I hire any more women" or something to that effect. Bywater could not recall exactly when Lewis made this statement, but indicated that it was just before Lewis became supervisor.

At his deposition, Lewis testified that he has hired four men and no women since becoming

supervisor. Two of these men, Rolla Gruesbeck and Kevin Russell, were hired as custodians and had been substitute custodians. Plaintiff was not hired for one of these positions because Russell had experience with lawnmowers, whereas plaintiff did not. Lewis admitted that he never asked plaintiff if she was capable of operating a lawnmower. Lewis stated that the school district did not advertise the availability of the custodian positions and the school board did not approve Lewis' decision to hire Gruesbeck and Russell.

Lewis also testified that the school district had one woman custodian, who became a custodian after the school district eliminated her position as a housekeeper-cleaner. The housekeeper-cleaner positions had been held by women only and were eliminated before Lewis became a supervisor. Lewis described the position as a matron's job, involving strictly cleaning. The school district also only hired women to work in the cafeteria.

Lewis also testified at his deposition that he reviewed all the applications and selected four people, including plaintiff, as finalists for the position. Lewis admitted that the finalists were qualified for the position. However, Lewis felt Price was the most qualified because he did janitorial work and was the "jack-of-all-trades" at his then current job with a nursing home. Lewis claimed that he also contacted John Johnson, Price's boss at the nursing home, who explained what Price did in the building and on the grounds. Lewis did not contact the other applicants' employers regarding their qualifications.

Lewis also did not interview any of the applicants. Lewis claimed that he did not interview plaintiff because he felt he knew her qualifications and work habits through her work as a substitute custodian. Lewis did not have problems with plain-

tiff's work, nor did he receive complaints regarding her work.

Lewis claimed that he did not have authority to hire or fire the employees in his department and that he had to obtain authorization from Porrell to hire someone. Porrell explained during his deposition that although the hiring decisions for the previous custodian positions were not reviewed by the school board, he felt the hiring decision for the custodian position sought by plaintiff required the board's approval because the board agreed to reinstate the position.

On June 5, 1990, the school district filed a motion for summary disposition, arguing that plaintiff could not establish that she was not hired as a full-time custodian because of her sex. Defendant claimed that plaintiff was not qualified for the position because she had never operated lawnmowing equipment, performed building and equipment repairs, or operated the heating and air-conditioning systems. Defendant also claimed that Price was the most qualified for the position because of his experience as a custodian, performing janitorial work, minor equipment repairs, and yard work. In response, plaintiff argued that Lewis was predisposed to discriminate against women. Plaintiff also argued that the school district treated female employees differently than male employees because it only hired men as custodians and only hired women as housekeeper-cleaners and cafeteria workers. In granting defendant's motion, the trial court found that plaintiff's case was based on her subjective feeling that she was discriminated against and remarked that it did not have to find issues of fact. We disagree.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the claim at issue. *Schultes v Naylor,* 195 Mich App

640, 644; 491 NW2d 240 (1992). The benefit of doubt is to be given to the nonmoving party. *Id.,* p 645. If the trial court determines that there is a significant deficiency in the claim that cannot be cured by a full development of the factual record, then summary disposition is appropriate. *Id.*

Plaintiff alleges sex discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* Plaintiff claims that defendant did not hire her as a custodian because she is a woman. In a discrimination case, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. *Featherly v Teledyne Industries, Inc,* 194 Mich App 352, 358; 486 NW2d 361 (1992). If the plaintiff is successful in proving a prima facie case of discrimination, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its action. *Id.* If the defendant meets this burden, the plaintiff then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the defendant was a pretext. *Id.*

Upon a thorough review of the record, we conclude that plaintiff established a prima facie case of sex discrimination. A prima facie case of sex discrimination is established when it is proven that the plaintiff applied and was qualified for an available position but was rejected under circumstances giving rise to an inference of unlawful discrimination. *Pomranky v Zack Co,* 159 Mich App 338, 343-344; 405 NW2d 881 (1987). Plaintiff is a member of a protected class under the Civil Rights Act and applied for the available custodian position. Lewis admitted in his deposition that plaintiff, one of the four finalists selected for the custodian position, was minimally qualified. Moreover, the circumstances support the inference that

she was unlawfully discriminated against. Lewis' alleged statement indicates that he was predisposed to discriminate against women. Proof of Lewis' predisposition is bolstered by the fact that he has not hired a woman since becoming supervisor. Although Lewis denied making the statement, a question of fact arose that should be determined by the jury.

Furthermore, we find that plaintiff presented evidence that defendant's reason for hiring Price was a pretext. A plaintiff may succeed in establishing that the defendant's proffered reason was a pretext either directly, by persuading the trier of fact that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the proffered reason is not worthy of credence. *Id.*, p 343. Defendant claims that it hired Price because he was the most qualified for the position. However, Lewis admitted that he did not interview any applicants and did not contact any of the applicants' current or former employers except Price's then current employer. Moreover, although plaintiff admitted during her deposition that she never operated the lawnmowing equipment, performed building and equipment repairs, or operated the heating and air-conditioning systems, Lewis never asked her if she had done so or could do so. Finally, there is some indication that Lewis did not know Price's qualifications before he was hired. Price admitted during his deposition that he bolstered his application after plaintiff filed her lawsuit because he realized that his qualifications were not listed on it. Consequently, a genuine issue of material fact exists.

Defendant, however, argues that Lewis' alleged statement cannot create an issue of fact because (1) the alleged statement is double hearsay; (2) the alleged statement was an isolated, remote remark

made facetiously and was not directed at any particular person; (3) Bywater claimed that the alleged statement was made in the presence of other people, all of whom denied Lewis made the remark; and (4) the school board made the ultimate hiring decision, which plaintiff admitted did not discriminate against her. First, Lewis' alleged statement is not double hearsay because Bywater testified that Lewis made the statement. Next, it is not the court's function to determine whether the alleged tasteless, insensitive discriminatory remark was a "joke" and not probative of Lewis' predisposition. Moreover, the fact that three people aver that Lewis never made the statement does not transform a question of fact into an issue for the court to decide. In deciding whether to grant a motion for summary disposition, the court must accept as true all facts pleaded by the nonmoving party.

Finally, defendant's argument that the school board was the ultimate decision maker is without merit. Lewis submitted a list of applicants' names to Porrell, noting on the list that he wanted to hire Price. Porrell then submitted Lewis' recommendation to the school board, stating that he concurred with Lewis. Although the school board made the ultimate employment decision, it simply approved Lewis' choice.[1]

Accordingly, the trial court erred in granting

[1] This Court notes a remarkably similar case, *Cesaro v Lakeville Community School Dist,* 953 F2d 252 (CA 6, 1992), holding that a school superintendent's alleged discrimination in the selection process was irrelevant because the school board made the ultimate hiring decision. The plaintiff failed to establish her gender played any part in the school board's hiring decision. Unlike the case before this Court, the school board reviewed the qualifications of all the candidates and chose the applicant recommended by the school superintendent because he was the best qualified. There is nothing in the lower court record in this case that indicates defendant's school board extensively reviewed the qualifications of the applicants and made an independent decision to hire Price because he was the most qualified.

defendant's motion for summary disposition. Plaintiff established a prima facie case of sex discrimination and presented evidence that defendant's reason for not hiring her was a pretext. The case is remanded to the lower court.

Reversed and remanded. We do not retain jurisdiction.

LEE v AUTO-OWNERS INSURANCE COMPANY

Docket No. 134748. Submitted March 4, 1993, at Lansing. Decided August 2, 1993, at 9:00 A.M. Leave to appeal sought.

Blake Lee brought an action in the Ingham Circuit Court against Auto-Owners Insurance Company and others seeking, in part, recovery under an automobile insurance policy for injuries he sustained while a passenger in an automobile involved in an accident. The driver of the automobile had an insurance policy providing coverage of $20,000. The plaintiff had underinsured motorist coverage with Auto-Owners providing a maximum of $50,000 coverage. The plaintiff sued the driver and subsequently settled for $20,000. The plaintiff signed a release but did not notify Auto-Owners. The plaintiff then sought $30,000 of underinsured motorist coverage from Auto-Owners. When Auto-Owners refused to pay, the plaintiff brought this action. In the alternative, the plaintiff brought a malpractice claim against the attorney and the law firm that handled his case against the driver. The court, James R. Giddings, J., granted summary disposition dismissing several of Auto-Owners' affirmative defenses and certified its partial summary disposition as a final judgment. Auto-Owners appealed.

The Court of Appeals *held:*

1. The release was intended to release only the driver and the driver's insurance company from all claims arising out of the accident. The trial court properly dismissed Auto-Owners' claim of release.

2. The Auto-Owners policy required that the plaintiff, as a condition precedent to instituting a legal action against Auto-Owners, comply with all the conditions of the policy. The plaintiff did not comply with several conditions by suing the driver without notifying Auto-Owners and signing a release that destroyed Auto-Owners' subrogation rights against the driver. The plaintiff's failure to satisfy the conditions precedent prevents him from being able to state a cause of action in the courts to collect the insurance money he claims he is owed. The trial court erred in striking the affirmative defenses related to this issue and in not granting summary disposition for Auto-Owners with regard to this issue.

3. The plaintiff's failure to abide by the conditions of the

policy does not prevent him from recovering under the policy, it only bars him from instituting a lawsuit. He still has a right under the policy to compel arbitration of his claim.

4. The case must be remanded to the trial court for entry of an order of dismissal with regard to Auto-Owners.

Affirmed in part, reversed in part, and remanded.

*Jan Paul Benedict, P.C.* (by *Jan Paul Benedict*), for Blake Lee.

*Fraser, Trebilcock, Davis & Foster, P.C.* (by *C. Mark Hoover*), for Auto-Owners Insurance Company.

*Willingham & Coté, P.C.* (by *Ray Foresman* and *Anthony S. Kogut*), for Abood, Abood & Rheaume, P.C., and David P. Pasichnyk.

Before: MICHAEL J. KELLY, P.J., and MARILYN KELLY and CONNOR, JJ.

CONNOR, J. Defendant insurance company appeals as of right[1] the trial court's summary dismissal of several of its affirmative defenses. We affirm in part, reverse in part, and remand.

Plaintiff was a passenger in an automobile involved in an accident and suffered serious injuries. The driver had only the statutory minimum liability insurance coverage of $20,000 at the time of the accident. Plaintiff had underinsured motorist coverage with defendant insurance company for up to $50,000. Plaintiff sued the driver and subsequently settled for $20,000. As part of the settlement, plaintiff signed a form that purported to release the driver and "all other persons, firms, and corporations" from "any and all actions, claims, and demands." All this was done without

[1] Apparently, because the remaining issues were severable and not factually related to the affirmative defenses it ruled on, the trial court certified its partial summary disposition as a final judgment pursuant to MCR 2.604(A).

the knowledge or approval of defendant insurance company.[2]

Plaintiff thereafter demanded that defendant insurance company pay him $30,000 of underinsured motorist coverage, the $50,000 his policy provides minus the $20,000 received in the settlement. When it refused to pay, plaintiff brought this action seeking the insurance money.[3]

Defendant insurance company raised numerous affirmative defenses based on plaintiff's settlement and release of the driver. At issue below and on appeal is what effect that settlement has under the terms of the insurance policy.

We find defendant insurance company's contention that the release acted to release it to be without merit. Read literally, the release purports to release everyone from all future claims plaintiff may have without restriction. The release would not only release defendant insurance company from any liability, it would forever bar plaintiff from suing anyone for anything. We believe that would be an absurd result. The only reasonable interpretation that the release can be given is that it was intended to release the driver and the driver's insurance company from all claims arising out of the accident. We find that the trial court properly dismissed defendant insurance company's claim of release.

Plaintiff's suing, settling, and releasing the driver from future liability without defendant insurance company's knowledge or approval is a more troublesome issue. Defendant insurance company argues that failing to secure its approval violated the insurance policy. We agree.

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[2] Defendant appellees are the attorney and law firm that handled plaintiff's case against the driver. Plaintiff has made a malpractice claim against them in the alternative.

[3] Plaintiff also sought no-fault benefits, but has since settled that claim with defendant insurance company.

The underinsured motorist coverage endorsement in plaintiff's insurance policy states, "Uninsured Motorist Coverage is extended to bodily injury . . . arising out of the . . . use of an automobile with respect to which a bodily injury . . . insurance policy is applicable at the time of the accident but which provides" for less than $50,000 in liability insurance. The endorsement further provides that "[a]ll terms and conditions applicable to Uninsured Motorist Coverage are applicable to this extension."

We find no ambiguity in this wording. The underinsured motorist endorsement extended the policy's uninsured motorist coverage by redefining uninsured to include insured motorists with less than $50,000 in liability insurance. Thus, to collect under his underinsured motorist coverage, plaintiff must be entitled to collect under the terms of the uninsured motorist coverage, with the underinsured driver being considered to be an uninsured motorist.

The policy establishes a significant barrier to plaintiff being able to sue to collect underinsured motorist benefits. The policy requires that plaintiff, as a condition precedent to instituting a legal action against the insurance company, must comply with all the conditions of the policy. By suing the driver without notifying the company, plaintiff did not comply with one condition, and by signing a release that destroyed the company's subrogation rights against the driver, plaintiff failed to comply with several others.

Plaintiff argues that his failure to comply did not prejudice defendant insurance company because he settled with the driver for the full amount of the driver's insurance policy, and the subrogation rights plaintiff released were probably of no value to defendant insurance company. Thus,

although plaintiff admits that he breached his contractual obligations to defendant insurance company, he claims the breaches were harmless.

A condition precedent is something that must occur before there is a right to performance. *MacDonald v Perry*, 342 Mich 578, 586; 70 NW2d 721 (1955). Whether harmless or not, plaintiff's failure to satisfy the conditions precedent prevents him from being able to state a cause of action in the courts to collect the insurance money he claims he is owed. Because there is no factual dispute that plaintiff did not comply with the conditions of the policy, not only did the trial court err in striking the affirmative defenses raising the issue, but it erred in not granting summary disposition to defendant insurance company pursuant to MCR 2.116(I)(2).

We need not consider whether the policy provisions violate public policy. Michigan has, by statute, invalidated policy provisions barring suits. MCL 500.2254; MSA 24.12254. However, to invoke this statutory provision, plaintiff must have exhausted any reasonable remedy for adjudicating his claim. *Id.*; see also *Bradt v Allstate Ins Co*, 21 Mich App 529; 175 NW2d 876 (1970). Plaintiff's failure to abide by the conditions of the policy does not prevent him from recovering under the policy, it only bars him from instituting a lawsuit. Plaintiff still has a right under the policy to compel arbitration of his claim, although plaintiff has previously not chosen to invoke the policy's arbitration provisions.

We remand to the trial court for entry of an order of dismissal with regard to defendant insurance company. We note that this dismissal is not an adjudication of the merits of plaintiff's claims against defendant insurance company, but only a

recognition that plaintiff cannot at this time seek redress for his claims in a court of law.[4]

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

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[4] We do not decide whether plaintiff's settlement of his claims with the driver without defendant insurance company's consent rendered his losses beyond the coverage of the policy, because, even if covered, plaintiff cannot state a cause of action in the courts at this time.

PEOPLE v LEMARBE (AFTER REMAND)

Docket No. 137155. Submitted March 4, 1993, at Lansing. Decided August 2, 1993, at 9:05 A.M. Leave to appeal sought.

Richard LeMarbe was convicted by a jury in the Oakland Circuit Court, Jessica R. Cooper, J., of second-degree murder and possession of a firearm during the commission of a felony. He was sentenced to forty to eighty years' imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. He appealed. The Court of Appeals, SAWYER, P.J., and MURPHY, J. (MICHAEL J. KELLY, J., concurring), affirmed and remanded for resentencing, finding that the trial court failed to respond to the defendant's objections to the scoring of the sentencing guidelines. Unpublished opinion per curiam of the Court of Appeals, decided September 5, 1990 (Docket No. 112396). On remand, the defendant was sentenced to the same terms of imprisonment. The defendant appealed.

After remand, the Court of Appeals *held:*

1. Although the Court of Appeals would find that the defendant does not have a reasonable prospect of actually serving the sentence imposed, even assuming the effect of regular disciplinary credits, and for that reason would remand this matter for resentencing, Administrative Order No. 1990-6 requires that the Court follow the decision in *People v Weaver (After Remand),* 192 Mich App 231 (1991), which affirmed a sentence that would place Weaver in his early nineties before being eligible for parole. The defendant in this case will be in his early nineties before being eligible for parole.

2. The trial court erred in scoring Homicide Offense Variable 3 of the sentencing guidelines as though the defendant had a premeditated intent to kill. The jury rejected the original charge of first-degree premeditated murder, and the trial court did not rely on information regarding the defendant's intent that was not presented to the jury. Resentencing is required under the correct guidelines.

3. Resentencing must be by a different judge in order to

REFERENCES

Am Jur 2d, Criminal Law §§ 542, 598-600, 606, 629.
See ALR Index under Indeterminate Sentence.

preserve the appearance of justice and to avoid needless waste and duplication.

Remanded.

CONNOR, J., concurring in the result, noted that, pursuant to *Weaver,* a prisoner in Michigan has a reasonable possibility of living to be at least ninety-three years old. Therefore, the defendant's sentence does not violate the holding of *People v Moore,* 432 Mich 311 (1989), that a term-of-years sentence must be something that is reasonably possible for a defendant to serve. Nevertheless, the trial court erred in scoring Homicide Offense Variable 3. The highest minimum sentence that the sentencing guidelines contemplate in this case is twenty-five years. Thus, the forty-year minimum sentence imposed is disproportionate, and the defendant must be resentenced. Because the trial judge twice has sentenced the defendant to prison for forty to eighty years, resentencing by a different judge is appropriate.

1. SENTENCES — INDETERMINATE SENTENCES — MINIMUM SENTENCES.
   An indeterminate sentence must be one that the defendant has a reasonable prospect of actually serving, as measured by the minimum sentence.

2. SENTENCES — INDETERMINATE SENTENCES — MINIMUM TERMS.
   An indeterminate sentence under which a defendant will attain the age of the early nineties before being eligible for parole is one that the defendant reasonably can be expected to serve.

3. SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES.
   A sentencing court must score the sentencing guidelines' Homicide Offense Variable 3 consistent with a jury verdict unless the court has information that was not presented to the jury.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Richard Thompson,* Prosecuting Attorney, *Michael J. Modelski,* Chief, Appellate Division, and *Thomas S. Richards,* Assistant Prosecuting Attorney, for the people.

*Faintuck, Shwedel & Wolfram* (by *William G. Wolfram*), for the defendant.

AFTER REMAND

Before: MICHAEL J. KELLY, P.J., and MARILYN KELLY and CONNOR, JJ.

MICHAEL J. KELLY, P.J. Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to forty to eighty years' imprisonment and two years' imprisonment, respectively. He appealed to this Court, and we affirmed and remanded for resentencing on the basis that the trial court had failed to respond to defendant's objections to the scoring of the sentencing guidelines. Unpublished opinion per curiam, decided September 5, 1990 (Docket No. 112396). Subsequently, defendant was resentenced to the same terms. Defendant again appeals as of right.

At the time of the original sentencing, defendant was approximately fifty-four years old. Computation of the effect of regular disciplinary credits indicates that defendant will not be eligible for parole until he is in his early nineties. Defendant claims that he should be resentenced because it is not reasonably possible for him to serve the sentence imposed.

Under the indeterminate sentence provisions, a sentencing court may not impose a term of years of imprisonment that has the effect of avoiding eligibility for parole. *People v Moore,* 432 Mich 311, 323-324; 439 NW2d 684 (1989). An indeterminate sentence must be one that the defendant has a reasonable prospect of actually serving, as measured by the minimum sentence. *Id.* at 329. We do not believe that defendant has a reasonable prospect of actually serving the sentence imposed, even assuming regular disciplinary credits. *Id.; People v Rushlow,* 437 Mich 149; 468 NW2d 487 (1991). Because we believe the entire interval between

defendant's minimum and maximum sentence is virtually certain to occur after his death, we would remand this matter for resentencing but for this Court's recent decision in *People v Weaver (After Remand),* 192 Mich App 231; 480 NW2d 607 (1991).

The *Weaver* Court affirmed a seventy-five-year minimum sentence imposed on a defendant who was approximately thirty years old. The Court concluded that Weaver could reasonably be expected to serve a sentence that would place him in his early nineties before he would be eligible for parole. Although we consider this result spurious, unfortunately we are constrained under Administrative Order No. 1990-6 to follow the *Weaver* decision. We are following *Weaver* only because we are required to do so. Otherwise, for the same reasons as those set forth in Judge HOOD's dissenting opinion in *Weaver,* we would find that there is no empirical basis for a conclusion that prisoners in this state are likely to live well into their nineties, and we would hold that defendant does not have a reasonable prospect of actually serving his minimum sentence. The result reached in this case, as noted by Judge HOOD in *Weaver, supra* at 236, "pushes us beyond the pale of reason into the lap of ludicrousness."

Defendant also challenges the scoring of the sentencing guidelines' premeditation and deliberation points under Homicide Offense Variable (OV) 3. The trial court scored the variable at fifty points, signifying a premeditated intent to kill. However, we note that the instructions to OV 3 in the Michigan Sentencing Guidelines (2d ed), p 77, provide that the sentencing judge "must score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury." The jury rejected the charge of first-degree premeditated murder and convicted defen-

dant of the lesser-included offense of second-degree murder. The trial court mentioned no information regarding defendant's intent that was not presented to the jury. Therefore, the trial court erred in not following the guidelines' instruction to score OV 3 at 25 points. Hence, resentencing is required under the correct guidelines.

Resentencing shall be conducted by a different judge in order to preserve the appearance of justice and to avoid needless waste and duplication. *People v Evans,* 156 Mich App 68, 72; 401 NW2d 312 (1986); *People v Spalla,* 147 Mich 722, 727; 383 NW2d 105 (1985).

Remanded for resentencing by a different judge. We do not retain jurisdiction.

MARILYN KELLY, J., concurred.

CONNOR, J. *(concurring).* I concur in the result reached by the majority, albeit for different reasons.

The punishment for second-degree murder in Michigan is imprisonment for life, or any term of years. MCL 750.317; MSA 28.549. In *People v Moore,* 432 Mich 311, 329; 439 NW2d 684 (1989), our Supreme Court held that a term-of-years sentence must be reasonably possible for a defendant to actually serve. *People v Rushlow,* 437 Mich 149, 154-156; 468 NW2d 487 (1991), decided that it is proper to take into account regular disciplinary credits when reviewing a sentence under *Moore.*[1]

[1] I believe our Supreme Court should reconsider its decision in *Moore.* See *People v Mitchell,* 428 Mich 364, 370; 408 NW2d 798 (1987). The principle of proportionality announced in *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990), and the use of the sentencing guidelines in assessing proportionality adequately protect defendants from arbitrary and unfairly harsh sentences. Other artificial limitations placed on sentencing discretion should be disposed of. If our statutes give a sentencing court tools with which to fashion a sentence that is, in effect, a life sentence with no possibility of parole,

The briefs reflect some confusion about how to take regular disciplinary credits into account. For Proposal B offenses and for crimes committed on or after April 1, 1986, prisoners are eligible for five days of regular disciplinary credits for every month actually served. MCL 800.33(3), (5); MSA 28.1403(3), (5). Taking into account leap years, the average year is 365.25 days long. With the sixty days of regular disciplinary credits a prisoner can receive, a prisoner can move an average of 425.25 days closer to being eligible for parole each year. Therefore, multiplying the minimum sentence by the ratio of actual days served to total days credited (365.25÷425.25 or 0.8589) produces an estimate of what portion of a minimum sentence a prisoner will have to serve before being eligible for parole, taking into account regular disciplinary credits.

The *Moore* Court rejected a one hundred-year minimum sentence imposed on a defendant almost thirty-five years old. Taking into account regular disciplinary credits, Moore would have had to serve eighty-five years and eleven months of his sentence before he would have been eligible for parole. Thus, we know from this decision that

and if, considering the nature of the offense and the background of the offender, it would be appropriate to impose such a sentence, a trial court should be allowed to do so.

Moreover, as a result of *Rushlow*, trial courts routinely consult "good time charts" that carefully calculate the amount of regular disciplinary credits defendants can accumulate and factor the reduction into their sentence to ensure that a defendant they perceive to be particularly dangerous or who has committed an exceptionally offensive crime will not be eligible for parole until he has at least survived his ninetieth birthday. Review on appeal for a violation of *Moore* now consists of a mathematical exercise in futility to ascertain whether the trial court failed to add or subtract correctly.

Finally, as is noted in footnote 4, *infra*, a minimum sentence a defendant has a one-in-twelve chance of serving does not violate *Moore*. Thus, the decision in *Moore* expends scarce judicial resources on a question that it is quite unlikely will make any difference to anyone.

prisoners in Michigan do not have a reasonable possibility of living to be 120 years old.[2]

The *Rushlow* Court affirmed a seventy-five-year minimum sentence imposed on a defendant twenty-six years old. Taking into account regular disciplinary credits, Rushlow will have to serve sixty-four years and five months of his sentence before being eligible for parole. Thus, we know from this decision that our Supreme Court believes that prisoners in Michigan have a reasonable possibility of living to be at least ninety years old.[3] The eighty-seven-year figure that is frequently mentioned in discussions of *Rushlow* is not correct, because that figure takes into account "all possible disciplinary credits" including special disciplinary credits that the Supreme Court decided could not be considered. *Rushlow, supra* at 154.

In *People v Weaver (After Remand),* 192 Mich App 231; 480 NW2d 607 (1991), this Court affirmed a seventy-five-year minimum sentence imposed on a defendant who was about thirty years old. Weaver will have to serve sixty-four years of his minimum sentence. Taking into account credit for time served before conviction, Weaver will be at least ninety-three before being eligible for parole. Under Administrative Order No. 1990-6, we are bound by *Weaver* to find that prisoners in Michigan have a reasonable possibility of living to be at least ninety-three years old.[4]

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[2] This is not surprising. With apologies to Methuselah, only once in human history has it been verified that a person lived to celebrate his 120th birthday. *Guinness Book of Records* (New York: Bantam Books, 1993), pp 154-158.

[3] According to my calculations based on the United States population mortality table found in the Tables volume of MCLA (1993 Supp), pp 71-72, a person twenty-six years old has about a one-in-seven chance of living to his ninetieth birthday.

[4] According to my calculations based on the United States population mortality table found in the Tables volume of MCLA (1993 Supp), pp 71-72, a person thirty years old has about a one-in-twelve chance of living to his ninety-third birthday.

Taking regular disciplinary credits into account, defendant will be eligible for parole after serving less than thirty-four years and five months of his forty-year minimum sentence. Because he first had to serve two years for the felony-firearm conviction, defendant did not actually begin serving time for his murder conviction until he was fifty-five or fifty-six. This means that he will likely be eligible for parole before his ninety-second birthday. Consequently, following *Weaver* as I must, I find no violation of *Moore, supra.*[5]

Defendant also challenges the trial court's scoring of the sentencing guidelines' Homicide Offense Variable (ov) 3. The trial court scored the variable at fifty points, signifying a premeditated intent to kill. The scoring instructions state:

> The sentencing judge must score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury. [Michigan Sentencing Guidelines (2d ed), p 77.]

In this case, the trial court had no information regarding defendant's intent that was not presented to the jury. The jury rejected the charge of first-degree premeditated murder and convicted defendant of the lesser-included offense of second-degree murder. Therefore, the trial court erred in not following the guidelines' instructions and scoring ov 3 at 25 points. Contrary to the trial court's assertion, the instructions do not make it impossible for someone convicted of second-degree murder to receive fifty points. Such a score is possible for convictions based on a guilty plea, a bench trial verdict, or even a jury verdict when the trial court

[5] According to my calculations based on the United States population mortality table found in the Tables volume of MCLA (1993 Supp), pp 71-72, a person fifty-six years old has about a one-in-nine chance of living to his ninety-second birthday.

is privy to information that the jury did not have before it.

In *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990), our Supreme Court decided that sentences are to be reviewed for their proportionality, and that the sentencing guidelines are the best barometer available to assess proportionality. Properly scored, the highest minimum sentence the guidelines contemplate in this case is twenty-five years, considering the nature of the offense and defendant's background. I find nothing remarkable about this defendant or his crime that would justify the trial court treating him more harshly than the courts of this state treat other similarly situated second-degree murderers. Consequently, I find the sentence disproportionate, and agree that defendant must be resentenced.

Defendant has asked to be resentenced by a different judge. The trial judge has twice sentenced defendant to prison for forty to eighty years, and this Court has twice ordered defendant to be resentenced. Under the circumstances, I agree that it is appropriate to grant defendant's request and order defendant to be resentenced by a different judge.

CHARLES MURPHY, MD, PC v CITY OF DETROIT

AMERICANA SUPERFOOD, INC v CITY OF DETROIT

Docket Nos. 139145, 139147. Submitted April 6, 1993, at Detroit. Decided August 2, 1993, at 9:15 A.M.

Charles Murphy, M.D., P.C., the owner of realty used as a medical clinic, and Americana Superfood, Inc., and Americana Superfood #1, the owners of realty used as a grocery store, brought separate actions for inverse condemnation in the Wayne Circuit Court against the City of Detroit and the Community and Economic Development Department after the defendants, as part of an urban renewal project, condemned and razed 1,400 houses occupied by 17,000 people near the plaintiffs' businesses. The plaintiffs alleged that the resultant decrease in the volume of their businesses constituted a de facto taking of their properties without just compensation. The court, John A. Murphy, J., summarily dismissed the plaintiffs' claims, ruling that no taking had occurred. The plaintiffs appealed, and the appeals were consolidated.

The Court of Appeals *held:*

For purposes of inverse condemnation, a taking occurs where government action permanently has deprived the property owner of any possession or use of the property. A de facto taking is established where some action by the government specifically directed toward the plaintiff's property has the effect of limiting the use of the property.

A taking cannot be established under the facts of this case. The defendants did not take from the plaintiffs their right to possess their lands and buildings, nor did the defendants take deliberate action toward the plaintiffs' properties that deprived the plaintiffs of the right to use their properties as they saw fit.

Affirmed.

EMINENT DOMAIN — INVERSE CONDEMNATION — LOSS OF BUSINESS VOLUME.

A decrease in the volume of business experienced by the owner of

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REFERENCES

Am Jur 2d, Eminent Domain §§ 157, 199, 482.

See ALR Index under Eminent Domain; Inverse Condemnation.

a business and the land on which the business is located resulting from the acquisition and demolition of an adjacent residential neighborhood by a municipality exercising its power of eminent domain does not constitute a taking of the business owner's property for which the municipality must pay compensation (US Const Am V; Const 1963, art 10, § 2).

*Stone & Richardson, P.C.* (by *Ralph H. Richardson*), for plaintiffs.

*Donald Pailen,* Corporation Counsel, and *Deborah Ross Adams,* Assistant Corporation Counsel, for the defendants.

Before: MARILYN KELLY, P.J., and SHEPHERD and CONNOR, JJ.

CONNOR, J. Plaintiffs filed inverse condemnation actions, claiming that defendants' conduct resulted in a de facto taking of their property without compensation. On defendants' motion for summary disposition brought pursuant to MCR 2.116(C)(10), the trial court ruled that there was no taking and dismissed plaintiffs' claims. Plaintiffs appeal as of right, and we affirm.

Plaintiffs own property and operate businesses on East Jefferson Avenue in Detroit. Defendants used their power of eminent domain to purchase large areas of land nearby for two urban renewal projects, and leveled the residential neighborhoods that had been located on the land. Each plaintiff's volume of business was reduced about seventy-five percent from what it was before defendants' action.

We agree with the trial court that there is no genuine question of material fact and that, as a matter of law, defendants did not take anything that could be construed as plaintiffs' property.

Both our state and federal constitutions provide

that private property may not be taken for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2. "Property" embraces everything over which a person may have a right to exclusive control or dominion. *Rassner v Federal Collateral Society, Inc,* 299 Mich 206, 213-214; 300 NW 45 (1941); *People v McKendrick,* 188 Mich App 128, 136; 468 NW2d 903 (1991). A "taking" for purposes of inverse condemnation means that government action has permanently deprived the property owner of any possession or use of the property. *Jack Loeks Theatres, Inc v Kentwood,* 189 Mich App 603, 608; 474 NW2d 140 (1991), modified in part 439 Mich 968 (1992). While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property. "[T]he form, intensity, and deliberateness of the governmental actions toward the injured party's property must be examined." *In re Acquisition of Virginia Park,* 121 Mich App 153, 160; 328 NW2d 602 (1982).

Defendants did not take from plaintiffs their right to possess their lands and buildings, and defendants took no deliberate action toward plaintiffs' property that deprived plaintiffs of their right to use their property as they saw fit. They did not take from plaintiffs their right to sell their land, lease it, or give it away. Plaintiffs may continue to operate their businesses on their land, or may use their land for any other purpose that is not a nuisance to others, subject only to reasonable government regulation. *McKendrick, supra* at 137. In short, defendants took no action directed at plaintiffs' property.

We do not doubt that the value of plaintiffs' properties has greatly diminished because of defen-

dants' actions. By removing 1,400 residences, housing 17,000 people, from the neighborhood immediately adjacent to plaintiffs' businesses, defendants have effectively eliminated most of plaintiffs' potential customers. What had once been prime locations for a medical center and a grocery store suddenly became unsuitable for those endeavors. Presumably, plaintiffs paid a premium for their property because of its proximity to a substantial base of potential customers. They assumed their customer base would remain constant because of their expectation that the land nearby would continue to be used in the future as it had been used in the past.

However, expectations are not rights. Despite plaintiffs' assumption that the adjacent properties would always be a residential community, they had no right to require that the property remain unchanged. The exclusive right to control the use of the land did not belong to plaintiffs, but to their neighbors who owned it. When defendants bought the neighbors' land, they bought the right to control the use of the land. Despite the diminution in value of plaintiffs' land and buildings, resulting from defendants' change in the way they used their land, defendants took no deliberate action directed toward plaintiffs' property rights that deprived plaintiffs of possession or use of their land or buildings.

Affirmed.

PEOPLE v WOOD

Docket No. 138084. Submitted January 13, 1993, at Grand Rapids. Decided August 2, 1993, at 9:20 A.M.

James Wood was convicted by a jury in the Calhoun Circuit Court, Stephen B. Miller, J., of possession of between 50 and 225 grams of cocaine and possession with intent to deliver marijuana. The defendant appealed, claiming that the trial court erred in refusing to suppress evidence of the narcotics uncovered in a search of his home pursuant to a warrant, inasmuch as the warrant was invalid because its supporting affidavit was given by a social worker in violation of a statutory privilege governing communications between the social worker and the defendant's minor daughter.

The Court of Appeals *held:*

1. The statutory privilege governing communications between social worker and client, MCL 339.1610; MSA 18.425(1610), is abrogated by the Child Protection Law, MCL 722.631; MSA 25.248(11), where a report is required under the Child Protection Law or where the communications are offered as evidence of neglect or abuse in a child protective proceeding. The exception provided by the Child Protection Law to the privilege between social worker and client does not apply in this case. A social worker is not required by the Child Protection Law to serve as an affiant for a warrant authorizing the search of a parent's home for illicit narcotics, and the communications involved in this case were offered as evidence in a criminal prosecution against the defendant, not in a protective proceeding for the benefit of the defendant's child.

2. The defendant, as a person authorized to act in behalf of his minor child, can assert or waive the privilege governing communications between the child and her social worker.

3. The defendant's child did not waive the privilege in discussions with others because those discussions did not involve the

REFERENCES

Am Jur 2d, Infants § 14 *et seq.*; Witnesses § 285 *et seq.*

See ALR Index under Children; Privileged and Confidential Matters.

communication itself. Because the privileged communication had not yet occurred, it could not have been waived.

4. The appropriate remedy for the violation of the privilege in this case is suppression of the evidence seized pursuant to the warrant.

Reversed.

EVIDENCE — PRIVILEGED COMMUNICATIONS — CHILD PROTECTION LAW.

The Child Protection Law abrogates legally recognized privileges, except that between attorney and client, only where a report is required under the act or where the communication subject to a privilege is offered as evidence of neglect or abuse in a child protective proceeding (MCL 722.631; MSA 25.248[11]).

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Jon R. Sahli,* Prosecuting Attorney, and *David J. Wallace,* Assistant Prosecuting Attorney, for the people.

*John H. Macfarlane,* for the defendant.

Before: MARILYN KELLY, P.J., and MACKENZIE and NEFF, JJ.

MARILYN KELLY, P.J. Following a jury trial, defendant was convicted of possession of between 50 and 225 grams of cocaine and possession with intent to deliver marijuana. MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii); MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). The judge sentenced him to consecutive terms of five to twenty years and three months to four years in prison for the convictions, respectively. On appeal, defendant argues that the judge erred in admitting evidence obtained in violation of the social worker-client privilege. He asserts, also, that prosecutorial misconduct denied him a fair trial. He argues that there was insufficient evidence to convict him and that the court erred in imposing consecutive sentences. He asserts that the search warrant used to seize the drugs was wrongfully issued. We reverse.

I

Narcotics charges were filed against defendant after a search of his residence led to the discovery of marijuana and cocaine. The affiant for the search warrant affidavit was John Loniewski, a social worker employed by the Calhoun County Children's Protective Services. Loniewski had counseled defendant's eleven-year-old daughter, Melissa. At the hearing on defendant's motion to suppress, Mr. Loniewski testified that he spoke to Melissa after receiving a telephone call from her school principal. Melissa had told her teacher she was having problems at home because of her parents' involvement with drugs.

Melissa told Loniewski that her parents were using and selling cocaine and marijuana. They sometimes took Melissa and her brother with them when they purchased or sold narcotics. Loniewski allegedly told Melissa that the information she provided him could be used in a criminal prosecution against her parents. Melissa denied this. She claimed she would not have said anything to Loniewski if he had told her the consequences.

Loniewski believed that Melissa and her brother were emotionally and possibly physically neglected. Consequently, he contacted the Michigan State Police and told them what he knew. At the suggestion of the police, Loniewski acted as the affiant.

At trial, the court denied defendant's motion to suppress the evidence seized during the search. It indicated that Loniewski's actions in serving as an affiant were reasonable and necessary and were not prohibited by the social worker-client privilege. Loniewski did not testify at defendant's trial.

II

On appeal, defendant argues that the trial court erred in failing to suppress evidence seized under an invalid search warrant. The warrant was invalid, he alleges, because the information providing the basis for its issuance violated the statutory social worker-client privilege. MCL 339.1610; MSA 18.425(1610). The privilege is not subject to waiver except by the client or a person authorized to act in the client's behalf. *Id.*

Privileges are intended to encourage society's interest in open discussion between persons in need and those from whom they seek help. *People v Adamski,* 198 Mich App 133; 497 NW2d 546 (1993). The rationale traditionally advanced for privileges is that public policy requires the encouragement of communications essential to effective relationships. *Howe v Detroit Free Press,* 440 Mich 203, 211; 487 NW2d 374 (1992). Statutorily created privileges should be narrowly construed, while exceptions are broadly construed. *In re Brock,* 442 Mich 101, 119; 499 NW2d 752 (1993).

The Child Protection Law provides an exception to the social worker-client privilege.

> Any legally recognized privileged communication except that between attorney and client is abrogated and shall neither constitute grounds for excusing a report otherwise required to be made nor for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to this act. [MCL 722.631; MSA 25.248(11).]

Section 11 does not completely abrogate the privilege in all child protective proceedings. *In re Brock,* 117, citing *In re Tedder,* 150 Mich App 688, 702; 389 NW2d 149 (1986). It abrogates the privilege only (1) where a report is required under the

act, or (2) where the communication subject to a privilege is offered as evidence of neglect or abuse in a child protective proceeding. *Id.* The exception does not otherwise affect privileges with regard to criminal proceedings. *People v Mineau,* 194 Mich App 244, 249; 486 NW2d 72 (1992).

We agree with defendant that the exception in § 11 applies only to child protective proceedings and not criminal proceedings. See *Mineau, supra.* In this case, the confidential communication was used to obtain probable cause for a search warrant. Once the warrant had been executed, defendant was charged, not for crimes against his children, but with violation of Michigan's narcotics laws. Cf. *Mineau, supra.*

Contrary to the prosecution's assertions, nothing in any other section of the Child Protection Law permits us to ignore the privilege in this case. We recognize that the Child Protection Law mandates that social workers cooperate with law enforcement officials in relation to preventing, identifying and treating child abuse and neglect. MCL 722.628; MSA 25.248(8). It also requires them to report incidents of abuse and neglect. MCL 722.623; MSA 25.248(3). However, the reporting requirements mandated under this act do not obligate social workers to act as affiants for search warrants when the police are seeking evidence of narcotics activities.

The intent of the Legislature in enacting the Child Protection Law was not to sanction the use of confidential information to obtain probable cause for a search warrant. It was, instead, to protect children from abuse and neglect. In this case, protection of the children was accomplished by removing them from the home and initiating child protection proceedings. Under the facts of

this case, we find that no exception to the social worker-client privilege exists.

III

The prosecution argues that, even if no exception exists, defendant has no standing to assert the privilege, because it belongs to his daughter. We note that the statute creating the social worker privilege states that the privilege is subject to waiver by a client or a person authorized to act in the client's behalf. MCL 339.1610; MSA 18.425(1610). A parent is a person authorized to act in the child's behalf. *Thames v Thames,* 191 Mich App 299, 303; 477 NW2d 496 (1991). Since defendant could waive the privilege, it logically follows that he could also assert it based on his status as the child's parent.

IV

We disagree that Melissa waived the privilege by telling other persons about her parents' drug dealings before she spoke with Loniewski. Disclosures she made prior to the meeting with Loniewski did not involve the communication itself. See *Kubiak v Hurr,* 143 Mich App 465, 474; 372 NW2d 341 (1985); Cf. *United States v Benford,* 457 F Supp 589, 597 (ED Mich, 1978). Since the privileged communication had not yet occurred, the privilege could not have been waived.

V

We conclude that the social worker-client privilege was violated under the facts of this case. The next question to be addressed is whether the evidence seized in violation of the privilege must be suppressed. The per se exclusionary rule is appli-

cable to constitutionally defective searches and seizures. *Birkenshaw v Detroit,* 110 Mich App 500, 512; 313 NW2d 334 (1981). The rule has a dual purpose: (1) protection of the right to privacy, and (2) deterrence of police misconduct. *Id.,* citing *People v Warner,* 401 Mich 186, 209; 258 NW2d 385 (1977). A statutory violation, especially where the statute provides its own remedy, does not require application of the exclusionary rule. *People v Moore,* 180 Mich App 301, 307; 446 NW2d 834 (1989). Even if the constitutional exclusionary rule is inapplicable, a similar exclusionary rule may be applied on public policy grounds. See *People v Burdo,* 56 Mich App 48, 52; 223 NW2d 358 (1974).

The social worker-client privilege is provided for by statute. MCL 339.1610; MSA 18.425(1610). However, the statute furnishes no remedy if the privilege is violated. Cf. *Mineau,* 248-249, citing MCL 722.625; MSA 25.248(5). We believe the appropriate remedy in this case is to suppress the evidence seized. Without imposing this remedy, such blatant violations of the social worker-client privilege would go unchecked.

Based on our disposition of this matter, defendant's remaining issues are rendered moot.

Reversed.

## HARRIS v HARRIS

Docket No. 155690. Submitted June 3, 1993, at Detroit. Decided August 2, 1993, at 9:25 A.M.

Samuel Harris brought an action in the Wayne Circuit Court against Doris L. Harris, seeking an annulment of their marriage on the ground of bigamy. A default was entered after the defendant failed to answer, but the court, John A. Murphy, J., refused to grant the requested annulment, determining that the equitable doctrine of clean hands precluded the parties from seeking an annulment because they knew when they married that the plaintiff was married to another woman. The plaintiff appealed.

The Court of Appeals *held:*

1. MCL 552.3; MSA 25.83 requires a circuit court that is presented with a petition for the annulment of a marriage alleged to be void to determine the validity of the marriage and, upon due proof of the nullity of the marriage, to declare the marriage void.

2. A bigamous marriage is void under MCL 551.5; MSA 25.5 and MCL 552.1; MSA 25.81.

3. Equitable principles of estoppel and clean hands do not prevent a party to a void marriage from seeking and obtaining an annulment.

Reversed and remanded for a determination whether the marriage is bigamous, and if so, for a declaration that the marriage is void.

HUSBAND AND WIFE — ANNULMENT — BIGAMY.

A circuit court, upon a petition for the annulment of a marriage on the ground of bigamy, must determine whether the marriage is bigamous, and if so, must declare the marriage invalid and grant an annulment; equitable principles of estoppel or clean hands do not prevent a party to a bigamous marriage from seeking and obtaining an annulment (MCL 551.5, 552.1, 552.3; MSA 25.5, 25.81, 25.83).

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REFERENCES

Am Jur 2d, Annulment of Marriage § 4.

See ALR Index under Annulment of Marriage.

*Neil Strefling,* for the plaintiff.

Before: WEAVER, P.J., and MURPHY and JANSEN, JJ.

MURPHY, J. Plaintiff appeals from an order of the Wayne Circuit Court denying his request for an annulment of his marriage to defendant. We reverse and remand.

Plaintiff married Estelle Mills Harris in 1945. Although plaintiff never divorced Estelle, he nonetheless married defendant in Michigan in 1977. Plaintiff maintains that, at the time of his marriage to defendant, both he and defendant knew of his previous marriage and knew that he had not been divorced from Estelle. Plaintiff and defendant had one child, Samantha Harris, born March 4, 1978. Plaintiff's first wife, Estelle, died in 1986.

Plaintiff initiated this action by filing a complaint for annulment of his marriage to defendant. Defendant failed to respond, and a default was entered against her. The circuit court denied plaintiff's request for annulment, however, reasoning that, because the parties were aware that the marriage was bigamous at the time they were married, they were precluded by the equitable doctrine of clean hands from receiving an annulment.

Plaintiff challenges the authority of the circuit court to deny his request for annulment, given the statutory provisions in question and given that defendant has defaulted by failing to appear. We hold that the circuit court was obligated to determine whether the marriage was bigamous and, if so, to declare the marriage void.

MCL 551.5; MSA 25.5 provides:

> No marriage shall be contracted whilst either of

> the parties has a former wife or husband living, unless the marriage with such former wife or husband, shall have been dissolved.

MCL 552.1; MSA 25.81 provides, in pertinent part:

> All marriages which are prohibited by law on account of consanguinity or affinity between the parties, or on account of either of them having a wife or husband then living, and all marriages solemnized when either of the parties was insane or an idiot, shall, if solemnized within this state, be absolutely void.

Thus, a bigamous marriage is void. *In re Meredith's Estate,* 279 Mich 298, 302; 272 NW 683 (1937); *Stevenson v Detroit,* 42 Mich App 294, 296; 201 NW2d 688 (1972); *Gallison v Gallison,* 5 Mich App 460, 462; 146 NW2d 812 (1966). Where a marriage is believed to be void, a party to the marriage may petition the circuit court for a declaration that the marriage is void. MCL 552.3; MSA 25.83 provides:

> When a marriage is supposed to be void, or the validity thereof is doubted, for any of the causes mentioned in the two [2] preceding sections, either party, excepting in the cases where a contrary provision is hereinafter made, may file a petition or bill in the circuit court of the county where the parties, or one of them, reside, or in the court of chancery for annulling the same, and such petition or bill shall be filed and proceedings shall be had thereon, as in the case of a petition or bill filed in said court for a divorce; and upon due proof of the nullity of the marriage, it shall be declared void by a decree or sentence of nullity.

Similarly, MCL 552.4; MSA 25.84 provides:

> When the validity of any marriage shall be denied or doubted by either of the parties, the other party may file a bill or petition in the manner aforesaid, for affirming the marriage; and upon due proof of the validity thereof, it shall be declared by a decree or sentence of the court; and such decree, unless reversed on appeal, shall be conclusive upon all persons concerned.

When interpreting statutes, our primary goal is to ascertain and give effect to the intent of the Legislature. *Mollett v Taylor,* 197 Mich App 328, 335; 494 NW2d 832 (1992). Where a statute is clear, judicial construction is not necessary, nor is it permitted. *Lorencz v Ford Motor Co,* 439 Mich 370, 376; 483 NW2d 844 (1992). In this case, the statute clearly states that where there is due proof that a marriage is invalid, the circuit court "shall" declare the marriage void. Thus, the circuit court in this case was required to determine whether the marriage was bigamous and therefore void. If it was, the circuit court was required by statute to declare the marriage void "by decree or sentence of nullity." MCL 552.3; MSA 25.83.

We appreciate the circuit court's concern regarding granting relief when both parties are alleged to have known at the outset that the marriage was bigamous and therefore both did not have clean hands. While we find no case in Michigan discussing this precise point, other jurisdictions are apparently split on the resolution of the issue. Although equitable concerns may come into play where a marriage is merely "voidable," the majority of courts appear to hold that equitable principles of estoppel and clean hands do not prevent a party to a void marriage from seeking and obtaining an annulment in court. 4 Am Jur 2d, Annulment of Marriage, § 44, p 469-470. Sound reasons can be advanced for granting an annulment in a

case such as this. First, bigamous marriages are void from the beginning and therefore need not be formally decreed to be void. Second, the concept of culpability has not been included in the relevant statutes in Michigan. See MCL 552.3; MSA 25.83. Third, refusing to grant an annulment would contravene public policy because it could be construed as essentially condoning bigamy.

We therefore hold that the circuit court was required by statute to determine if the marriage was bigamous and, if so, to declare the marriage void. We make no determination concerning property rights or child support obligations, because these issues are not before this Court.

Reversed and remanded. We do not retain jurisdiction.

HENISER v FRANKENMUTH MUTUAL INSURANCE COMPANY

Docket No. 142957. Submitted November 9, 1992, at Grand Rapids. Decided August 2, 1993, at 9:30 A.M. Leave to appeal sought.

Richard J. Heniser brought an action in the Kent Circuit Court against Frankenmuth Mutual Insurance Company, seeking the proceeds of a homeowner's insurance policy insuring a house that was sold by the plaintiff on a land contract and destroyed by fire while the policy was in effect. The court, Robert A. Benson, J., entered a judgment for the defendant, finding that the policy provided no coverage for the loss because it provided that the insured must be using the dwelling as his residence in order to receive coverage, and the plaintiff had relinquished his possessory interest and all rights to reside there when he sold the house and the buyers took possession two months before the fire. The plaintiff appealed.

The Court of Appeals *held:*

1. The "residence premises" as defined in the insurance policy is unambiguous and not in conflict with other language used in the policy. The policy clearly provides that the dwelling must be used as the insured's residence in order to receive coverage. When the plaintiff sold the house and the buyers took possession before the fire loss, it was no longer the plaintiff's residence premises and he was not entitled to coverage under the policy.

2. The policy clearly defined "residence premises" without resort to unusual or multiple definitions that might frustrate the insured's expectations or act as an exclusion.

Affirmed.

GRIFFIN, J., dissenting, stated that the majority impermissibly has transformed a policy definition into an exclusion. Coverage for the plaintiff's insurable interest as a land contract vendor was not forfeited as a result of the sale of the home. The policy definition describing the property as the "residence premises" does not exclude coverage after the property was sold. If an insurer intends to exclude coverage under certain

REFERENCES

Am Jur 2d, Insurance §§ 271, 283.

See ALR Index under Insurance and Insurance Companies.

circumstances, it should clearly state those circumstances in the "exclusions" section of the policy. The policy definition describes the residence covered at the time of the issuance of the policy and does not impose a condition requiring the policyholder to continue to live in the residence.

INSURANCE — JUDICIAL CONSTRUCTION — CONTRACTS.

Insurance policies are construed in favor of coverage when an ambiguity exists; if the policy fairly admits of but one interpretation, the policy should not be considered ambiguous or fatally unclear.

*Cholette, Perkins & Buchanan* (by *Bruce M. Bieneman* and *Robert J. Riley*), for the plaintiff.

*Denenberg, Tuffley, Bocan, Jamieson, Black, Hopkins & Ewald, P.C.* (by *Michael P. McDonald*), for the defendant.

Before: MACKENZIE, P.J., and GRIFFIN and CONNOR, JJ.

MACKENZIE, P.J. This is an action for recovery under a homeowner's insurance policy issued by defendant to plaintiff. Following a bench trial, the trial court found that the policy provided no coverage for plaintiff's fire-loss claim and entered a judgment in favor of defendant. Plaintiff appeals as of right. We affirm.

The facts are undisputed. For several years, plaintiff had owned a house in Honor that he used as a seasonal residence. In September 1988, he renewed his homeowner's policy on the house for a one-year period. In November 1988, plaintiff sold the property on a land contract, and the buyers took possession of the house. In January 1989, while the homeowner's policy was still in effect, the house was destroyed by fire. Defendant denied coverage for the fire loss.

The policy at issue provided in relevant part in Section I—Property Coverages:

We cover:

1. the dwelling on the residence premises shown in the Declarations, including structures attached to the dwelling.

The definitions section of the policy states in relevant part:

8. "residence premises" means:

a. the one family dwelling, other structures and grounds; or

b. that part of any other building; *where you reside* and which is shown as the "residence premises" in the Declarations. "Residence premises" also means a two to four family dwelling *where you reside* in at least one of the family units and which is shown as the "residence premises" in the Declarations. [Emphasis added.]

The sole issue in this case is whether the trial court erred in finding that the policy of insurance issued by defendant to plaintiff provided no coverage for the fire loss because of the "residence premises" definition in the policy. We find no error.

Insurance policies will be construed in favor of coverage when an ambiguity exists. However, if an insurance contract fairly admits of but one interpretation, the policy should not be considered ambiguous or fatally unclear. *Farm Bureau Mutual Ins Co of Michigan v Stark,* 437 Mich 175, 182; 468 NW2d 498 (1991). Here, we agree with the trial court that "residence premises" as defined in the insurance policy was unambiguous and not in conflict with other language used in the policy. As found by the court, the policy is clear that the dwelling listed on the declaration sheet must be used as the insured's residence in order to receive coverage. Here, when plaintiff sold the

house two months before the fire loss, he relinquished his possessory interest and all rights to reside there. Under the clear language of the policy, the house was no longer his "residence premises," and, thus, he was not entitled to coverage under this insurance policy. Instead, it appears that plaintiff's remedy lies with the purchasers of the house, who under the terms of the land contract were obligated to insure the property with a loss-payable clause in favor of plaintiff.

Plaintiff also relies on *Powers v DAIIE,* 427 Mich 602; 398 NW2d 411 (1986), and *Transamerica Ins Corp of America v Buckley,* 169 Mich App 540; 426 NW2d 696 (1988), to argue that an insurer is not allowed to enforce purported exclusionary language that is found in the definitions section of the insurance contract. We agree with the trial court that those cases are inapplicable under the circumstances of this case. Unlike *Powers* and *Buckley,* the policy in this case clearly defines "residence premises" without resort to unusual or multiple definitions that might frustrate the insured's expectations or act as an exclusion. Accordingly, we affirm the decision of the trial court.

Affirmed.

CONNOR, J., concurred.

GRIFFIN, J. *(dissenting).* I respectfully dissent. In my view, the majority has impermissibly transformed a policy definition into an exclusion. As a general rule, once coverage is afforded,

> if an insurer intends to exclude coverage under certain circumstances, it should clearly state those circumstances in the section of its policy entitled "Exclusions." *Powers v DAIIE,* 427 Mich 602, 632-633; 398 NW2d 411 (1986). [*Transamerica Ins Corp*

*of America v Buckley,* 169 Mich App 540, 546; 426 NW2d 696 (1988).]

As noted by the majority, the sole issue before us is whether coverage is excluded in this instance because the home did not meet the policy's definition of "residence premises" at the time of the fire. The seminal case in this area appears to be *Reid v Hardware Mutual Ins Co of the Carolinas, Inc,* 252 SC 339; 166 SE2d 317 (1969). In *Reid,* the plaintiff insureds purchased a policy of fire insurance covering their family home. The insured building was described in the policy as a "one story frame constructed . . . *owner occupied,* one family dwelling." *Id.* at 342 [emphasis added]. While the policy was in force, the Reids sold their home to a third party, who assumed the Reids' outstanding mortgage on the property. Significantly, the insurance policy was not transferred with the property and the Reids remained the named insureds.

Shortly after the property was sold, the home was destroyed by fire. Because she remained liable on the mortgage, Mrs. Reid sought to recover the outstanding balance from the insurer, Hardware Mutual. Hardware Mutual denied coverage, arguing, in part, that because the Reids were no longer living in the home, it was not "owner occupied" at the time of the fire. The trial court disagreed and entered judgment in favor of Mrs. Reid.

On appeal, the Supreme Court of South Carolina affirmed. After concluding that Mrs. Reid held an insurable interest in the property, the court held that the policy provision describing the property as "owner occupied" did not operate to exclude coverage after the property was sold. In pertinent part, the court concluded:

> [A] description of a house in a policy of insur-

ance, as "occupied by" the insured, is a description merely and is not an agreement that the insured should continue in the occupation of it. *Joyce v Maine Ins Co,* 45 Me 168 [71 Am Dec 536 (1858)]. *O'Niel v Buffalo Fire Ins Co,* 3 NY 122 [1849]. A statement in an insurance policy that the property is occupied by the insured as a dwelling for himself and family, is not a warranty that it shall continue to be so occupied but is only a warranty of the situation at the time the insurance is effected. *German Ins Co v Russell,* 65 Kan 373; 69 P 345; 58 LRA 234 [1902].

There is no provision in the policy contract that the dwelling would be "owner occupied" during the term of the insurance contract nor any requirement that if the premises are otherwise occupied than by the owner, notice of such change of occupancy or use would be given to the insurer.

The insurance contract here involved contained a description of the dwelling insured as being "owner occupied." This was an affirmative warranty, not a continuing warranty, by the respondent that the dwelling was so occupied by him at the time the contract of insurance was made. [*Reid, supra* at 346-347.]

The decision in *Reid* was followed by the United States Court of Appeals for the Ninth Circuit in *Ins Co of North America v Howard,* 679 F2d 147 (CA 9, 1982). In *Howard,* the insured rented her home to a third party, after which it burned down. The policy previously issued to the insured defined the covered dwelling as the "residence *owned and occupied* by the insured exclusively for residential purposes." *Id.* at 148 [emphasis added]. Like the majority in the case at bar, the district court in *Howard* found the policy language unambiguous and concluded that there was no coverage. On appeal, the Court of Appeals for the Ninth Circuit reversed, holding in pertinent part as follows:

The district court found the provision "unambiguous," saying that it required the policyholder to occupy the residence herself during the entire time the policy was in effect or forfeit coverage under the policy. We also find the provision unambiguous. However, we find that it has a wholly different effect than the district court thought. *The provision describes the residence covered at the time of the issuance of the policy. It contains a representation that the insured is the homeowner and occupant and that the insurance is not being purchased by a third party. It does not impose a condition requiring the policyholder to continue to live in the residence.*

Neither party cites any Oregon decision interpreting language similar to that contained in the provision. Nor did the district court in its brief order. Plaintiff insurance company cites *Bryan v United States Fire Ins Co,* 456 SW2d 702 (Tex Civ App, 1970), in support of the district court's interpretation. Mrs. Howard cites *Reid v Hardware Mutual Ins Co of Carolinas,* 252 SC 339; 166 SE2d 317 (1969). We find that the latter case and the authorities on which it relies far more pertinent and persuasive. . . .

In interpreting state law in a diversity case we are required to apply the law as we believe the Supreme Court of the state would apply it. See *Kabatoff v Safeco Ins Co,* 627 F2d 207, 209 ([CA 9] 1980). We believe the Oregon Supreme Court would adopt the same reasonable, enlightened view of the effect of the "owned and occupied" language which the South Carolina court has adopted. We conclude that, under Oregon law, if an insurance company wishes to have a homeowner's policy terminate upon rental of his home, it must so provide explicitly and unambiguously in the policy of insurance, and that a mere statement in the policy that he is the owner and occupant is wholly insufficient for this purpose. Under any proper view of the law, a homeowner is entitled to be given specific and unequivocal notice in the insurance policy that his coverage will be forfeited upon his rental of his home so that if a death in

> the family, other changes in family or economic circumstances, or even just a desire to change his way of life, causes him to move from his home, he may make whatever other insurance arrangements are necessary to protect the asset which often represents all the remaining proceeds of a lifetime of labor. [*Ins Co of North America, supra* at 148-149. Emphasis added.]

Although there exists authority to the contrary,[1] I would follow the holdings in *Reid* and *Howard.* Not only are these decisions persuasive, they are consistent with the following general rule:

> "A statement in an insurance policy that the building insured is a residence or dwelling house, or is used and occupied as such, is as a rule regarded as a matter of representation or description only, and even where from the stipulations of the contract the statement amounts to a warranty, such warranty is not generally regarded as a continuing one, but only a warranty of the situation at the time of the issuance of the insurance." [*Rush v Hartford Mutual Ins Co,* 652 F Supp 1432, 1435 (WD Va, 1987), quoting 44 Am Jur 2d, Insurance, § 1209, p 153.]

In the present case, there is no dispute that the homeowner's policy issued by Frankenmuth was in full force and effect at the time of this loss. There is also no dispute that plaintiff possessed an insurable interest in the property by virtue of his status as a land contract vendor. *Sriro v Dunn,* 265 Mich 112, 113; 251 NW 370 (1933). Consistent with the foregoing authorities, I would hold that the fact that plaintiff sold the home on a land contract does not operate to forfeit coverage for plaintiff's interest. Accordingly, I would reverse the judgment of the circuit court and remand for entry of judgment in favor of plaintiff.

[1] See *Nancarrow v Aetna Casualty & Surety Co,* 932 F2d 742 (CA 8, 1991); *Epps v Nicholson,* 187 Ga App 246; 370 SE2d 13 (1988).

PEOPLE v THEW

Docket No. 145357. Submitted September 24, 1992, at Lansing. Decided August 2, 1993, at 9:35 A.M.

John W. Thew offered in the Gogebic Circuit Court, Roy D. Gotham, J., pleas of guilty of first-degree murder and felony murder in connection with the death of an eleven-year-old girl. The court, finding a factual basis only for a killing connected to first-degree criminal sexual conduct, accepted the plea of guilty of felony murder and rejected the plea of guilty of first-degree murder. The defendant moved to withdraw the plea before sentencing. The court denied the motion and sentenced the defendant to life imprisonment without parole. The defendant appealed.

The Court of Appeals *held:*

1. There is no merit to the claim that the defendant did not understand the consequences of pleading guilty. The trial court adequately advised the defendant that the crimes of which he pleaded guilty carried mandatory sentences of life imprisonment without parole. The record does not support the defendant's contention that he pleaded guilty because he believed that the only way he could receive the psychiatric treatment he desired was by pleading guilty. The defendant's solitary confinement in the county jail did not coerce him into pleading guilty.

2. A sufficient factual basis exists to support a plea of guilty of felony murder. A homicide qualifies as a felony murder where it is committed to prevent detection of the felony. In this case, the defendant's admissions at the plea hearing lead to an inculpatory inference that he killed the victim to prevent detection of the criminal sexual conduct.

3. The defendant's claim that, in the interest of justice, he must be allowed to withdraw his plea on the basis of ineffective assistance of trial counsel requires that the case be remanded. The trial court must supplement the record with respect to whether the defendant's guilty plea was made involuntarily

REFERENCES

Am Jur 2d, Criminal Law §§ 474, 985; Homicide §§ 71-87.

Adequacy of defense counsel's representation of criminal client regarding guilty pleas. 10 ALR4th 8.

and without understanding because of any failure by trial counsel to explain to the defendant the nature of the charges against him, the consequences of a guilty plea, the possible defenses to the charged offenses, the strength of the prosecution's evidence, and the applicability of lesser included offenses.

Remanded.

1. HOMICIDE — FELONY MURDER.

Felony murder consists of the killing of a human being with the intent to kill, to do great bodily harm, or to create a high risk of death or bodily harm with knowledge that death or great bodily harm was the probable result while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548.

2. HOMICIDE — FELONY MURDER — CONTINUOUS TRANSACTION.

A murder committed while attempting to escape from or prevent detection of a felony is felony murder, but only if committed as part of a continuous transaction with, or is otherwise immediately connected with, the underlying felony.

3. CRIMINAL LAW — GUILTY PLEAS — INEFFECTIVE ASSISTANCE OF COUNSEL.

A claim of ineffective assistance of counsel in the context of a guilty plea requires a determination whether the plea was tendered voluntarily and understandingly by the defendant after sufficient advice from counsel regarding the nature of the charges, possible defenses, the consequences of pleading guilty, and the applicability of lesser included offenses.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Nicholas J. Jacobs,* Prosecuting Attorney, and *William E. Molner,* Assistant Attorney General, for the people.

*Lori, Jaspen & Stopczynski, P.C.* (by *Kenneth M. Stopczynski*), for the defendant on appeal.

Before: MICHAEL J. KELLY, P.J., and SHEPHERD and FITZGERALD, JJ.

SHEPHERD, J. Defendant appeals as of right from a September 4, 1991, decision of the trial court

denying his motion to withdraw his guilty plea to the charge of first-degree felony murder, MCL 750.316; MSA 28.548. We remand.

I

Defendant was charged with one count of first-degree murder, MCL 750.316; MSA 28.548, and one count of first-degree felony murder, MCL 750.316; MSA 28.548, for killing an eleven-year-old girl who died as a result of being run over and dragged underneath defendant's automobile in Gogebic County on February 15 or 16, 1991. After waiving his preliminary examination, defendant entered pleas of not guilty at the arraignment on April 2, 1991. On June 25, 1991, defendant offered to plead guilty to the charges without the benefit of a plea agreement. At the plea hearing, the trial court found a sufficient factual basis to accept defendant's plea of guilty of first-degree felony murder, but not first-degree murder. This finding was based upon defendant's admissions that he killed the victim while committing first-degree criminal sexual conduct. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) [victim under thirteen years of age].

Subsequently, on July 25, 1991, the trial court granted defense counsel's motion to withdraw as counsel for defendant. On August 26, 1991, defendant filed a motion to withdraw his plea of guilty, which the court denied on September 4, 1991. On September 26, 1991, defendant was sentenced to the mandatory term of life imprisonment without parole.

II

MCR 6.310(B) states the standard of review that governs motions to withdraw guilty pleas:

> Withdrawal Before Sentence. On the defendant's motion or with the defendant's consent, the court in the interest of justice may permit an accepted plea to be withdrawn before sentence is imposed unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by MCR 6.311(B).

In *People v Spencer,* 192 Mich App 146, 150; 480 NW2d 308 (1991), this Court stated:

> Under MCR 6.310, the use of the term "may" denotes that the trial court has discretion to allow the withdrawal of the plea before sentencing if withdrawal is in the interest of justice and the withdrawal does not substantially prejudice the prosecutor because of reliance on the plea.

This Court, interpreting the phrase "in the interest of justice" in light of the discussion contained in 3 ABA Standards for Criminal Justice (2d ed), Standard 14-2.1(a), further remarked:

> Accordingly, in order to withdraw a guilty plea before sentencing, the defendant must first establish that withdrawal of the plea is supported by reasons based on the interests of justice. If sufficient reasons are provided, the burden then shifts to the prosecution to demonstrate substantial prejudice. To constitute substantial prejudice, the prosecution must show that its ability to prosecute is somehow hampered by the delay. This would appear to require more than mere inconvenience in preparing for trial. Ultimately, the trial judge should bear in mind what is in the interests of justice in deciding if a plea may be withdrawn. Accordingly, what constitutes substantial prejudice may vary from case to case. [192 Mich App 151.]

III

MCR 6.302 provides that a trial court may not accept a plea of guilty unless it is convinced that the plea is understanding, voluntary, and accurate. In *In re Valle,* 364 Mich 471, 477; 110 NW2d 673 (1961), the Supreme Court stated:

> In order to be accepted, a plea of guilty in a criminal case must be entirely voluntary by one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertence or ignorance.

Defendant first argues that his guilty plea was not understandingly given because the trial court failed to advise him that the crimes of which he was pleading guilty carried mandatory sentences of life imprisonment without parole. We disagree.

During the plea-taking process, the following colloquy occurred:

> [*The Court*]: As to either of these charges the penalty is life imprisonment without parole. The sentencing judge, if you were convicted of either of these charges, has no discretion whatever but to sentence you to life in prison without parole. Do you understand that, sir?
> [*The Defendant*]: Yes.

Despite the fact that defendant has only a seventh-grade education and claims that he suffers from serious psychiatric problems, the record shows that he understood that he would be sentenced to life imprisonment without parole if the trial court accepted his plea of guilty of first-degree felony murder.

Furthermore, there is no basis to defendant's assertion that he understood that he had to enter

a plea of guilty in order to receive psychiatric treatment. Although defendant now claims that he pleaded guilty in order to receive such treatment, the record shows otherwise:

> [*The Court*]: . . . Now, has anybody promised you in any way or hinted to you in any that things would go easy with you; that you wouldn't get the penalty prescribed by law if you offered a plea of guilty at this time?
>
> [*The Defendant*]: No, they haven't.
>
> * * *
>
> [*The Court*]: Is it your intention to appear before this Court today and offer a plea of guilty to first degree murder of your own free choice; of your choice alone?
>
> [*The Defendant*]: Yes.
>
> [*The Court*]: Why do you wish to offer a plea of guilty to this crime, Mr. Thew? You stated it's of your choice.
>
> [*The Defendant*]: Because I did it and it's wrong and I should be punished for it.

Defendant further stated that he had discussed with his lawyer on several occasions his intention to offer a guilty plea and that he had been considering pleading guilty "for the last month." On the basis of defendant's statements, the trial court concluded that "he is pleading guilty of his own free choice in this case; without threat, without promise, his own volitional act after careful consideration over a period of time."

Nor is there any basis to defendant's claim that his plea was coerced because he was isolated from the general population in the Gogebic County Jail and placed in a special detoxification cell from February 17, 1991, until June 25, 1991. In *People v Smith,* 182 Mich App 436, 442; 453 NW2d 257 (1990), this Court reiterated the well-established

rule that detention itself has never been recognized as so inherently coercive that it will render a guilty plea invalid.

Moreover, while defendant was segregated from the general population and placed in a detoxification cell because the sheriff of Gogebic County learned that some inmates at the jail had made threats against defendant, the record shows that he received basically the same treatment and had the same privileges as the other inmates. Further, defendant made no complaints to the sheriff regarding the conditions at the jail during his confinement. As the trial court found in ruling on the motion to withdraw the plea of guilty:

> I do not believe that his environment at the Gogebic County Jail was such as to coerce him to offer a plea of guilty, the consequence of which would require him to be incarcerated for the rest of his life. Although, those conditions at the Gogebic County Jail in the detox cell are obviously less than desirable to any of us, Mr. Thew's decision to plead guilty in this case was based upon a great deal of soul searching over a long period of time with advice of counsel and the visitation by counsel on numerous occasions.
>
> The Court is convinced that his plea of guilty on June 25, and the Court's acceptance of his plea on that date was valid. It appears only now that he has changed his mind since.

IV

Although defendant did not raise it as an issue, we further note that a sufficient factual basis exists to support his plea of guilty of felony murder.[1]

[1] The issue was added pursuant to our order dated December 18, 1992.

In *People v Jones,* 190 Mich App 509, 511-512; 476 NW2d 646 (1991), this Court observed:

> A factual basis to support a plea exists if an inculpatory inference can be drawn from what the defendant has admitted. *Guilty Plea Cases,* 395 Mich 96, 128-132; 235 NW2d 132 (1975). This holds true even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference. *Id.,* p 130. Even if the defendant denies an element of the crime, the court may properly accept the plea if an inculpatory inference can still be drawn from what the defendant says. *People v Haack,* 396 Mich 367, 374-375; 240 NW2d 704 (1976).

Felony murder consists of

> (1) [t]he killing of a human being (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result (3) *while committing, attempting to commit, or assisting in the commission* of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. [Emphasis added. *People v Bush,* 187 Mich App 316, 327; 466 NW2d 736 (1991).]

Criminal sexual conduct in the first and third degree are felonies specifically enumerated in MCL 750.316; MSA 28.548.

In applying the felony-murder rule, this Court in *People v Smith,* 55 Mich App 184, 189; 222 NW2d 172 (1974), stated:

> [I]f a murder is committed while attempting to escape from or prevent detection of the felony, it is felony murder, but only if it is committed as a part of a continuous transaction with, or is other-

wise "immediately connected" with, the underlying felony.

Subsequent panels of this Court have held that it is not necessary that the murder be contemporaneous with the enumerated felony. *People v Brannon,* 194 Mich App 121, 125; 486 NW2d 83 (1992). In *People v Goddard,* 135 Mich App 128, 135-136; 352 NW2d 367 (1984), rev'd on other grounds 429 Mich 505; 418 NW2d 881 (1988), this Court stated:

> Michigan courts have held that a homicide qualifies as a felony murder if it is committed while a defendant is attempting to escape from or prevent detection of the felony and if it is immediately connected with the underlying felony. *People v Podolski,* 332 Mich 508, 518; 52 NW2d 201 (1982); *People v Smith,* 55 Mich App 184, 189; 222 NW2d 172 (1974). . . .
>
> This position has been adopted in other jurisdictions. Although the language of other felony-murder statutes varies widely, most require that the killing be in the "commission/perpetration" or attempt to "commit/perpetrate" the underlying felony. LaFave & Scott, Criminal Law, § 71, p 555. Where a causal connection between the killing and the underlying felony exists, courts generally have held that a killing may take place sometime before or after, as distinguished from during, the felony and yet still qualify as a killing "in the commission or attempted commission of" the felony. LaFave & Scott, *supra,* p 555. Courts have usually required that the killing and the underlying felony be "closely connected in point of time, place and causal relation." *State v Adams,* 399 Mo 926; 98 SW2d 632 (1936). The required relationship between the homicide and the underlying felony has been summarized as being "whether there is a sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide." LaFave & Scott, *supra,* p 557.

> We hold that, to qualify as felony murder, the homicide must be incident to the felony and associated with it as one of its hazards. It is not necessary that the murder be contemporaneous with the felony. A lapse of time and distance are factors to be considered, but are not determinative. [Citations omitted.]

In the instant case, an examination of the relevant portions of the plea transcript reveals that there was a sufficient factual basis to support the trial court's acceptance of defendant's plea of guilty of felony murder based upon inculpatory inferences that may be drawn from what defendant admitted.

According to defendant's testimony at the plea hearing, defendant and the victim engaged in sexual intercourse about fifteen to twenty minutes before defendant killed the victim by running her down with his car. Although defendant claims that the sexual intercourse was consensual, he knew that the victim was only eleven years old. Immediately thereafter, an argument ensued between them about the allegedly false testimony that the victim and the victim's brother had given in a rape case against someone else. Defendant stated that the victim became "hyper" and "pissed off," slapping, kicking, and beating his car. Defendant then got into his car and took off, intentionally running into the victim, who was standing in front of the car. After he struck the victim, she became stuck under the car, and he had to rock the car back and forth several times to get his car free of her. Although defendant got out of the car once and saw that the victim was injured, he left the area and went to a local bar.

While there is no question that defendant admitted killing the victim and that he possessed at least the intent to do great bodily harm, there is a

question whether defendant murdered her while committing the underlying criminal sexual conduct offense, as required by the felony-murder rule. On the basis of defendant's testimony, we believe that inculpatory inferences can be drawn that he killed the victim to prevent detection of the act of sexual intercourse with her, and that the killing was "immediately connected" with the act of sexual intercourse.

At the plea hearing, the following exchange took place:

> [*The Court*]: Well, you intended to injure her; did you not when you struck her with the car?
>
> [*The Defendant*]: Yes.
>
> [*The Court*]: Did you have any concern, Mr. Thew, at that time that [the victim] would—would tell others, would squeal, would tell others that you and she had had sex there at that place and time?
>
> [*The Defendant*]: Yes.
>
> [*The Court*]: Did she threaten to tell during your argument?
>
> [*The Defendant*]: No.

Even though defendant stated that the victim did not say that she would tell others about their having had sexual relations, defendant admitted that one of his concerns, at the time he struck down the victim, was that she would tell others that he had had sexual relations with an eleven-year-old girl. Although approximately fifteen to twenty minutes transpired between the underlying felony and the murder, the trial court could have drawn the conclusion that the argument between defendant and the victim was part of a continuous transaction that resulted in her death.

V

Defendant also claims that he was denied the effective assistance of counsel because his counsel failed to investigate the facts surrounding the death of the victim and to have defendant examined to determine if he had an insanity defense or other defenses based upon mental defect, diminished capacity, or intoxication.

To prevail on a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment of the United States Constitution. The defendant must overcome the presumption that the alleged deficient performance was sound trial strategy. Second, the alleged deficiency must be prejudicial to the defendant. *Strickland v Washington,* 446 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991); *People v Armendarez,* 188 Mich App 61, 74; 468 NW2d 893 (1991).

When reviewing a claim of ineffective assistance of counsel arising out of a guilty plea, courts apply the test set forth in *Strickland* in light of *McMann v Richardson,* 397 US 759; 90 S Ct 1441; 25 L Ed 2d 763 (1970), and *Tollett v Henderson,* 411 US 258; 93 S Ct 1602; 36 L Ed 2d 235 (1973). *In re Oakland Co Prosecutor,* 191 Mich App 113, 120-122; 477 NW2d 455 (1991). To establish ineffective assistance in the context of a guilty plea, courts must determine whether the defendant tendered a plea voluntarily and understandingly. *Id.,* p 120. The question is not whether a court would, in retrospect, consider counsel's advice to be right or wrong, but whether the advice was within the

range of competence demanded of attorneys in criminal cases. *Id.,* p 122. Where a defendant fails to move for a new trial or an evidentiary hearing regarding the issue of ineffective assistance of counsel, appellate review is limited to the present record. *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973).

Although defendant failed to request a *Ginther* hearing, the issue of ineffective assistance of trial counsel was considered at the motion to withdraw the plea, where the trial court made the following findings of fact:

> On the matter of effective assistance of counsel at the plea proceeding on the 25th of June, the Court also inquired of Mr. Thew directly as to whether or not he had discussed these issues with his attorney, Mr. Stella; had gone over his rights with his attorney before coming to court. Mr. Thew in that regard advised the Court that he had been considering a plea of guilty for, I believe, if I recall correctly, over a month before we appeared in court on June 25, and that he had not on the spur of the moment but several days earlier ultimately and firmly decided in [sic] making a plea of guilty.
>
> His motive for the plea in his own words was, because I did it and it's wrong and I should be punished for it.
>
> Based upon the further record here today and the testimony of Attorney Stella, I am confident both because of Mr. Stella's expressed testimony here and also because he's known here as an experienced attorney in the criminal law, I am confident that he did consider the issues now raised by the defendant prior to the plea proceeding, and on the basis of his testimony, contrary to the defendant's affidavit, he discussed these issues such as diminished capacity, the nature and elements of an insanity or guilty but mentally ill and other possible defenses.

> I specifically find that Attorney Stella never advised the defendant that he would have to plead guilty before he would be able to assert any psychiatric defense.

Here, the record shows that defendant's counsel demonstrated competence with respect to the issues raised by defendant on appeal.

Nevertheless, guilty pleas have been found to be involuntary or unknowing on the basis of ineffective assistance of counsel where the defense counsel has failed to explain to his client the nature of the charges or to discuss possible defenses to the charges to which he is pleading guilty. Anno: *Adequacy of defense counsel's representation of criminal client regarding guilty pleas,* 10 ALR4th 8, §§ 25-26, pp 130-151.

In *Rinehart v Brewer,* 561 F2d 126 (CA 8, 1977), the Eighth Circuit Court of Appeals affirmed an order granting habeas corpus relief in a case where a teenager's plea of guilty of second-degree murder was involuntary because defense counsel's failure to explain adequately the nature of the charges and the consequences of the guilty plea as well as his failure to discuss the "the very real possibility" of a manslaughter defense supported a finding of ineffective assistance of counsel. In that case, the court noted:

> Rinehart was only 15 years old at the time he made the guilty plea and was somewhat immature for his age. Although he had at least average intelligence, he had no prior experience with the legal system and no other basis for understanding what was happening to him. In addition, Rinehart had difficulty in communicating with respect to the underlying events. His failure to fully grasp the situation is perhaps best illustrated by his requests as to whether he would be able to have a

> car in jail. Under these circumstances, a particularly stringent duty is imposed upon both defense counsel and the trial court to make certain that the defendant understands the charges and the consequences of his plea. [*Id.*, p 130.]

Concluding that defense counsel rendered ineffective assistance of counsel, the court stated:

> Regardless of whether defense counsel actually informed the defendant of the possibility of a life sentence for second-degree murder or of the possibility that manslaughter might be the appropriate outcome, they did not adequately follow up to ascertain whether the defendant and his parents fully understood those possibilities. Rinehart was materially prejudiced thereby because he was unable to make an intelligent and informed choice from among his alternative courses of action.
>
> Second, defense counsel failed to grasp the very real possibility that Rinehart was guilty of only manslaughter, not second-degree murder. . . . However, defense counsel did not pursue the lesser-included charge of manslaughter and did not stress this possibility to Rinehart or his parents. Rinehart was obviously materially prejudiced because he was not informed of these possibilities before he entered his guilty plea. [*Id.*, p 132.]

In this case, there is no indication that defense counsel made certain that defendant understood the nature of the charges or the possible defenses that were available to him before he pleaded guilty of first-degree murder and felony murder. According to his affidavit, defendant states that he did not realize that he would remain in prison for the rest of his life until he met with Ms. Judy Hickman, his parole and probation officer, who interviewed him on June 28, 1991, three days after he entered the guilty plea, for the purpose of preparing a presentence investigation report. In

her affidavit, Ms. Hickman states that at the close of the presentence interview defendant asked whether she thought the judge would send him to prison or if he might be sent for mental health counseling. In his affidavit, defendant further states that while he was incarcerated in the Gogebic County Jail he advised his attorney that he had experienced blackouts and that he was in need of psychiatric treatment.

Under these circumstances, we agree with the *Rinehart* court's observation that defense counsel had a "particularly stringent duty" to ensure that defendant understood the nature of the charges and the consequences of his plea because this is a capital case where the offenses to which defendant was pleading guilty carry the mandatory minimum sentence of life imprisonment without parole —the maximum penalty under law in the State of Michigan. Given the gravity of defendant's plea of guilty to these charges, coupled with defendant's level of education and his apparent mental problems of which defense counsel was aware, defense counsel had a duty to make certain that defendant fully understood the nature of these charges and that a guilty plea carried a mandatory minimum sentence of life imprisonment without parole.

Moreover, there is no indication in the record that defense counsel discussed "the very real possibility," *id.,* p 132, of establishing defenses to the charged offenses. As it was, the trial court declined to accept defendant's plea of guilty of first-degree murder because his plea admissions did not provide a sufficient factual basis to establish that he killed the victim with premeditation and deliberation. If this case had gone to trial, there was also a "real possibility" that, absent defendant's self-incriminating plea testimony, the prosecution would not have been able to establish the elements of

felony murder. Even assuming that the prosecution established beyond a reasonable doubt that defendant had sexual relations with the underage victim and that he killed her with malice and without justification or excuse, it was still necessary to show beyond a reasonable doubt that the murder was part of a single, continuous transaction immediately following the criminal sexual conduct. Absent defendant's plea testimony, the prosecution's case for felony murder was not at all overwhelming. The prosecutor would have to prove by independent evidence that the assault on the victim with the automobile was related to the criminal sexual conduct. For the reasons stated, defendant had a very real possibility of prevailing on that issue.

Furthermore, there is no indication that defense counsel stressed the possibility to defendant that he could be guilty of various lesser included offenses, such as first-degree criminal sexual conduct, second-degree murder, manslaughter, or assault with a deadly weapon, but not of first-degree murder and felony murder. While defendant admitted that what he did was wrong and that he should be punished for it, he appears to have been unaware that he could only be punished for criminal offenses that the prosecution could establish beyond a reasonable doubt. Even if he wished to plead guilty because of a guilty conscience, it appears he was not made aware of the fact that he could go before a jury and be found guilty of a lesser offense and be punished accordingly, i.e., the record shows that defendant understood that he was faced with only the two options of pleading guilty to an offense that carried life without parole and going free. Although the record reveals that defense counsel reviewed the homicide statutes and researched the elements of second-degree murder, manslaughter,

and criminal sexual conduct in the first and third degree, and otherwise acted competently, the record does not show whether defense counsel explained to defendant the elements of the various offenses of which he could be guilty, the possible defenses to each of these charges, and the prosecution's evidence supporting each of them. In short, there is nothing in the record to suggest that defendant understood his full range of options before he entered his plea of guilty of first-degree murder and felony murder.

It has been well recognized that a guilty plea is the most serious step a defendant can take in a criminal prosecution. For that reason, the plea "not only must be voluntary but must be [a] knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v United States,* 397 US 742, 747-748; 90 S Ct 1463; 25 L Ed 2d 747 (1970).

On the present record, there is a serious question whether defendant's guilty plea was the result of a sufficiently informed choice that constituted a voluntary and knowing act. The record does not show whether defense counsel rendered effective assistance of counsel by making certain that defendant was aware of the nature of the charges and the consequences of his guilty plea or of alternative courses of actions, including defenses available against the charged offenses to which he offered a plea, as well as any lesser included offenses.

VI

As previously stated, on a motion to withdraw a guilty plea before sentencing, a defendant must bring forth evidence that it is in the interest of justice to withdraw the plea and the burden then shifts to the prosecutor to show substantial prejudice. MCR 6.310(B); *Spencer, supra.*

In the instant case, the trial court denied defendant's motion because the court did not find that it was in the interest of justice. However, the court noted that the prosecutor failed to show substantial prejudice because there was only some prejudice in having to proceed with a trial. Although defendant claimed, and continues to claim, that he is innocent of felony murder, the trial court did not believe him. Here we note that the issue of innocence is whether defendant is innocent of the offense of which he pleaded guilty. In other words, the issue is not whether the trial court believes him but whether defendant has a valid defense to the charge of felony murder, even if he might be guilty of other offenses, such as second-degree murder and first-degree criminal sexual conduct.

On the existing record, we believe that there is a basis for defendant's claim of innocence of the specific offense to which he entered a plea of guilty insofar as there is a possible defense to the charge of felony murder. First, defendant's testimony at the plea hearing leaves open the question whether there was evidence beyond a reasonable doubt that he killed the victim, not because she would tell others, but because he was angry with her. In addition, there is also the question on the present record whether defense counsel rendered effective assistance of counsel by making certain that defendant was aware of the nature of the charges and by advising him of alternative courses of action, including possible defenses to the charged offenses as well as any lesser included offenses.

On the basis of the foregoing, we believe that it is necessary to remand this case for further proceedings to allow the trial court to supplement the record with regard to whether defendant has established that the withdrawal of his plea of guilty

of felony murder is "in the interest of justice." See the order in *People v Stewart,* 442 Mich 889; 498 NW2d 430 (1993), entered April 19, 1993, where the Supreme Court held that this Court erred in deciding on its own motion that the defendant received ineffective assistance of counsel in pleading guilty as charged without requiring a hearing to supplement the record. On remand, the trial court is instructed to make specific findings of fact regarding this matter in light of defendant's claim of innocence of felony murder, the possibility of a valid defense to the charge of felony murder, and the question of effective assistance of counsel regarding defendant's plea of guilty of felony murder. We do not wish to imply that counsel has the obligation to ensure that defendant fully understands the nature of the charges against him. It is enough if counsel makes defendant aware of, i.e., explains, the nature of the charges and the possible defenses. Counsel cannot possibly ensure comprehension.

Remanded for further proceedings consistent with this opinion. We retain jurisdiction.

PEOPLE v ALLEN

Docket No. 136801. Submitted May 13, 1993, at Detroit. Decided August 2, 1993, at 9:40 A.M. Leave to appeal sought.

Talvest Allen was convicted by a jury in the Recorder's Court for the City of Detroit, Leonard Townsend, J., of first-degree felony murder, armed robbery, and possession of a firearm during the commission of a felony. He appealed.

The Court of Appeals *held:*

1. The trial court properly denied the defendant's motion for a directed verdict. Sufficient evidence was presented to support the charge of felony murder. There was sufficient evidence that the defendant committed an assault while armed with a dangerous weapon, and the jury reasonably could have inferred that there was a felonious taking of property from the victim.

2. In denying the defendant's motion for a directed verdict, the trial court, pursuant to the excited utterance exception to the hearsay rule, properly admitted and considered a statement by the victim.

3. The defendant's statement at trial that the trial was his first opportunity to tell his version of the events opened the door for the prosecutor's attempt to discredit the defendant's testimony by showing that the defendant had an opportunity before the trial to tell his side of the story. The defendant's rights to a fair trial and due process were not violated, and the prosecutor's comments during closing argument regarding the defendant's opportunity to explain were not improper.

4. The trial court properly permitted the prosecutor to comment regarding the defendant's opportunity to conform his testimony to that of the other witnesses presented at trial. A curative instruction could have remedied any prejudice resulting from the other allegedly erroneous comments of the prosecutor that were not objected to at trial. Manifest injustice will not result from the failure to grant relief in this respect.

5. Neither the evidence nor the theories of the parties sup-

REFERENCES

Am Jur 2d, Criminal Law §§ 791-797; Homicide §§ 72, 190.

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

ported the cautionary accomplice instructions requested by the defendant. The court properly denied the request for the instructions.

6. The defendant's convictions of and sentences for both felony murder and the underlying felony, armed robbery, violate the defendant's right against double jeopardy. The convictions of felony murder and felony-firearm must be affirmed and the conviction of and sentence for armed robbery must be vacated.

Affirmed in part and vacated in part.

1. CONSTITUTIONAL LAW — DUE PROCESS — POSTARREST SILENCE — WITNESSES — IMPEACHMENT.

The Due Process Clause of the Fourteenth Amendment prohibits the use of postarrest, post-*Miranda* warnings silence to impeach a defendant's exculpatory story at trial; however, where the defendant claims at trial that the trial was the defendant's first opportunity to offer an exculpatory version of the events leading up to the arrest, the prosecution, in attempting to impeach the defendant's version of postarrest activity, may attempt to rebut the impression that the defendant had no opportunity before the trial to tell what happened (US Const, Am XIV).

2. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — FELONY MURDER — UNDERLYING FELONIES.

Conviction of felony murder and the underlying felony violates the state constitution's guarantee against double jeopardy (Const 1963, art 1, § 15).

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Kathleen T. Donahue,* Assistant Prosecuting Attorney, for the people.

*Rose Mary C. Robinson,* for the defendant on appeal.

Before: JANSEN, P.J., and REILLY and M. R. KNOBLOCK,* JJ.

REILLY, J. Defendant appeals as of right from his

* Circuit judge, sitting on the Court of Appeals by assignment.

convictions, after a jury trial, of first-degree felony murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm defendant's felony-murder and felony-firearm convictions and vacate his conviction of and sentence for armed robbery.

I

Defendant first argues that the trial court erred in denying his motion for a directed verdict because insufficient evidence was presented to support the charge of felony murder. Specifically, defendant contends that there was insufficient evidence regarding the underlying crime of armed robbery.

This Court reviews a challenge to the sufficiency of the evidence by viewing the evidence in a light most favorable to the prosecution and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton,* 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885 (1980). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *People v Reddick,* 187 Mich App 547, 551; 468 NW2d 278 (1991).

The essential elements of an armed robbery are (1) an assault, and (2) a felonious taking of property from the victim's person or presence, while (3) the defendant is armed with a weapon described in the statute. *People v Newcomb,* 190 Mich App 424, 430; 476 NW2d 749 (1991). On the basis of our review of the record, we conclude that there was sufficient evidence regarding the element of as-

sault and sufficient evidence to show that defendant was armed with a weapon described in the statute. Furthermore, we believe that, viewing the evidence in a light most favorable to the prosecution, a jury could have reasonably inferred that there was a felonious taking of property from the victim.

Testimony was presented that established that the victim wanted to buy crack cocaine and that she asked defendant if he could supply a "$2 crumb." Defendant responded that the victim would have to "do him," and the victim and defendant went into an apartment building. A neighbor heard a man and a woman fighting and heard a voice that she recognized as the victim's say "Stop, stop, I don't have no more." There was also testimony that no money was found on the victim when she was discovered at the bottom of a stairwell in the apartment building dead as a result of five gunshot wounds to the head. Lastly, the testimony of a witness established that defendant was seen leaving the apartment building with money in his hands.[1]

We believe that a jury could reasonably infer that the victim had at least two dollars on her before her death, and that this money was taken by defendant during the struggle preceding her death. Contrary to defendant's argument, the hearsay statement made by the victim, "Stop, stop, I don't have no more," was properly admitted and considered by the trial court in denying defendant's motion for a directed verdict. The statement

[1] Although this same witness testified that defendant had earlier received money from another man for the purchase of crack cocaine, the witness said that the money was given back to the purchaser when defendant could not provide the crack cocaine. Furthermore, the same witness testified that earlier that day defendant asked the witness for $5. The witness did not remember if he had given defendant the money.

was admissible under the excited utterance exception to the hearsay rule. MRE 803(2); *People v Ellis,* 174 Mich App 139, 143-144; 436 NW2d 383 (1988). *People v Jones,* 115 Mich App 543, 549-550; 321 NW2d 723 (1982), aff'd 419 Mich 577; 358 NW2d 837 (1984).

II

Next, defendant asserts that he was denied his right to a fair trial when the prosecutor was allowed to question him about his postarrest, post-*Miranda* warnings[2] silence.

The Due Process Clause of the Fourteenth Amendment prohibits the use of postarrest, post-*Miranda* warnings silence to impeach a defendant's exculpatory story at trial. *Doyle v Ohio,* 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Sutton (After Remand),* 436 Mich 575, 592; 464 NW2d 276 (1990) (opinion by BOYLE, J). However, this rule is inapplicable where a defendant claims to have told the police the same version of the exculpatory story upon arrest. *Id.* at 593. The *Doyle* Court, citing *United States v Fairchild,* 505 F2d 1378 (CA 5, 1975), made the following distinction:

> It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. [*Doyle, supra* at 619-620, n 11.]

[2] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

In the present case, defendant did not claim to have told the police the same version of his exculpatory story upon arrest. Rather, his claim on redirect examination was that the trial was his first opportunity to tell his version of the events.[3] We believe that this case falls within the exception permitting impeachment of a defendant's version of his postarrest behavior. *Doyle, supra* at 633; *Fairchild, supra.* Although defendant's testimony would not have permitted the prosecutor to argue that his postarrest silence was inconsistent with his claim of innocence, it did permit the prosecutor to attempt to discredit defendant's testimony by showing that defendant did have an opportunity before the trial to tell his side of the story. See *United States v Mavrick,* 601 F2d 921, 933 (CA 7, 1979). Having raised the issue of his opportunity to explain his version of the events, he "opened the door to a full and not just a selective development of that subject." *Fairchild, supra* at 1383; *Mavrick, supra.*

Additionally, we conclude that the prosecutor's comments during closing argument regarding defendant's opportunity to explain were not improper. The prosecutor did not use the evidence of defendant's silence as direct evidence of defen-

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*Q.* [*By Mr. Collins, defense counsel:*] Is this the first time you have had to give your side of the story?

*Ms. Worthy* [*prosecutor*]: Objection.

*The Witness*: Yes.

*Ms. Worthy*: Objection to that form of that question. I cannot get into those answers.

*The Court*: Yes, he can go ahead.

*Q.* [*By Mr. Collins*]: You didn't testify at pretrial, did you?

*A.* No.

*Q.* The first time you had a chance to testify is in front of this jury; is that correct?

*A.* Yes.

dant's guilt. Compare *Fairchild, supra* at 1383. Rather, the remarks were aimed at rebutting the impression that defendant did not have an opportunity to tell his version of the events.

III

Defendant also argues that certain comments made by the prosecutor during closing argument denied him a fair trial. We disagree.

Questions of prosecutorial misconduct are decided case by case. The reviewing court examines the record and evaluates the prosecutor's remarks in context. *People v Foster,* 175 Mich App 311, 317; 437 NW2d 395 (1989). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* Appellate review of prosecutorial misconduct is foreclosed where the defendant fails to object or request a curative instruction, unless the misconduct was so egregious that no curative instruction could have removed the prejudice to the defendant or if manifest injustice would result from our failure to review the alleged misconduct. *People v Buck,* 197 Mich App 404, 418; 496 NW2d 321 (1992).

We have already concluded that the prosecutor did not improperly comment about defendant's exercise of his right to remain silent after arrest. Additionally, we conclude that pursuant to *People v Buckey,* 424 Mich 1; 378 NW2d 432 (1985), the trial court properly permitted the prosecutor to comment about defendant's opportunity to conform his testimony to that of the other witnesses presented at trial. Contrary to defendant's argument on appeal, we do not believe that the prosecutor implied that defense counsel had assisted defendant in misleading the jury. Nor do we find that the prosecutor's comments implicated the attorney-client privilege. *Id.* at 15.

Defendant cites several other comments that he claims denied him a fair trial. However, no objections were made. We have carefully reviewed the record and conclude that a curative instruction could have remedied any prejudice arising from the comments. No manifest injustice will result from our failure to grant defendant relief in this respect. *Buck, supra* at 418.

IV

Next, defendant asserts that the trial court should have given the requested cautionary accomplice instructions, CJI2d 5.5 and 5.6, with regard to the testimony of Keith Robinson. CJI2d 5.5 defines "accomplice" as a "person who knowingly and willingly helps or cooperates with someone else in committing a crime." The instruction also informs jurors that they must decide whether the witness was an accomplice. CJI2d 5.6 instructs the jury, among other things, to be careful about accepting the accomplice's testimony.

The trial court did not err in refusing to give the requested instructions. There was no evidence that Robinson "knowingly and willingly helped or cooperated" in the killing. See *People v Holliday,* 144 Mich App 560, 574; 376 NW2d 154 (1985). Compare *People v Smith,* 158 Mich App 220, 229; 405 NW2d 156 (1987). Although Robinson was initially arrested with regard to the instant offense, he was apparently never charged. The prosecution's theory was that defendant alone committed the instant offense. Defendant's theory was that Robinson, not defendant, committed the murder. Neither side presented Robinson as an accomplice.

V

Lastly, defendant argues and the prosecution

concedes that defendant's convictions of and sentences for both felony murder and the underlying, or predicate, felony violates defendant's right against double jeopardy. We agree. Accordingly, defendant's conviction of and sentence for armed robbery must be vacated. *People v Passeno,* 195 Mich App 91, 97; 489 NW2d 152 (1992).

Defendant's felony-murder and felony-firearm convictions are affirmed. Defendant's conviction of and sentence for armed robbery are vacated.

Affirmed in part and vacated in part.

LARRABEE v SACHS

Docket No. 146775. Submitted June 4, 1993, at Lansing. Decided August 2, 1993, at 9:45 A.M. Leave to appeal sought.

Linda Larrabee brought a paternity action in the Oakland Circuit Court against Ralph Sachs. The court, Fred M. Mester, J., granted an order compelling the defendant to appear for the taking of his deposition. The defendant appealed by leave granted, alleging violation of his right to due process and the right against self-incrimination.

The Court of Appeals *held:*

1. Paternity actions are considered to be fundamentally civil in nature, not quasi-criminal. Procedure in paternity actions is governed by MCR 3.212.

2. The protection against compulsory self-incrimination provided under US Const, Ams V and XIV and Const 1963, art 1, § 17 does not entitle the defendant to refuse to give any testimony in a civil trial. Where, as in this action, the testimony sought to be elicited does not tend to incriminate the witness, the witness may be ordered to submit to discovery.

Affirmed.

1. PRETRIAL PROCEDURE — CIVIL PROCEEDINGS — DISCOVERY.

Parties in civil proceedings may obtain discovery regarding any matter that is not privileged and that is relevant to the subject matter involved in the pending action; after commencement of the action, upon reasonable notice, a party may take the sworn testimony of an opposing party by deposition (MCR 2.302, 2.306, 2.307).

2. ACTIONS — PATERNITY PROCEEDINGS.

Paternity proceedings are civil in nature, not quasi-criminal, and are governed by the rules applicable to other civil actions, except as modified by MCR 3.212 and the Paternity Act (MCL 722.711 *et seq.*; MSA 25.491 *et seq.*).

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REFERENCES

Am Jur 2d, Bastards §§ 75, 111; Depositions and Discovery §§ 21; 130.

See ALR Index under Depositions; Legitimacy of Children; Self-Incrimination.

3. CONSTITUTIONAL LAW — SELF-INCRIMINATION — PATERNITY PROCEEDINGS.

The protection against compulsory self-incrimination does not entitle a defendant in a paternity action to refuse to give any testimony, including depositions, and may be invoked only when the testimony sought to be elicited will in fact tend to incriminate the witness (US Const, Ams V and XIV; Const 1963, art 1, § 17; MCL 600.2154; MSA 27A.2154).

*Norman E. Conn,* for the plaintiff.

*Stanley T. Dobry,* for the defendant.

Before: REILLY, P.J., and SAWYER and P. J. CLULO,* JJ.

REILLY, P.J. Defendant appeals by leave granted an order compelling him to appear for the taking of his deposition in this paternity proceeding. Defendant contends that the proceeding is quasi-criminal in nature and, therefore, the order forcing him to be a witness against himself before trial is invalid because it is a violation of due process and his constitutional right against self-incrimination. We disagree and affirm.

Parties in civil proceedings may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action. MCR 2.302. After commencement of the action, upon reasonable notice, a party may take the sworn testimony of an opposing party by deposition. MCR 2.306; MCR 2.307. Procedure in actions under the Paternity Act, MCL 722.711 *et seq.*; MSA 25.491 *et seq.*, is governed by the rules applicable to other civil actions, except as modified by MCR 3.212 and the Paternity Act. MCR 3.212; *Bowerman v MacDonald,* 431 Mich 1, 16; 427 NW2d 477 (1988).

* Circuit judge, sitting on the Court of Appeals by assignment.

We reject defendant's contention that paternity proceedings are quasi-criminal, not civil, and therefore that he is entitled to the constitutional protections afforded criminal defendants. Although historically the Paternity Act, and its predecessor, the Bastardy Act, contained numerous aspects of criminal procedure, those provisions have been gradually eliminated. The one remaining criminal procedural right afforded by the act, that of appointed counsel for an indigent defendant, is a recognition of the fundamental unfairness of providing counsel for an indigent plaintiff while denying the same to an indigent defendant. MCL 722.714(9); MSA 25.494(9); *Artibee v Cheboygan Circuit Judge,* 397 Mich 54; 243 NW2d 248 (1976). However, as stated in *Bowerman, supra* at 13, "[i]t would be erroneous to conclude that the application of this particular and clearly demarcated right was intended to suggest that the full panoply of criminal procedural rights were to be afforded." With the virtual elimination of all remaining vestiges of criminal procedure, paternity actions are now considered to be fundamentally civil in nature. Accordingly, procedure in paternity cases is controlled by MCR 3.212. *Id.*

Defendant's reliance upon *Pridemore v Williams,* 90 Mich App 483; 282 NW2d 363 (1979), no longer has merit. In *Pridemore,* this Court held that the putative father's statutory right under MCL 722.715(1); MSA 25.495(1) not to be compelled to testify superseded the right to conduct discovery under the general court rules. However, as a result of 1989 PA 258, the Legislature deleted the language regarding the right not to be compelled to testify. Consequently, the conflict between the statute and the court rules no longer exists, and the rules of civil procedure apply. MCR 3.212; *Bowerman, supra.*

The protection against compulsory self-incrimination provided by the Fifth and Fourteenth Amendments of the United States Constitution and Const 1963, art 1, § 17 does not entitle defendant to refuse to give any testimony in a civil action. The privilege against self-incrimination may be invoked only when the testimony sought to be elicited will in fact tend to incriminate the witness. *People v Ferency*, 133 Mich App 526; 351 NW2d 225 (1984). Because the defendant did not show that he would incriminate himself by responding to questions in a deposition, the trial court properly ordered defendant to submit to discovery. MCL 600.2154; MSA 27A.2154.

Affirmed.

PEOPLE v GRIEL THOMAS

PEOPLE v MARY LEE THOMAS

Docket Nos. 145392, 149194. Submitted February 9, 1993, at Detroit. Decided August 2, 1993, at 9:50 A.M. Leave to appeal sought.

Griel and Mary Lee Thomas were charged in the Recorder's Court for the City of Detroit with possession with intent to deliver more than 50, but less than 225, grams of cocaine. Mary Lee was also charged with, and pleaded guilty of, delivery of less than 50 grams of cocaine. The defendants were arrested after Mary Lee sold cocaine to an undercover police officer at the defendant's party store. Following the defendants' arrest, a search warrant was obtained for the premises, and the subsequent search resulted in the discovery of more cocaine. Both defendants brought motions to suppress the evidence regarding the possession with intent to deliver charges, alleging violation of their Fourth Amendment rights. The court, Gershwin A. Drain, J., granted the motions and ordered the possession charges dismissed, finding that the search warrant was defective because the affidavit submitted by the police failed to include the date that the controlled buy from May Lee took place. The people appealed as of right with regard to Griel Thomas and by leave granted with regard to Mary Lee Thomas, alleging that, notwithstanding the defective warrant, the officers had the authority under the Liquor Control Act to search the defendants' party store even without a warrant. The appeals were consolidated.

The Court of Appeals *held:*

1. The officers' conduct was permissible under the Liquor Control Act. The trial court clearly erred in ordering the evidence suppressed.

2. The officers' subjective intent at the time they executed the defective warrant is not dispositive.

3. The provision of the Liquor Control Act governing searches and seizures, MCL 436.7a(2); MSA 18.977(1)(2), is constitutional.

4. The liquor industry, being a pervasively regulated industry, is subject to an exception to the search warrant requirement. In applying the pervasively regulated industry doctrine, a balance must be struck between the enforcement needs of

governmental agencies and the privacy interests of the regulated parties. Conflicts that arise should be resolved by balancing (1) the existence of express statutory authorization of searches and seizures, (2) the importance of the governmental interest at stake, (3) the pervasiveness and longevity of industry regulation, (4) the inclusion of reasonable limitations on searches in statutes and regulations, (5) the government's need for flexibility in the time, scope, and frequency of inspections in order to achieve reasonable levels of compliance, (6) the degree of intrusion occasioned by a particular regulatory search, and (7) the degree to which a business person may be said to have impliedly consented to searches without a warrant as a condition of doing business, so that the search does not infringe upon reasonable expectations of privacy.

5. The administrative search scheme involved in this case is valid under the pervasively regulated industry doctrine. There is statutory authority for the search of the defendants' party store and seizure of the contraband; there is a substantial governmental interest in prohibiting the sale of narcotics on premises operated under the authority of the Liquor Control Commission; the liquor industry is a pervasively regulated industry; the Liquor Control Act contains reasonable limitations on searches and those limitations were not exceeded in this case; there is a need for flexibility in the time, scope, and frequency of inspections of premises operated under the authority of the Liquor Control Commission; the degree of intrusion occasioned by the search was minimal; and the defendants reasonably should have expected a search without a warrant to occur on the licensed premises.

6. The police officers did not need a search warrant to conduct a search of the defendants' party store because they witnessed a clear violation of the Liquor Control Act when the controlled buy from Mary Lee occurred and they had the authority under the act to search for further evidence of violations. The defect in the warrant does not render inadmissible the evidence seized, inasmuch as the warrant was unnecessary.

7. The order of suppression must be reversed and the matter remanded for further proceedings.

Reversed and remanded.

1. SEARCHES AND SEIZURES — INTOXICATING LIQUORS — SEARCHES WITHOUT A WARRANT.

Police officers are authorized by statute to search without a warrant the premises of a licensed liquor establishment for the purpose of discovering any violations of the Liquor Control Act

or the rules promulgated pursuant to that act by the Liquor Control Commission and to seize any evidence of a violation of the act or the rules (MCL 436.1, 436.7a[2]; MSA 18.971, 18.977[1][2]; 1985 AACS, R 436.1011[1], [5][d]).

2. ADMINISTRATIVE LAW — SEARCHES AND SEIZURES — PERVASIVELY REGULATED INDUSTRIES.

In determining whether a search and seizure without a warrant falls within the pervasively regulated industry exception to the requirement that a warrant is required for regulatory and administrative searches, a court should balance: the existence of express statutory authorization of such searches and seizures; the importance of the governmental interest; the pervasiveness and longevity of regulation; the inclusion in statutes and regulations of reasonable limitations on searches; the government's need for flexibility in the time, scope, and frequency of inspections to achieve reasonable levels of compliance; the degree of intrusion occasioned by the search; and the degree to which implied consent to such searches is given as a condition of doing business.

3. CONSTITUTIONAL LAW — INTOXICATING LIQUORS — INSPECTION OF LICENSED PREMISES.

The statute authorizing police officers to inspect without a warrant premises licensed under the authority of the Liquor Control Commission is constitutional (MCL 436.7a[2]; MSA 18.977[1][2]).

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Karen M. Woodside,* Assistant Prosecuting Attorney, for the people.

*Timothy M. Holloway* and *W. Otis Culpepper,* for the defendants.

Before: JANSEN, P.J., and CAVANAGH and P. D. SCHAEFER,* JJ.

P. D. SCHAEFER, J. The prosecution appeals a

* Circuit judge, sitting on the Court of Appeals by assignment.

September 20, 1991, Recorder's Court order suppressing certain evidence because it was allegedly seized in violation of defendants' Fourth Amendment rights. As a result of the order suppressing the evidence, charges of possession of more than 50, but less than 225, grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), lodged against each defendant were ordered dismissed. We reverse the order of suppression and remand the matter to the trial court for further proceedings.

The charges against defendants arise out of a controlled drug buy that took place on April 26, 1991, in defendants' party store. Officer Romel Jamerson entered defendants' store during business hours and purchased "crack" cocaine from Mary Thomas through a glass window at the cashier's station. Officer Jamerson notified a team of officers who were waiting to make the arrest. The officers entered the premises, where they arrested Mary Thomas and Griel Thomas. One of the officers then went to a magistrate to obtain a warrant based upon the facts articulated above. When the officer swore out the affidavit, he failed to include the date upon which the controlled buy took place. The magistrate issued a warrant and the officers proceeded to search the store.

Officers searched the office of the store and found a substantial amount of cocaine in a desk. On the basis of the controlled buy and the subsequent discoveries, Mary Thomas was charged with delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession with intent to deliver more than 50, but less than 225, grams of cocaine. Mary Thomas pleaded guilty of the delivery charge and does not attack the validity of that conviction on appeal. Defendant Griel Thomas was also charged with

possession with intent to deliver more than 50, but less than 225, grams of cocaine. Both defendants were bound over on the charges and subsequently brought motions to suppress the evidence found in the desk because of the officer's failure to include in the affidavit the date that the controlled buy took place.

At the suppression hearing, the prosecution conceded that the warrant was defective because the affidavit omitted the date upon which the controlled buy took place. However, the prosecution argued that, notwithstanding the defective warrant, the officers had authority to search the premises under the Liquor Control Act, MCL 436.1 *et seq.*; MSA 18.971 *et seq.* The prosecution cited the case of *People v Jones,* 180 Mich App 625; 447 NW2d 844 (1989), wherein this Court concluded that the Liquor Control Act grants law enforcement personnel broad authority to execute without a warrant searches of a licensed premises in order to enforce provisions of the act. *Id.* at 631. The trial court found *Jones* to be distinguishable and found that the officers had no intention of enforcing the liquor control laws. The court then granted defendants' motion to suppress.

The Fourth Amendment of the United States Constitution forbids unreasonable searches and seizures and provides that no warrants shall issue in the absence of probable cause. US Const, Am IV; *People v Davis,* 442 Mich 1, 9; 497 NW2d 910 (1993).[1] In order to justify a search, the police must demonstrate either that they had a valid warrant

[1] Although the Michigan Constitution contains a substantially similar provision for protection against unreasonable searches and seizures, it is inapplicable where a defendant seeks to have evidence of a controlled substance suppressed where that evidence was found outside the curtilage of a dwelling house. See Const 1963, art 1, § 11; *People v Bullock,* 440 Mich 15, 24 and n 6; 485 NW2d 866 (1992). Accordingly, our discussion of this issue is limited to the question whether seizure was permissible under the Fourth Amendment.

authorizing the search, or that the circumstances were such that one of the recognized exceptions to the warrant requirement was implicated. *Id.* at 10. Searches conducted without a warrant are unreasonable per se, and in order to justify a search without a warrant, the officers must demonstrate that the conduct fell within one of the narrow specific exceptions to the warrant requirement. *Id.*

In this case, we are persuaded that the officers' conduct was permissible under the Liquor Control Act, and thus believe the court clearly erred in ordering the evidence suppressed. Just as in *Jones, supra,* the officers' subjective intent at the time they executed the defective warrant is not dispositive. *Jones, supra* at 631-632, n 3. The trial court concluded that the holding in *Jones* was distinguishable because in *Jones* the officers first consulted the Attorney General's office before conducting the search. However, that fact was irrelevant to the holding of the case inasmuch as it only sheds light on the officers' intent when the search took place. Inasmuch as the officers had broad authority to perform the search with or without the consent of the Attorney General, the fact that the officers failed to obtain that consent in this case is irrelevant as well.[2]

Having concluded that the trial court erred in granting defendants' motion to suppress, we must now address defendants' proposition that the provision of the Liquor Control Act governing searches and seizures is unconstitutional. We conclude that it is not.

Statutes are presumed to be constitutional, and courts have a duty to construe them as such.

[2] In fact, the *Jones* Court specifically stated that it was unnecessary for the officers to obtain a warrant because they had absolute authority to conduct the search pursuant to the terms of the Liquor Control Act. See *Jones, supra* at 632 and n 4.

*Ullery v Sobie,* 196 Mich App 76, 79; 492 NW2d 739 (1992). Absent a showing that unconstitutionality is clearly apparent, the statute will be upheld. *Id.* The party challenging a statute has the burden of proving its invalidity. *Id.* A valid statute is not unconstitutional merely because those charged with its enforcement might improperly administer it. *People v Kirby,* 440 Mich 485, 493; 487 NW2d 404 (1992). In *Tallman v Dep't of Natural Resources,* 421 Mich 585, 617-618; 365 NW2d 724 (1984), our Supreme Court officially sanctioned the "pervasively regulated industry doctrine" in evaluating regulatory search schemes. The Court adopted the following seven-part test in applying the doctrine:

> (1) the existence of express statutory authorization for search or seizure;
>
> (2) the importance of the governmental interest at stake;
>
> (3) the pervasiveness and longevity of industry regulation;
>
> (4) the inclusion of reasonable limitations on searches in statutes and regulations;
>
> (5) the government's need for flexibility in the time, scope, and frequency of inspections in order to achieve reasonable levels of compliance;
>
> (6) the degree of intrusion occasioned by a particular regulatory search; and
>
> (7) the degree to which a business person may be said to have impliedly consented to warrantless searches as a condition of doing business, so that the search does not infringe upon reasonable expectations of privacy. [*Id.* at 617-618.]

These factors are substantially similar to those adopted by the federal courts. *Id.*

In the instant case, the statute at issue provides in relevant part as follows:

> A licensee shall make the licensed premises available for inspection and search by a commission investigator or law enforcement officer empowered to enforce the commission's rules and Act No. 8 of the Public Acts of the Extra Session of 1933, as amended, being sections 436.1 to 436.58 of the Michigan Compiled Laws during regular business hours or when the licensed premises are occupied by the licensee or a clerk, servant, agent, or employee of the licensee. Evidence of a violation discovered pursuant to this subsection may be seized and used in an administrative or court proceeding. [MCL 436.7a(2); MSA 18.977(1)(2).]

Pursuant to MCL 436.1; MSA 18.971, a police officer is charged with the duty of seeing that the provisions of the act are enforced strictly. In fact, it makes it a misdemeanor for an officer to wilfully neglect or refuse to enforce the act.

We now turn to application of the factors articulated in the *Tallman* test to this case. We undertake this task, keeping in mind our duty to construe a statute to avoid constitutional infirmities and our obligation to construe the statute narrowly so as to effectuate the legislative intent. See *People v Pashigian,* 150 Mich App 97, 101; 388 NW2d 259 (1986); *People v Barnes,* 146 Mich App 37, 46-47; 379 NW2d 464 (1985).

Clearly there exists statutory authority for the search of the premises and seizure of contraband in this case. In fact, there is a specific administrative rule prohibiting the conduct at issue herein. See 1985 AACS, R 436.1011(1) and (5)(d). Inasmuch as the activity in this case constitutes a clear violation of the liquor control laws, the police officers had the lawful authority to seize the evidence and search for further violations. See MCL 436.1; MSA 18.971. Although defendants disagree, we believe that there is a substantial governmen-

tal interest, not only in prohibiting the sale of narcotics, but, perhaps more importantly, in prohibiting the sale of narcotics on premises operated under the authority of the Liquor Control Commission. Defendants do concede, as they must, that the liquor industry is a pervasively regulated industry. *Colonnade Catering Corp v United States,* 397 US 72, 76-77; 90 S Ct 774; 25 L Ed 2d 60 (1970). Accordingly, the first three prongs of the *Tallman* test are satisfied in this case.

The true focus of the dispute in this case lies in the questions addressed by the remaining four factors under the *Tallman* test. Under the fourth factor, we must determine whether there are reasonable limitations on searches in the statutes and regulations. *Tallman, supra* at 618. We conclude that there are reasonable limitations within the statute and, further, that those limitations were not exceeded in this case. The statute specifically limits the searches to "regular business hours" or times when the licensee is present. Furthermore, the scope of the search is limited to the "licensed premises," thereby keeping the search within the bounds necessary to enforce the provisions of the act and excluding private and nonbusiness areas. See *id.* at 626-627. The search in this case took place when the licensed premises were open for business and when both licensees were present. Moreover, the search was limited to the licensed premises. We believe that the statute contains reasonable limitations on the searches and seizures.

The next factor is focused on the government's need for flexibility in the time, scope, and frequency of the inspections. *Id.* at 618. This factor is necessarily related to the nature of the industry and the extent to which the industry is pervasively regulated. In the case of the liquor industry,

the potential for violation is extremely high and the danger occasioned by certain violations may be severe. In order to offer incentive to licensed business owners to comply with the provisions of the Liquor Control Act, it is somewhat necessary to enforce the provisions under the fear of an unannounced search of the premises. See *Pashigian, supra* at 101; *Barnes, supra* at 46-47. Moreover, the nature of the violation in the case at hand is such that an announced search would arguably lead to destruction of the evidence and thereby frustrate the purpose of the regulatory scheme.

The next factor to consider is the degree of intrusion occasioned by a particular regulatory search. *Tallman, supra* at 618. In this case, the search took place during business hours with both licensees present. The search must be viewed in the context of having followed a valid arrest for delivery of controlled substances on the premises: a violation of both the Liquor Control Act and of the controlled substance provisions of the Public Health Code, MCL 333.7101 *et seq.*; MSA 14.15(7101) *et seq.* Some of the contraband was found in the office area of the store on top of a desk, while the major portion was found in an unlocked desk drawer. The facts do not reveal any forcible means employed to conduct the search. Under the circumstances, we believe that the degree of intrusion occasioned by the search in this case was minimal.

The final factor to be considered is the degree to which the business person may be said to have impliedly consented to a search without a warrant as a condition of doing business. We note that the face of the application for a license contains a statement indicating that the licensee agrees to submit to an unannounced search of the premises for violations. Moreover, the license contains a

statement that the licensee agrees to abide by all of the regulatory provisions contained in the Liquor Control Act. Given the extensive regulation of the liquor industry and the decreased expectation of privacy in certain commercial property, *Donovan v Dewey,* 452 US 594, 598-599; 101 S Ct 2534; 69 L Ed 2d 262 (1981), we believe that defendants should have reasonably expected a search without a warrant to occur on the premises.

Defendants' reliance on *Colonnade, supra,* for the proposition that the Supreme Court has invalidated statutes similar to that at issue in this case is misplaced. In *Colonnade,* the Court determined that "[w]here Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Id.* at 77. The Court did not conclude that the statute at issue was unconstitutional. Rather, the Court invalidated a search conducted by the police where officers broke into a locked storage area containing liquor because that method of search was not within the provisions of the statutes governing such inspections. The Court stated that when Congress provided for monetary fines for a licensee's failure to comply with a request for inspection, it precluded the use of force to effectuate the regulatory goals of the statutes. *Id.*

Under the circumstances of this case, we hold that the police officers did not need a search warrant to conduct a search of defendants' party store in view of the fact that the officer witnessed a clear violation of the Liquor Control Act and had the authority under the statute to search for further evidence of violations. Just as we commended the officers' decision to delay the search of the premises pending the issuance of a warrant in

*Jones, supra* at 632, n 4, we similarly commend the officers in this case for their deference to defendants' constitutional rights. However, under the circumstances of this case, the defect in the warrant does not render inadmissible the evidence seized inasmuch as the warrant was unnecessary. We further hold that the statute at issue survives the *Tallman* test for determining the constitutionality of an administrative search scheme. We caution that, although the facts of this case do not warrant suppression of the evidence, this opinion is by no means a blanket authorization for law enforcement personnel to conduct random searches of licensed liquor establishments. The better approach, as is always the case with searches of personal property, is to secure from a neutral and detached magistrate a validly executed warrant supported by probable cause.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

JANSEN, P.J., concurred.

CAVANAGH, J., concurred in the result only.

PEOPLE v RATKOV (AFTER REMAND)

Docket No. 139737. Submitted May 18, 1993, at Detroit. Decided August 2, 1993, at 9:55 A.M.

John Ratkov, charged with first-degree criminal sexual conduct, was convicted by a jury in the Macomb Circuit Court, Kathleen Jansen, J., of second-degree criminal sexual conduct and was sentenced to eight to fifteen years of imprisonment. The Court of Appeals, MICHAEL J. KELLY, P.J., and GILLIS and GRIBBS, JJ., affirmed the conviction in an unpublished opinion per curiam, decided September 5, 1990 (Docket No. 107638). On rehearing, the Court of Appeals remanded for resentencing in light of the principle of proportionality announced in *People v Milbourn*, 435 Mich 630 (1990). On remand, the trial court, Deborah A. Servitto, J., imposed the same sentence. The defendant appealed.

The Court of Appeals *held:*

When computing a sentence pursuant to the sentencing guidelines, a trial court may consider all record evidence, including, but not limited to, the contents of the presentence investigation report, admissions made by the defendant, or testimony at the preliminary examination or at the trial. Facts that form the basis for the scoring of the sentencing guidelines need not have been found by the trier of fact to be proven beyond reasonable doubt. Rather, where such facts are contested by the defendant, the prosecution need only prove them by a preponderance of the evidence to the satisfaction of the sentencing court.

In this case, a preponderance of the evidence supported the trial court's decision to assess points for offense variables related to sexual penetration and contemporaneous criminal acts. Although there is merit in the defendant's challenge to assessment of points for offense variables related to multiple victims and psychological injury to the victim, any error from

REFERENCES

Am Jur 2d, Criminal Law § 525 *et seq.*
See ALR Index under Sentence and Punishment.

such incorrect scoring is harmless because a rescoring would not affect the resultant sentence range.

The sentence imposed in this case is proportionate to the offense and the offender.

Affirmed.

SENTENCES — SENTENCING GUIDELINES — EVIDENCE.

Facts relied on by a sentencing court in computing a sentence pursuant to the sentencing guidelines need not have been found by the trier of fact to be proven beyond a reasonable doubt; rather, where such facts are contested by the defendant, the prosecution need only prove them by a preponderance of the evidence to the satisfaction of the sentencing court.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Carl J. Marlinga,* Prosecuting Attorney, *Robert J. Berlin,* Chief Appellate Lawyer, and *Edward L. Graham,* and *Steven M. Kaplan,* Assistant Prosecuting Attorneys, for the people.

*Stephen T. Rabaut,* for the defendant on appeal.

John Ratkov, in propria persona.

AFTER REMAND

Before: MURPHY, P.J., and MCDONALD and W. R. BEASLEY,* JJ.

MCDONALD, J. Defendant, charged with first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), was convicted by a jury of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), and sentenced to eight to fifteen years' imprisonment. This Court in an unpublished opinion per curiam, decided September 5, 1990 (Docket No. 107638), affirmed the defendant's conviction, and on rehearing remanded the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

matter to the trial court for resentencing pursuant to the principles of proportionality announced by our Supreme Court in the then recent opinion, *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). Defendant was resentenced by a different judge to the same eight- to fifteen-year term of imprisonment. Defendant appeals, claiming the sentencing court erred in calculating the guidelines' recommended minimum sentence range and that the sentence is excessive. We affirm.

Defendant's main claim on appeal is that the sentencing court erred in considering information presented at trial that was either not specifically "found" by the jury or that appears inconsistent with the jury's verdict. However, before addressing each of defendant's claimed scoring errors, we note there exists no requirement that a factfinder find the facts that form the basis of the scoring of the guidelines when rendering its verdict. *People v Williams,* 191 Mich App 269; 477 NW2d 877 (1991). A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial. *People v Harris,* 190 Mich App 652; 476 NW2d 767 (1991); *People v Walker,* 428 Mich 261; 407 NW2d 367 (1987). The contents of the presentence report are presumptively accurate if unchallenged by the defendant. However, once a defendant has effectively challenged an adverse factual assertion contained in the presentence report or any other controverted issues of fact relevant to the sentencing decision, the prosecution must prove by a preponderance of the evidence that the facts are as asserted. *Walker, supra.* If the record provides

insufficient evidence upon which to base the decision supporting or opposing the scoring, the court in its discretion may order the presentment of further proofs. This Court will affirm a sentencing court's scoring decision where there is evidence existing to support the score. *People v Warner,* 190 Mich App 26; 475 NW2d 397 (1991).

Because the prosecution must prove controverted factual assertions underlying the scoring of the sentencing guidelines by a preponderance of the evidence rather than beyond a reasonable doubt, situations may arise wherein although the factfinder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing. *Harris, supra; People v Purcell,* 174 Mich App 126; 435 NW2d 782 (1989).

With these principles in mind we review defendant's specific allegations of incorrect scoring. Defendant contests the court's scoring of twenty-five points for Criminal Sexual Offense Variable (OV) 12, criminal sexual penetrations, arguing the jury's failure to convict him of first-degree criminal sexual conduct requires a finding by the sentencing court that defendant did not sexually penetrate the victim. However, as previously noted, the jury was functioning within its obligation in requiring proof beyond a reasonable doubt of penetration for conviction, whereas the sentencing court only needed to determine that penetration was proven by a preponderance of the evidence for sentencing. Reviewing the victim's testimony, the sentencing court's determination is well supported by the record. We find no error. *Williams, supra.*

We likewise find no error in the court's assessment of fifteen points for OV 25, contemporaneous

criminal acts. The testimony indicated a pattern of abuse occurring two to three times a week for a period of approximately three years.

Although defendant's objections to the scoring of OV 6, multiple victims, and OV 13, psychological injury to the victim, have some merit, recalculation of those variables does not affect the ultimate guidelines range, and any error in their calculation was harmless.

Lastly, we find defendant's sentence to be proportionate to both the offense and the offender. *People v Milbourn, supra.*

Affirmed.

YPSILANTI TOWNSHIP v GENERAL MOTORS CORPORATION

Docket No. 161245. Submitted June 2, 1993, at Lansing. Decided August 3, 1993, at 9:00 A.M. Leave to appeal denied, 443 Mich —.

The Charter Township of Ypsilanti brought an action in the Washtenaw Circuit Court against General Motors Corporation, seeking to enjoin the defendant from transferring production of vehicles from its Willow Run plant to any other facility. The County of Washtenaw and the State of Michigan were made plaintiffs. Following a lengthy trial, the court, Donald E. Shelton, J., enjoined the defendant from transferring production, holding that the defendant had promised to continue production and maintain continuous employment at the Willow Run plant in exchange for twelve-year, fifty percent tax abatements granted with respect to two separate capital improvements made at the plant and that the promise resulted in an enforceable contract on the basis of promissory estoppel. The defendant appealed.

The Court of Appeals *held:*

Promissory estoppel requires an actual, clear, and definite promise that the promisor reasonably should expect to induce action or forbearance by the promisee or a third party. The statement made on behalf of the defendant relative to continued production and employment was nothing more than a repeating of the statutory prerequisites for the granting of an abatement stated using the hyperbole and puffery that might be expected of one seeking an abatement and clearly was not intended to create an independent contractual duty. Further, it is clear from the record that the township at the time of granting the abatements did not expect that the granting of the abatements contractually would insure that no transfers of production or reductions in employment would take place.

The trial court clearly erred in determining that there was an enforceable promise that there would be no future changes in production or employment levels and that there was reliance

REFERENCES

Am Jur 2d, Contracts § 120; Estoppel and Waiver § 48.
Comment Note.—Promissory estoppel. 48 ALR2d 1069.

by the township on such a promise. Accordingly, the court erred in granting the requested injunctive relief.

Reversed.

1. CONTRACTS — PROMISSORY ESTOPPEL — REASONABLE RELIANCE.

Promissory estoppel requires an actual, clear, and definite promise that the promisor reasonably should expect to induce action or forbearance by the promisee or a third party; reliance by the promisee or a third party is reasonable only if it is induced by an actual promise.

2. CONTRACTS — PROMISSORY ESTOPPEL — TAXATION — TAX ABATEMENTS — PUFFERY.

Hyperbole and puffery by an employer relative to job and work retention and expectations made in conjunction with an application for a tax abatement does not necessarily constitute a promise of future employment levels that may be enforced as a matter of contract by the taxing authority under the doctrine of promissory estoppel.

*McLain & Winters* (by *Wm. Douglas Winters*), for the Charter Township of Ypsilanti.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, and *Russell E. Prins* and *Ross H. Bishop,* Assistant Attorneys General, for the State of Michigan.

*Harris, Guenzel, Meier & Nichols, P.C.* (by *Robert E. Guenzel*), for the County of Washtenaw.

*Mayer, Brown & Platt* (by *Stephen M. Shapiro, Kenneth S. Geller, James D. Holzhauer, Charles Rothfeld,* and *Michael A. Vatis*), *Dykema Gossett* (by *Donald S. Young*), and *Lee A. Schutzman,* for General Motors Corporation.

Amici Curiae:

*Bauckham, Sparks, Rolfe & Thomsen, P.C.* (by *John H. Bauckham* and *Lynda E. Thomsen*), for the Michigan Townships Association.

*Clark, Klein & Beaumont* (by *Dwight H. Vincent, J. Walker Henry, Nancy J. Gordon,* and *Robert J. McClory*), for the Michigan Manufacturers Association.

*Larry P. Weinberg* and *Robert D. Lenhard,* for the American Federation of State, County, and Municipal Employees, AFL-CIO.

*Hoekenga and Farrell, P.C.* (by *Daniel J. Hoekenga*), for the Michigan Education Association.

*V. Mark Slywynsky,* for the American Automobile Manufacturers Association and the Michigan Chamber of Commerce.

*Barbara Harvey, Fran Ansley,* and *Healy, Davidson & Hornack* (by *Joseph S. Hornack*), for the Federation for Industrial Retention & Renewal.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, and *Barbara J. Brown,* Assistant Attorney General, for the Attorney General.

*Jordan Rossen, Betsey A. Engel, Julie H. Hurwitz,* and *Mark Granzotto,* for the International Union, UAW; Local 1776, UAW; Phillip J. Donato; Charles D. Evans; and Flora Gibson.

Before: REILLY, P.J., and SAWYER and P. J. CLULO,* JJ.

PER CURIAM. Defendant appeals from a February 9, 1993, order of the Washtenaw Circuit Court that enjoins defendant "from transferring the production of its Caprice sedan, and Buick and Cadil-

* Circuit judge, sitting on the Court of Appeals by assignment.

lac [sic, Chevrolet] station wagons, from the Willow Run plant to any other facility." We reverse.

Defendant has operated two plants in Ypsilanti for a number of years. The Hydra-Matic plant employs approximately 9,000 workers and the Willow Run plant employs more than 4,000. In 1975, the township created an industrial development district for the Hydra-Matic plant. It did the same for Willow Run in 1977. Over the years the township granted defendant eleven tax abatements under MCL 207.551 *et seq.*; MSA 7.800(1) *et seq.*, eight at Hydra-Matic and three at Willow Run. That statute authorizes municipalities to establish plant rehabilitation and industrial development districts to encourage the creation and maintenance of jobs in the state. The act provides for tax exemptions for businesses that meet the requirements of the act. *Creative Industries Group, Inc v Dep't of Treasury,* 187 Mich App 270, 272; 466 NW2d 311 (1991). Two of the Willow Run abatements, for 1984 and 1988, are at issue in this case. On July 17, 1984, the township approved defendant's application for a twelve-year fifty percent abatement of personal property taxes on the corporation's $175 million investment for the introduction of a new car. The State Tax Commission later granted the exemption certificate. In April 1988, defendant announced that it would produce a new rear-wheel-drive vehicle, the Chevrolet Caprice, at Willow Run. Six months later, on October 7, 1988, defendant applied for a tax abatement for that project. The application was also for a twelve-year fifty percent abatement of personal property taxes on defendant's planned $75 million project. Following public hearings, the township approved that application, and the State Tax Commission issued an exemption certificate.

On December 18, 1991, defendant announced

that it had decided to consolidate the work being done at Willow Run and Arlington, Texas, at Arlington. Defendant claims that the consolidation was necessary because of the company's record losses and because its Caprice sales, projected at 330,000 a year, had been running at about 275,000 a year and had slipped below 100,000 by late 1991.

The township commenced this action on April 29, 1992. The county joined voluntarily, while the state joined as an amicus curiae, but the trial court added the state as a party-plaintiff. The complaint alleged counts of breach of a contract created by the tax abatement statute, breach of a contract created by conduct, promissory estoppel, unjust enrichment, and misrepresentation.[1] Following a lengthy trial, the trial court found that the abatement statute and application did not create a contract between the township and the corporation. However, it did find that defendant was bound by promissory estoppel to retain production of the Caprice line in Willow Run, as long as the company produces that model. It concluded:

> There would be a gross inequity and patent unfairness if General Motors, having lulled the people of the Ypsilanti area into giving up millions of tax dollars which they so desperately need to educate their children and provide basic governmental services, is allowed to simply decide it will desert 4500 workers and their families because it thinks it can make these same cars cheaper somewhere else.

The trial court, relying on the background of

[1] The circuit court did not separately discuss the misrepresentation claim but incorporated it into its holding regarding promissory estoppel. A count for environmental nuisance was voluntarily dismissed without prejudice before trial. The unjust enrichment count was not discussed or decided by the trial court. The township considers that claim to be viable and preserved. We express no opinion concerning the claim or its viability, because neither point was decided below.

defendant's negotiations for abatements and principally on a statement by Willow Run plant manager Harvey Williams at a public hearing, found that a promise had been made. Williams stated that "[u]pon completion of this project and favorable market demand, it will allow Willow Run to continue production and maintain continuous employment for our employees." The trial court ruled:

> In the context of this background, when the plant manager, in the prepared statement on behalf of General Motors stated that, subject to "favorable market demand," General Motors would "continue production and maintain continuous employment" at the Willow Run plant, *it was a promise.* The promise was clearly that if the Township granted the abatement, General Motors would make the Caprice at Willow Run and not just transfer that work somewhere else. [Emphasis added.]

A trial court's findings of fact in an equity action are reviewable under the clearly erroneous standard. A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made. *Beason v Beason,* 435 Mich 791, 802-804; 460 NW2d 207 (1990); *Attorney General v Lake State Wood Preserving, Inc,* 199 Mich App 149; 501 NW2d 213 (1993); *Badon v General Motors Corp,* 188 Mich App 430; 470 NW2d 436 (1992); MCR 2.613(C).

The elements of promissory estoppel are:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may

> be limited as justice requires. [1 Restatement Contracts, 2d, § 90, p 242.]

Promissory estoppel requires an actual, clear, and definite promise. *State Bank of Standish v Curry,* 442 Mich 76, 84-85; 500 NW2d 104 (1993). Further, "reliance is reasonable only if it is induced by an actual promise." *Id.* at 84. A determination that there was a promise will be overturned if it is clearly erroneous. *Id.*[2]

The trial court's finding that defendant promised to keep Caprice and station wagon production at Willow Run is clearly erroneous. First, the mere fact that a corporation solicits a tax abatement and persuades a municipality with assurances of jobs cannot be evidence of a promise. The very purpose of tax abatement legislation is to induce companies to locate and to continue business enterprises in the municipality. Even the trial court recognized this when it stated, "Every time, the inducement to the township was the same—jobs will be created or preserved at that plant, and it should have been, for that was the ostensible purpose of the abatement."

Second, representations of job creation and retention are a statutory prerequisite. An applicant for an industrial facilities exemption certificate must, among other things, certify that "[c]ompletion of the facility is calculated to, and will *at the time of issuance of the certificate* have the reasonable likelihood to create employment, retain employment, prevent a loss of employment, or produce energy in the community in which the facil-

[2] Plaintiffs' reliance on *Curry* is misplaced. It merely dealt with a situation in which there was a clear promise upon which the plaintiff detrimentally relied. *Curry,* rather than compelling a conclusion in plaintiffs' favor, points to why the doctrine does not apply to this case: the promise necessary to invoke the doctrine is distinguished from a statement of opinion or mere prediction of future events. *Id.* at 86.

ity is situated." MCL 207.559(2)(e); MSA 7.800(9)(2)(e); emphasis added.

Third, the fact that a manufacturer uses hyperbole and puffery in seeking an advantage or concession does not necessarily create a promise. For example, statements such as "We're partners" and "We look forward to growing together" were found not to constitute a promise to keep a collective bargaining agreement in force for the foreseeable future so as to create by promissory estoppel a continuing duty of the employer to honor an expired agreement. *Marine Transport Lines, Inc v Int'l Organization of Masters, Mates, & Pilots,* 636 F Supp 384 (SD NY, 1986). Nor did exhortations for union concessions in order to keep a foundry open constitute promises under promissory estoppel to prevent a foundry from closing. *Abbington v Dayton Malleable, Inc,* 561 F Supp 1290 (SD Ohio, 1983), aff'd 738 F2d 438 (CA 6, 1984). Similarly, exhortations to its employees to increase productivity and assurances that a plant would not be closed, as long as it was profitable, did not establish by promissory estoppel an obligation on a steel company to keep open a plant. *Local 1330, United Steel Workers v United States Steel Corp,* 631 F2d 1264 (CA 6, 1980).

Turning to the case at bar, almost all the statements the trial court cited as foundations for a promise were, instead, expressions of defendant's hopes or expectations of continued employment at Willow Run. The court summarized the corporation's concerted efforts to obtain abatements for Hydra-Matic between 1974 and 1981 as follows:

> Over the years, General Motors followed the example set in its first application and a course of conduct developed between General Motors and the township for the granting of tax abatements.

> Each time General Motors wanted an abatement to make a physical change in the plants, it would invite township officials to the plant for a briefing, a tour of the plant, and lunch. Then the formal application would be submitted and General Motors officials would appear at a public hearing before the entire Board, which would then approve the application. Each time, the Board was advised, in some specifics, of the impact of the improvements, and presumably the abatement, on production and employment levels in the plant.

The acts cited by the trial court were acts one would naturally expect a company to do in order to introduce and promote an abatement proposal to a municipality. The acts did not amount to a promise and, as course-of-conduct evidence, showed only efforts to take advantage of a statutory opportunity. They did not constitute assurances of continued employment. In any event, we note that the activity referred to by the trial court related to Hydra-Matic, not Willow Run.

The court cited the State Tax Commission's resolution regarding the 1984 Willow Run abatement in which the commission's approval "was based on its concern for economic development in Washtenaw County which results in increased job opportunities for unemployed and underemployed residents of our county." However, that was the commission's expectation, not defendant's promise.

In defendant's 1988 presentation, Russell Hughes, the Willow Run comptroller, recited background, including: "Since the '81, '82 time-frame you can see that we've been basically maintaining about five thousand employees each year in a very consistent pattern." However, Hughes made the statement by way of history, and not as an assurance of future employment.

The circuit court also cited plant manager Harvey Williams' prepared statement:

> General Motors selected Willow Run to build these new vehicles because of our reputation for high quality, our continued harmonious relationship and our spirit of all employees working together.
>
> . . . We are asking the Board to accept our application and pass on it favorably. To join the corporation in the kind of relationship we have in the Township in assuring future investments in our plant.

However, that language is nearly identical to the puffery the federal court found not to constitute a promise in *Marine Transport Lines, Inc, supra.*

The trial court referred to the township assessor's remarks:

> Needless to say I recommend approval of the petition. Based on the past history in dealing with the people at General Motors, they've always done what they said they would do and they've kept the jobs there and they kept the plant operating as an operational facility.

Again, however, that was the assessor's evaluation, not defendant's promise.

The court quoted the State Tax Commission's resolution, which stated in part, "Where the facts indicate that positive results in gains in employment and taxes appear justified . . . we will support all the local unit decisions." Once again, that was the commission's assessment, not defendant's promise of continuing employment.

Defendant's statement that the lower court principally relied on to find a promise was not sufficient to constitute a promise. Plant manager Williams stated:

> Good evening, my name is Harvey Williams and I am the plant manager of the Buick Oldsmobile Cadillac groups [sic] Willow Run plant.

> We are pleased to have this opportunity to appear before the Ypsilanti Township Board of Trustees. This application for an industrial facilities exemption certificate is for an investment totalling $75,000,000.00 for machinery and equipment. This will enable our plant to assemble a new full size car in the 1991 model year.
>
> This new rear wheel drive car is substantially larger then [sic] our current model. And specifically it will generate major booth, oven and conveyor changes in the paint shop and assembly line process, changes in the body, trim and chassis department. This change will also provide additional flexibility at our assembly plant. Essentially we would now have the capability to produce either front or rear wheel drive cars with minimum modifications to our facility. *Upon completion of this project and favorable market demand, it will allow Willow Run to continue production and maintain continuous employment for our employees.*
>
> I would like to introduce Russell Hughes, our controller, who will review pertinent charts pertaining to our request. [Emphasis added.]

Although the parties greatly dispute what the speaker meant by "favorable market demand" and even whether defendant should have been allowed to narrow it to Willow Run production, the fact is that the statement qualified defendant's expectation that the new abatement would allow it to continue production at the plant and maintain continuous employment for the employees. Again, even that statement was nothing more than the kind of hyperbole a corporation would use to obtain the tax abatement benefits afforded by the statute and willingly offered by the township. The trial court clearly erred in concluding that Williams' statement, and particularly the portion emphasized in the foregoing quotation, constituted a promise of continued Caprice and station wagon

production at Willow Run as long as the company produces those vehicles.

Even if the finding of a promise could be sustained, reliance on the promise would not have been reasonable. "[T]he reliance interest protected by [Restatement] § 90 is reasonable reliance." *Curry, supra* at 84.

It has never been held that an abatement carries a promise of continued employment. Indeed, the history of this case shows that persons involved in the 1988 Willow Run abatement understood that defendant was not promising continued employment.

At a township board meeting in November 1988, Dillard Craiger, chairman of the Washtenaw County Board of Commissioners, opposed a tax break for Willow Run "unless a commitment was made by General Motors to remain operating at the present facility in Ypsilanti Township for that period of time thereby securing employment for the community." Craiger also complained that defendant had not given any commitments whatsoever. Outgoing Township Supervisor Ron Allen nevertheless endorsed defendant's request for tax relief, noting that "General Motors has never been overbearing or threatening" and cautioning "the Board not to take any action that would unravel the success that the Township has had [in dealing with General Motors] over the last several years." At a subsequent work session held on December 5, 1988, at least five of the seven board members—including new Township Supervisor Wesley Prater and Township Treasurer Ruth Ann Jamnick—decided to support the application.

At the public hearing at which plant manager Harvey Williams supposedly promised "continuous employment for our employees," plant comptroller Russell Hughes almost immediately warned that

"[o]ne percent [market share] penetration that we lose at General Motors means ten thousand jobs for this corporation of our employees. In the assembly plant operation one percent means about twenty five hundred jobs throughout the US and all assembly plants."

Other speakers then took the floor, several of whom specifically pointed out that defendant had not committed itself to continue operating the Willow Run plant for any particular period of time. Washtenaw County Commission Chairman Craiger, after listening to plant manager Williams' presentation, restated in detail his admonition from the previous month:

> The plant has not given us any commitments in any way that they will not "outsource" production, they will not tell you how long they are going to stay, they will not tell you that we only want it as long as we stay. Who knows, they might move tomorrow or two years from now and they will have been given three tax breaks with a hidden plan.
>
> * * *
>
> If Georgia or Alabama gives them a hundred percent [tax abatement], don't we have a right to bid on it? Don't we have that right, or should they just say, we're closing the plant because we got a better deal. . . . I would like to be able for them to tell us how long are they going to stay.

Others echoed this concern. A Mr. Smith referred to increases in his own property taxes and added: "I have eighteen years in and I'd like to see them stay here twelve years so I can retire, but they are not promising anything." Township Supervisor Prater, who chaired the meeting, then interjected a "point of clarification," explaining to Smith that "the abatement they are asking for is

not on real estate tax, it's personal property tax." But Prater did not take issue with Smith's statement that no "promise" had been made, and Smith replied that "there should be some kind of proof by them that they are not going to . . . move out." Prater made no response. Other witnesses agreed with Smith that defendant had made no commitment to continue operations at Willow Run. Mr. Debs, president of the local union at the Willow Run plant, pointed out that "nobody can tell us what the sales are going to be" and that "no plant can stay open" if sales drop. A Mr. Alford remarked that "there were some legal issues there that cannot bind [Willow Run] or Hydra-Matic to giving jobs to Ypsilanti Township."

Defendant's representatives were not asked to respond to these comments, and no member of the township board took issue with them. Instead, Supervisor Prater urged the board to approve defendant's application. The township board then voted unanimously to approve a twelve-year abatement at Willow Run; the resolution contained no suggestion that approval was conditioned on a commitment to operate the plant for any particular period.

In short, defendant made no promises.

Reversed. Defendant may tax costs.

JENKINS v CARNEY-NADEAU PUBLIC SCHOOL

Docket No. 151337. Submitted May 4, 1993, at Marquette. Decided August 3, 1993, at 9:05 A.M. Leave to appeal sought.

Susan Jenkins, as next friend of Amber Jenkins, a disabled minor enrolled in the Carney-Nadeau Public School, brought an action in the Menominee Circuit Court against the school, alleging discrimination in violation of the Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, with respect to certain conditions the school imposed on Amber pursuant to an individualized education program required by the Individuals with Disabilities Education Act, 20 USC 1400 *et seq.*, and the mandatory special education act, MCL 380.1701 *et seq.*; MSA 15.41701 *et seq.* The court, John D. Payant, J., granted summary disposition for the school, ruling that the plaintiff failed to state a claim upon which relief could be granted under the Handicappers' Civil Rights Act. The plaintiff appealed.

The Court of Appeals *held:*

The mandatory special education act, being a more specific statute than the Handicappers' Civil Rights Act in the governance of special education programs and services for handicapped public school students, controls the plaintiff's challenge of the conditions the defendant school imposed on Amber pursuant to her individualized education program.

Under the mandatory special education act, the provisions of an individualized education program cannot be challenged in federal or state court unless the administrative remedies provided by the act are first exhausted. In this case, the trial court, in summarily dismissing the plaintiff's claim, correctly determined that such administrative remedies were not exhausted.

Affirmed.

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REFERENCES

Am Jur 2d, Civil Rights § 92.5; Schools §§ 330-335.

Exhaustion of state administrative remedies under sec. 615 of the Education for All Handicapped Children Act (20 USCS sec. 1415). 62 ALR Fed 376.

SCHOOLS — SPECIAL EDUCATION — INDIVIDUALIZED EDUCATION PROGRAMS — MANDATORY SPECIAL EDUCATION ACT.

A challenge of the provisions of an individualized education program prepared for a disabled public school student pursuant to the Individuals with Disabilities Education Act and the mandatory special education act is subject to the administrative appeals procedure provided by those acts; a challenge may not be made in federal or state court unless such administrative remedies are first exhausted (20 USC 1400 *et seq.*; MCL 380.1701 *et seq.*; MSA 15.41701 *et seq.*).

*Petrucelli & Petrucelli, P.C.* (by *Joseph C. Sartorelli*), for the plaintiff.

*Weber, Swanson & Dettmann* (by *Keith E. Swanson*), for the defendant.

Before: SAWYER, P.J., and HOOD and WEAVER, JJ

PER CURIAM. This is a discrimination action brought under the Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* Plaintiff appeals as of right from the trial court's grant of summary disposition to defendant under MCR 2.116(C)(8). We affirm.

Plaintiff was born with spina bifida and suffers from related disabilities. She complains that the school will not allow her to use her motorized wheelchair in the school building, that she is forced to walk up stairs, which causes her pain, and that attention is drawn to her handicap because an aide has been assigned to accompany her at school even though she does not need such assistance. The school contends that the complained-of conditions are required by plaintiff's individualized education program (IEP) and that in order to challenge them, she must follow certain administrative procedures. We agree with defendant.

Under the Individuals with Disabilities Educa-

tion Act (IDEA), 20 USC 1400 *et seq.*,[1] states must fulfill certain conditions in order to receive federal assistance. See 20 USC 1412. Among other things, states must have "in effect a policy that assures all children with disabilities the right to a free appropriate public education" and must develop a detailed plan with goals and timetables implementing that policy. 20 USC 1412(1) and (2). Further, "[e]ach local educational agency . . . will maintain records of the individualized education program for each child with a disability, and such program shall be established, reviewed, and revised" at least annually. 20 USC 1412(4); 20 USC 1414(a)(5).

Under the IDEA, states are required to provide an administrative appeals procedure for the review of decisions regarding the "identification, evaluation, . . . educational placement, or the provision of free appropriate education." 20 USC 1415(b)(1)(E). Administrative decisions may eventually be appealed to either state or federal court. 20 USC 1415(e)(2). However, administrative remedies must be exhausted before resorting to the courts. *Doe v Smith,* 879 F2d 1340, 1343 (CA 6, 1989).

Michigan has implemented the IDEA through the mandatory special education act (MSEA), MCL 380.1701 *et seq.*; MSA 15.41701 *et seq.* See *Woolcott v State Bd of Ed,* 134 Mich App 555, 562; 351 NW2d 601 (1984). Pursuant to the MSEA, regulations have been promulgated controlling the preparation, content, and appeal of IEPS. See 1987 AACS, R 340.1721-340.1725e; see also 1990 AACS, R 340.1722a. As mandated by the IDEA, once the administrative process is exhausted, the school board's decision may be appealed to either state or federal court. See 1987 AACS, R 340.1725(3); 1980 AACS, R 340.1725a; see also 20 USC 1415(e)(2) and *Doe, supra* at 1343.

[1] Formerly known as the Education of the Handicapped Act.

Here, plaintiff has declined to follow this administrative procedure and has instead filed suit directly in the circuit court under the HCRA. She relies on a provision that makes it unlawful for an educational institution to "[e]xclude, expel, limit or otherwise discriminate against an individual . . . enrolled as a student in the terms, conditions, and privileges of the institution, because of a handicap that is unrelated to the individual's ability to utilize and benefit from the institution, or because of the use by an individual of adaptive devices or aids." MCL 37.1402(b); MSA 3.550(402)(b). Plaintiff argues that she has an independent right to sue under that section. See MCL 37.1606(1); MSA 3.550(606)(1). We disagree.

Specific statutes prevail over general statutes covering the same subject matter. *Woolcott, supra* at 563. Contrary to plaintiff's arguments, the MSEA is unquestionably more specific than the HCRA.

As noted above, the HCRA prohibits discrimination on the basis of handicap. See MCL 37.1402(b); MSA 3.550(402)(b). The MSEA, on the other hand, affirmatively requires the state to provide "special education programs and services designed to develop the maximum potential of every handicapped person." MCL 380.1701(a); MSA 15.41701(a). This means not only refraining from excluding, expelling, limiting, or otherwise discriminating against handicapped students, but also affirmatively providing them with special programs and services designed to maximize their potential. The MSEA therefore more specifically addresses the education of disabled children than does the HCRA.

Additionally, regulations issued pursuant to the MSEA govern the preparation and content of IEPS and provide an administrative procedure for appeals. The HCRA does not address IEPS at all.

Clearly then, the MSEA is also more specific than the HCRA regarding the source of the allegedly discriminatory conditions.

The case relied upon by plaintiff, *Littsey v Wayne State University Bd of Governors,* 108 Mich App 406; 310 NW2d 399 (1981), is distinguishable because it involved a hearing-impaired law student, not a special education pupil enrolled in an intermediate school district, and therefore the MSEA simply did not apply. See MCL 380.1701(a); MSA 15.41701(a); MCL 388.1705(1)(a); MSA 15.1919(1005)(1)(a). We are not, however, deciding that disabled students covered by the MSEA can never sue under the HCRA. We hold only that plaintiff may not circumvent the MSEA's administrative procedures for appealing IEPs by filing suit under the HCRA. *Woolcott, supra* at 563; see also *Smith v Robinson,* 468 US 992, 1019; 104 S Ct 3457; 82 L Ed 2d 746 (1984); *Austin v Brown Local School Dist,* 746 F2d 1161, 1164 (CA 6, 1984); *Smith v Cumberland School Committee,* 703 F2d 4, 9-10 (CA 1, 1983).

The trial court properly held that plaintiff was limited to the administrative remedies provided by the MSEA and that her complaint failed to state a claim under the HCRA.

Affirmed.

PEOPLE v HARRIS

PEOPLE v JACKSON

Docket Nos. 130529, 146674. Submitted June 9, 1993, at Detroit. Decided August 3, 1993, at 9:10 A.M.

Thomas Harris and Tim Jackson were convicted after a joint jury trial in the Detroit Recorder's Court, Prentis Edwards, J., of first-degree murder and sentenced to life imprisonment. Harris was also convicted of possession of a firearm during the commission of a felony and sentenced to two years' imprisonment for that conviction. Harris appealed as of right. Jackson appealed as on leave granted by order of the Supreme Court. 439 Mich 869 (1991). The appeals were consolidated.

The Court of Appeals *held:*

1. The admission of each defendant's redacted confession against the other, with neither defendant testifying against the other, did not violate the defendants' rights of confrontation. Even if the admission of such evidence violated the defendants' rights of confrontation, it would be harmless error because in each case evidence properly admitted against the defendant was strong and the prejudicial effect of the codefendant's admission was insignificant by comparison.

2. In the case against Harris, the admission into evidence of a statement made by a police officer who took Harris' confession did not violate the rule against hearsay. The statement was not offered to prove the truth of the matter asserted, but only to establish that the statement was made.

3. The trial court did not abuse its discretion in denying Harris' request for a recess to allow him to obtain other clothing. The clothing Harris was wearing did not resemble prison clothing that could have prejudiced Harris in the eyes of the jurors.

4. The trial court did not abuse its discretion in denying Jackson's motion for a separate trial. Severance was not required in the absence of antagonistic defenses or confessions by the defendants.

5. Jackson's claim that he was denied effective assistance by trial counsel because counsel failed to ask for a hearing regarding the voluntariness of his confession despite an indication

that Jackson did not understand his constitutional rights is without merit. The record indicates that Jackson was aware of his rights when he gave his confession.

Affirmed.

1. CRIMINAL LAW — JOINT JURY TRIALS — CODEFENDANTS' REDACTED CONFESSIONS.

In a joint jury trial, the admission of a nontestifying codefendant's confession does not violate a defendant's right of confrontation where the confession is redacted to eliminate all references to the defendant.

2. EVIDENCE — HEARSAY.

Where a witness testifies that an out-of-court statement was made, rather than about the truth of the statement, the testimony is not hearsay (MRE 801[c]).

3. CRIMINAL LAW — JURY TRIALS — DEFENDANTS' ATTIRE.

The Court of Appeals reviews only for an abuse of discretion a trial court's decision to grant or deny a recess to allow a defendant to obtain civilian clothing before appearing for a jury trial if the trial court has observed the defendant's attire and has concluded that it is not prison garb.

4. CRIMINAL LAW — JOINT TRIALS — SEVERANCE.

A request for severance of joint trials should be granted by a trial court where the defenses or the confessions of the codefendants are antagonistic (MCL 768.5; MSA 28.1028).

5. CRIMINAL LAW — INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant establishes ineffective assistance of counsel by showing that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment (US Const, Am VI).

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Janice M. Joyce Bartee,* Assistant Prosecuting Attorney, for the people.

*Charles Burke,* for Thomas Harris on appeal.

*Stone & Richardson, P.C.* (by *Ralph H. Richardson*), for Tim Jackson.

Before: McDONALD, P.J., and CORRIGAN and M. WARSHAWSKY,* JJ.

PER CURIAM. Each of the defendants was convicted after a joint jury trial of one count of first-degree murder, MCL 750.316; MSA 28.548, and sentenced to life imprisonment. Harris was also convicted of one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and sentenced to two years' imprisonment for that conviction. Harris appeals his convictions as of right. Jackson appeals by leave granted on order of the Supreme Court. 439 Mich 869 (1991). The appeals were consolidated. We affirm both convictions.

Jackson was offered $10,000 by an Arabic man known as "Ray" to kill another Arabic male, Jihad. Jackson asked Harris to join him. Together, the defendants approached a group of men, including Jihad. Harris shot Jihad in the head with a .38 caliber revolver. Both men escaped. Neither could be identified by any of the eyewitnesses. Both were later arrested and both made inculpatory statements to the police. Neither moved to suppress his statement and both statements, redacted to replace references to the other defendant with the word "blank," were introduced at trial.

Each defendant argues that the admission of his codefendant's statement was error requiring reversal. We disagree.

Defendants rely primarily on *People v Banks,* 438 Mich 408; 475 NW2d 769 (1991), decided after their trial. In *Banks,* the Supreme Court examined the effect of admitting the redacted statement of a

* Circuit judge, sitting on the Court of Appeals by assignment.

nontestifying codefendant and concluded that it might sometimes constitute error requiring reversal. *Id.* at 420-421. The Court stressed, however, that each case requires separate analysis. *Id.* at 421.

A violation of *Bruton v United States,* 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), does not automatically require reversal of a defendant's conviction. *Banks* at 427. If evidence properly admitted against the defendant is strong and the prejudicial effect of the codefendant's admission is insignificant in comparison, the admission is harmless. Here, each defendant's confession was properly admitted against him. In each case, even if the codefendant's statement had never been admitted, sufficient evidence would have justified conviction. Further, the jury did consider the statements only against their makers, because it convicted only Harris of felony-firearm even though Harris' statement implicates Jackson in the use of the gun before the shooting: "Blank had the gun. Blank showed me the gun. Blank gave me the gun and I went and hid it in the garage."

The court's cautionary instruction was sufficient. There was no *Bruton* problem.[1]

*PEOPLE v HARRIS* (DOCKET NO. 130529)

Defendant Harris first argues that the court erred in allowing into evidence certain allegedly hearsay statements. We disagree. MRE 801(c) defines "hearsay" as "a statement, other than the one made by the declarant while testifying at the

[1] *People v Watkins,* 438 Mich 627; 475 NW2d 727 (1991), is inapplicable. This is not a case in which a codefendant's confession was admitted as substantive evidence against the defendant. See *People v Petros,* 198 Mich App 401; 499 NW2d 784 (1993), lv pending. Neither did either defendant exculpate himself by shifting blame to the codefendant, the Court's prime concern in *Watkins.*

trial or hearing, offered in evidence to prove the truth of the matter asserted." Where a witness testifies that a statement was made, rather than about the truth of the statement itself, the testimony is not hearsay. See *People v Sanford,* 402 Mich 460, 491; 265 NW2d 1 (1978).

The disputed statement arose during the prosecution's redirect examination of Detective Clark, who had taken defendant's statement. In response to a question about what the witness had told defendant that caused defendant to change his statement, the witness said, "I told him that his partner had told and that Shari and Freddie had made statements also." This statement was not offered for the truth of the matter asserted. It was irrelevant whether "Shari" or "Freddie" had actually made statements to the police. What was important was the fact that the statements had been made. Because Detective Clark, the declarant, was testifying at the trial, his statement was not hearsay within the meaning of MRE 801(c). The court did not err in overruling defendant's objections.

Defendant next argues that he was denied a fair trial because the court would not permit a recess so that he could obtain civilian clothing. We disagree. A defendant's timely request to wear civilian clothing must be granted. *People v Lee,* 133 Mich App 299, 301; 349 NW2d 164 (1984), citing *Estelle v Williams,* 425 US 501; 96 S Ct 1691; 48 L Ed 2d 126 (1976); *People v Shaw,* 381 Mich 467; 164 NW2d 7 (1969). If the trial court observes the defendant's clothing and finds that it is not "prison garb," this Court will review only for abuse of discretion. Compare *People v Turner,* 144 Mich App 107, 111-112; 373 NW2d 255 (1985) (court did not note description but record indicated that the defendant was in jail clothing), and *Peo-*

*ple v Lee, supra* (trial court believed that the defendant's clothing would be recognized as jail garb), with *People v Woods,* 32 Mich App 358, 359; 188 NW2d 649 (1971) (trial court found that the defendant's attire resembled work clothes).

The court found that defendant's blue pants and shirt did not look like prison clothing. It described them as "like what teenagers, young people, are wearing now" and noted that defendant's clothing differed from prisoners' clothes that had been seen on jail visits. We defer to the trial court's opportunity to observe defendant and its finding that the clothes did not prejudicially mark defendant as a prisoner.

*PEOPLE v JACKSON* (DOCKET NO. 146674)

Defendant Jackson asserts that the trial court erred in denying his motion for a separate trial. We disagree.

A court may decide whether two or more defendants "jointly indicted for any criminal offense" should be tried separately or together. MCL 768.5; MSA 28.1028. "The general rule is that a defendant does not have a right to a separate trial." *People v Hurst,* 396 Mich 1, 4; 238 NW2d 6 (1976). A strong policy favors joint trials in the interest of justice, judicial economy, and administration. A defendant does not have an absolute right to a separate trial. *People v Etheridge,* 196 Mich App 43, 52; 492 NW2d 490 (1992). Whether to hold separate trials is within the discretion of the trial court, and the court's decision will not be reversed on appeal absent an abuse of that discretion. *Id.* at 53.

When the offered defenses are "antagonistic," severance should be granted. See, e.g., *People v*

*Stanley Jackson,* 158 Mich App 544, 555; 405 NW2d 192 (1987). "A defense is deemed antagonistic when it appears that a codefendant may testify to exculpate himself and to incriminate the defendant." *Id.* The burden is on the accused to make an affirmative showing that a substantial right will be prejudiced in a joint trial. *Etheridge, supra* at 53. A conclusory statement of antagonistic defenses without affidavits defining the inconsistencies between them is insufficient. *Id.* A confession is not antagonistic for the purposes of determining whether to sever a trial where the confession of a codefendant incriminates both the codefendant and the defendant. *People v Chester Jackson,* 179 Mich App 344, 349; 445 NW2d 513 (1989), vacated on other grounds 437 Mich 866; 462 NW2d 587 (1991). See also *Stanley Jackson, supra* at 556 (when a confession incriminates codefendants and inculpates the defendant, it is not antagonistic).

The codefendants' confessions in this case were not antagonistic. Harris confessed to hiding the gun when it was obtained from "Ray," making a first attempt to commit the murder, hiding the gun again, retrieving the gun again, shooting the victim four times, running from the scene of the crime, and seeing the money that was paid to Jackson. Jackson confessed to being solicited and agreeing to commit the crime, seeing Harris shoot the victim and hearing five shots, running away from the scene, seeing Harris return the gun to "Ray," obtaining $2,000 from Ray's uncle, and sharing it with Jackson. Nothing in either defendant's confession can be construed as antagonistic to the other's defense. The trial court properly denied the motion for separate trials.

Jackson finally argues that he was denied the effective assistance of counsel because his trial

attorney did not ask for a *Walker* hearing.[2] Defendant claims that he was unable to understand his *Miranda* rights[3] because of his low level of education. We do not agree. The standard of review of claims of ineffective assistance of counsel appears in *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment.

Where a defendant fails to request an evidentiary hearing, *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to the record. On this record, counsel was not ineffective. The detective who had taken defendant's statement indicated that defendant had read the typed statement and made two changes in it. Defendant also responded "Yes" when the detective asked whether he understood his rights. The detective described defendant as "rational and coherent" at the time the statement was taken. We have no record evidence to support defendant's claim that his limited education and mental deficiencies affected the voluntariness of his confession.

Docket No. 130529, affirmed.

Docket No. 146674, affirmed.

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[2] *People v Walker (On Rehearing),* 374 Mich 331; 132 NW2d 87 (1965).

[3] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

FELLOWS v SUPERIOR PRODUCTS COMPANY

Docket No. 129846. Submitted December 9, 1992, at Detroit. Decided April 27, 1993; approved for publication August 5, 1993, at 9:00 A.M.

Steven Fellows, as personal representative of the estate of Wesley W. Risi, deceased, brought a wrongful death action in the Wayne Circuit Court against Superior Products Company, alleging liability on a theory of attractive nuisance with respect to the decedent's accidental death on the defendant's premises. The decedent, age twelve, had entered the defendant's fence-enclosed facility to play on concrete pipes stored there. One of the pipes rolled over the decedent and crushed him. A jury returned a verdict in favor of the plaintiff and awarded damages that included exemplary damages. The court, Richard P. Hathaway, J., disallowed the award of exemplary damages and refused the defendant a new trial. The defendant appealed, and the plaintiff cross appealed.

The Court of Appeals *held:*

1. The trial court did not err in striking the award of exemplary damages from the verdict. Exemplary damages are not recoverable in a wrongful death action.

2. The defendant was denied a fair trial as a result of repeated comments by plaintiff's counsel stressing the wealth, power, and insensitivity of the defendant. Because the defendant stipulated that the utility of maintaining the alleged dangerous condition and the burden of eliminating the danger were slight when compared to the risk to the decedent and other children, the trial court erred in allowing evidence of the defendant's financial condition and photographs of the fence as it had been repaired two weeks after the accident.

Reversed and remanded for a new trial.

CAVANAGH, P.J., concurring in part and dissenting in part,

REFERENCES

Am Jur 2d, Damages § 781; Death §§ 255-263; Trial §§ 672-675.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged. 30 ALR4th 707.

Counsel's appeal in civil case to wealth or poverty of litigants as ground for mistrial, new trial, or reversal. 32 ALR2d 9.

agreed that exemplary damages are not recoverable in a wrongful death action, but stated that admission of evidence of the defendant's financial condition was proper inasmuch as such evidence had a bearing on whether the utility of maintaining the dangerous condition and the burden of eliminating the danger were slight when compared to the risk to the children involved, a point not conceded by the defendant. The denial of the defendant's motion for a new trial should be affirmed.

1. DAMAGES — WRONGFUL DEATH — EXEMPLARY DAMAGES.

Exemplary damages are not recoverable in a wrongful death action (MCL 600.2922; MSA 27A.2922).

2. TRIAL — ARGUMENTS BY COUNSEL.

In a jury trial of an action for damages against a corporate defendant, comments by the plaintiff's counsel that stress the wealth, power, and insensitivity of the defendant are improper and may constitute a ground for invalidating a verdict in favor of the plaintiff where the comments are part of a deliberate course of conduct aimed at depriving the defendant of a fair and impartial trial and the resultant prejudice to the defendant cannot be obviated with a cautionary instruction to the jury.

*Mayer B. Gordon & Associates, P.C.* (by *Frank G. Becker, Mayer B. Gordon,* and *Paul R. Swanson*), for the plaintiff.

*Harvey, Kruse, Westen & Milan, P.C.* (by *Paul S. Koczkur, John G. Gleeson,* and *Phyllis F. Snow*), for the defendant.

Before: CAVANAGH, P.J., and MACKENZIE and GRIFFIN, JJ.

PER CURIAM. In this wrongful death action, defendant appeals and plaintiff cross appeals two postjudgment orders issued by the Wayne Circuit Court. Following a jury verdict in favor of plaintiff, the circuit court granted in part defendant's motion for judgment notwithstanding the verdict, denied defendant's motion for a new trial, and granted in part and denied in part defendant's

motion to set aside the judgment. We reverse both orders and remand for a new trial.

I

This is a tragic case. Defendant, Superior Products Company, is a manufacturer of concrete products used in construction projects. On December 30, 1986, plaintiff's decedent, twelve-year-old Wesley Wayne Risi, went to defendant's Taylor, Michigan, facility to play on top of the large concrete pipes defendant stored there. Accompanied by two of his friends, the decedent entered defendant's facility through a large opening in the fence and began climbing the pipes. The decedent was fatally injured when one of the pipes unexpectedly rolled onto him and crushed him.

Plaintiff sued defendant, claiming liability on a theory of attractive nuisance. After a lengthy trial, a jury found in favor of plaintiff and awarded damages in the amount of $2,273,500.

II

The primary issue on appeal concerns the admissibility of certain evidence introduced by plaintiff to support the claim for exemplary damages. We begin by noting that, contrary to plaintiff's position on cross appeal, exemplary damages are not recoverable in a wrongful death action. The various authorities supporting this rule were summarized recently by the federal district court in *In re Disaster at Detroit Metropolitan Airport on August 16, 1987,* 750 F Supp 793, 805 (ED Mich, 1989):

> In Michigan, the courts of that State refuse to allow the recovery of punitive damages. See *Kewin*

v *Massachusetts Mutual Life Ins, Co,* 409 Mich 401; 295 NW2d 50 (1980); *Currie v Fiting,* 375 Mich 440; 134 NW2d 611 (1965); *Hicks v Ottewell,* 174 Mich App 750; 436 NW2d 453 (1989); *Kirk v Ford Motor Co,* 147 Mich App 337; 383 NW2d 193 (1985); *Association Research & Development Corp v CNA Financial Corp,* 123 Mich App 162; 333 NW2d 206 (1983), lv den 418 Mich 858 (1983). While exemplary damages are distinct from punitive damages and are designed to compensate plaintiffs for humiliation, outrage, and indignity resulting from a defendant's wilful, wanton, or malicious conduct, see *CNA Financial,* 123 Mich App at 171; 333 NW2d at 211, neither form of damages is available under the Michigan Wrongful Death Act, MCLA 600.2922 [MSA 27A.2922] (West 1986). This act has been construed by the Michigan Supreme Court as the statute which provides the exclusive remedies for those injuries which result in death, see *Endykiewicz v State Highway Commission,* 414 Mich 377, 387-88; 324 NW2d 755 (1982); *Courtney v Apple,* 345 Mich 223, 228; 76 NW2d 80, 83 (1956), and that statute does not provide for punitive or exemplary damages. See *Bernier v Board of County Road Commissioners,* 581 F Supp 71, 80 (WD Mich, 1983); *cf. Currie,* 375 Mich 440; 134 NW2d 611.

We believe that this analysis represents a correct application of Michigan precedent. Accordingly, we agree with defendant that the trial court did not err in striking the $500,000 exemplary damage award from the jury's verdict.

III

We also agree with defendant that simply striking the exemplary damage award from the verdict was insufficient to eradicate the prejudice resulting from the numerous errors that occurred at trial. Defendant argues that the entire proceedings

in this case were tainted by improper evidence and argument designed to portray defendant as a wealthy and callous corporation that deserved to be punished with a substantial judgment. After thoroughly reviewing the record in this case, we agree with defendant that prejudicial error occurred and that a new trial is warranted.

A

In an attractive nuisance case, one of the elements a plaintiff must prove is that the utility of maintaining the dangerous condition and the burden of eliminating the danger are slight as compared with the risk to the children involved. *Rand v Knapp Shoe Stores,* 178 Mich App 735, 740-741; 444 NW2d 156 (1989). In the present case, this element was not in dispute. Defense counsel offered on several occasions to stipulate that it was feasible for defendant to eliminate the danger by either repairing the fence or posting "no trespassing" signs.

Nonetheless, on the third day of trial, plaintiff sought to introduce evidence of defendant's financial records for the year 1986. Defense counsel objected on the basis that feasibility of repairs was not at issue and that using defendant's wealth to support a claim for exemplary damages was clearly improper. Ultimately, the trial court overruled defendant's objection without explanation. Plaintiff then called defendant's president, Howard T. Rex, Jr., as a witness and asked him about the company's assets and liabilities. Reading from defendant's balance sheet, Rex testified that in 1986 his company had assets in excess of $24 million and liabilities of approximately $15.6 million.

On cross-examination, defense counsel tried to rebut the inference of defendant's wealth by show-

ing that defendant had been losing money in recent years. Rex testified that defendant showed net losses of approximately $1.6 million in 1987, $980,000 in 1988, and $1.4 million from January 1, 1989, through September 30, 1989. Then, on redirect examination, plaintiff's counsel sought to show that the losses were simply the result of "creative accounting" by defendant:

> *Q.* [*Mr. Swanson*]: Mr. Rex, are you an accountant by education?
>
> *A.* No, not by education.
>
> *Q.* Have you ever heard of the term creative accounting?
>
> *A.* Yes.
>
> *Q.* What does that mean?
>
> *A.* Well, you get things to go the way you want them to go.
>
> *Q.* In the years that you took your losses, '87, '88, '89, did you get some federal—some sort of tax credits for those?
>
> *A.* Yes.
>
> *Q.* You wouldn't suggest to us, would you, that you took—you didn't take your salary in those years, would you?
>
> *A.* (No response).
>
> *Q.* You did not take your salary in '87, '88 or '89, did you?
>
> *A.* No.
>
> *Q.* Or any of the officers?
>
> *A.* No.

B

With the above evidence before the jury, closing arguments in this case became what can best be described as a virtual "free-for-all" with respect to the issue of defendant's financial status. In connection with his feasibility argument, plaintiff's coun-

sel characterized defendant as the "$24 million corporation":

> What did he say the cost of the signs would be, if he wanted to post them every fifty foot? A thousand bucks, eleven thousand dollars to do a tip-top job, state of the art, to a *twenty-four million dollar corporation.*
>
> I submit, gentlemen, that burden is slight. If they wanted to do a tip top job. As compared with the risk to children involved. [Emphasis added.]

Shortly thereafter, plaintiff's counsel emphasized the contrast between the plaintiff's family and defendant's wealth. Counsel told the jury:

> What can I say? How can I express the devastation that this needless tragedy has inflicted upon Wesley's mother, Fran. She's a single mother. She works hard. Set up an example for her boys. And *she's not a wealthy lady.* She works as a cashier. They tried to show, hey, this lady works for a living. Well, she's not ashamed of it. She worked hard. Set a good example for her boys. And, you know, *money was always short. She had two kids to feed, two kids to cloth [sic], but they never went to bed hungry.* They always showed up to school with clean clothes.
>
> You learned from Wendy McGee and most of all they had a loving home to come home to in the afternoon when school was done.
>
> Now what has she got to show for it? *She's got no jewels. No stocks. No bonds; no real estate investments.* All her blood, her sweat, her time; her love and money, they were all invested in her boys Larry and Wesley. These were her jewels. These were her investments. They were her life. [Emphasis added.]

During rebuttal, plaintiff's counsel again addressed the issue of defendant's wealth when he stated:

Mr. Rex got up on the stand. He told you in the year 1986 they had twenty-four million dollars in assets, only fifteen million dollars in liability. Okay.

And then in the succeeding years brought out by counsel on cross examination—excuse me.

Yes, cross examination, they said, well, okay, we lost a million. We lost a million and half in the following year. And then we lost another million, something like that. They lost a few million in there. Okay.

But then when Mr. Swanson, remember Mr. Swanson got back up and he said, oh, gee, that sounds terrible.

Did you take your salaries for those years; did directors and officers take your salaries?

Answer: yes.

*Q.* Did [sic] get tax refunds?

*A.* Yes.

*Q.* Do you know what creative accounting is?

Oh, yes. That's when you get things to go your own way.

Well, were they juggling the books to get things to go their own way?

Finally, near the end of his rebuttal, plaintiff's counsel made the following comment:

*Mr. Gordon*: You've heard all the evidence.

It is overwhelmingly in favor of the plaintiff. Anybody can see that. I know you've seen it. You know so much of the time we are just lost; we say, we say, God tell us what is right; what is true. *Seems like there is no justice. That the rich wins and the poor are powerless.* [Emphasis added.]

The transcript of the closing arguments is riddled with objections from both sides. In most instances, the objections were not ruled upon by the trial court. Ultimately, at the conclusion of plaintiff's rebuttal, defendant moved for a mistrial. The

sole comment by the trial judge was, "That's noted and denied, counsel."

At one point, defense counsel did attempt to use the financial evidence to his client's advantage. Although also improper, defense counsel told the jury that a substantial award of exemplary damages would force defendant to close its plant and put fifty local families out of work:

> Gentlemen, you shouldn't give not a single dollar, not one for exemplary damages. That's especially true despite the irrelevant value of the assets that Mr. Gordon likes to bring up.
>
> It is especially true because Superior Products has been losing money. I mean loss of money over the last few years. And the future, and its future doesn't look good.
>
> What Mr. Gordon is asking you to do is effectively shut [down] Superior Products and put fifty men with families out on the street. That's what Mr. Gordon wants.

C

In *Reetz v Kinsman Marine Transit Co,* 416 Mich 97, 111-112; 330 NW2d 638 (1982), our Supreme Court condemned as always improper comments that tend to stress the wealth, power, and insensitivity of a corporate defendant:

> The effect of these comments was to create in the minds of the jurors an image of Kinsman as an unfeeling, powerful corporation controlled by a ruthless millionaire. Even a juror who harbored no prejudice against corporations or millionaires might have been swayed by these inflammatory remarks to alter his view of the evidence.
>
> Our prior cases should have made clear that even isolated comments like these are always im-

proper, even if not always incurable or error requiring reversal. However, when, as in this case, the theme is constantly repeated so that the error becomes indelibly impressed on the juror's consciousness, the error becomes incurable and requires reversal. We find the following statement from *Steudle v Yellow & Checker Cab & Transfer Co,* 287 Mich 1, 11-12; 282 NW 879 (1938), to be applicable in this case:

"We believe the record in the instant case shows a deliberate course of conduct on the part of counsel for plaintiff aimed at preventing defendant from having a fair and impartial trial. We think the course of misconduct was so persistently followed that a charge of the court in an effort to obviate the prejudice would have been useless."

After thorough review, we are persuaded that defendant was denied a fair trial. By erroneously allowing proof regarding the question of exemplary damages, the trial court permitted plaintiff to cast defendant as a wealthy, callous, and insensitive corporation. As the last comment emphasized above plainly indicates, plaintiff was erroneously permitted to play on the helplessness that individuals sometimes feel in their dealings with large corporations. See *Duke v American Olean Tile Co,* 155 Mich App 555, 563; 400 NW2d 677 (1986). Moreover, we reject plaintiff's argument that defendant's attempt to use the financial evidence to its advantage cured any error.

Finally, we must discuss briefly one other significant error that occurred at trial. Although less serious than the above errors, the trial court improperly admitted into evidence photographs of the fence as it had been repaired two weeks after the accident. Plaintiff's counsel sought admission of these photographs to show the "feasibility of making these changes." As noted above, however, defense counsel stipulated that it was feasible to

make the repairs. Accordingly, defense counsel argued that in view of such an admission, MRE 407 barred the evidence. The trial court overruled the objection, stating, "I do in fact find these photographs have relevance." Because feasibility was not an issue, this ruling was erroneous.

On the basis of the foregoing, we vacate the orders below and remand this matter for a new trial. In view of our disposition, we need not address the remaining evidentiary matters raised by defendant on appeal. We note, however, that when this matter is retried, plaintiff shall not be permitted to introduce evidence of defendant's past misconduct unless such evidence is relevant to a material issue. Such evidence shall not be admitted to prove any matter which, by virtue of stipulation, is not in dispute. Compare *McDonald v Stroh Brewery Co,* 191 Mich App 601, 605-606; 478 NW2d 669 (1991).

IV

Defendant's remaining issues on appeal merit only cursory discussion. We reject defendant's argument that it was entitled to judgment notwithstanding the verdict on the basis of the decedent's age. Defendant's own expert agreed that a twelve-year-old would not recognize that the pipes would shift. Furthermore, our review indicates that defense counsel stipulated the verdict form now claimed to be erroneous. It is well settled that error requiring reversal must be that of the trial court and not that to which the appellant contributed by plan or negligence. *Bloemsma v Auto Club Ins Ass'n (After Remand),* 190 Mich App 686, 691; 476 NW2d 487 (1991). On remand, however, defendant shall be free to renew its objections to the verdict form on the basis that it fails to comply

with the tort reform act, MCL 600.6301 *et seq.*; MSA 27A.6301 *et seq.*

Reversed and remanded. We do not retain jurisdiction.

CAVANAGH, P.J. *(concurring in part and dissenting in part).* While I agree with the majority that exemplary damages are not recoverable in a wrongful death action, I cannot agree that by erroneously allowing proof regarding the question of exemplary damages the trial court permitted plaintiff to cast defendant as a wealthy, callous, and insensitive corporation. The evidence regarding defendant's financial status was admitted because plaintiff was required to prove that the utility of maintaining the cement pipes for sale or salvage and the burden of eliminating any danger caused by the pipes was slight when compared to the risk to the children involved. The evidence established that only about three percent of defendant's business was generated by the stored cement pipes and that it would have cost defendant between $6,000 and $10,000 to address the dangers caused by this practice.

Given this state of the record, I find no abuse of discretion in the trial court's decision to admit evidence of defendant's financial assets. It certainly has bearing on whether the utility of maintaining the dangerous practice and the burden of eliminating the danger were slight when compared to the risk. And, contrary to the conclusion reached by the majority, I am not convinced that defendant conceded this element by stipulating that it was feasible to repair its fence and post warning signs. For this reason, I would affirm the trial court's decision denying defendant's motion for a new trial.

KATINSKY v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 134492. Submitted April 7, 1993, at Detroit. Decided August 16, 1993, at 9:00 A.M. Leave to appeal sought.

John Katinsky brought an action in the Wayne Circuit Court against Auto Club Insurance Association and others, seeking a declaration that he was entitled to benefits pursuant to a no-fault insurance policy issued to Sean McBride by Auto Club. Katinsky had been injured on May 6, 1989, when his motorcycle collided with an automobile registered to McBride. On the basis of the following facts, Auto Club denied that it was McBride's insurer on the date of the accident. McBride applied for no-fault insurance on his automobile on April 25, 1989, and Auto Club deposited McBride's check for the premium on May 3, 1989. The check was returned to Auto Club on May 17, 1989, dishonored because of insufficient funds. On May 19, 1989, Auto Club issued a "Policy Billing Notice" and a "Family Automobile Policy New Declaration Certificate," showing a policy in effect from April 25, 1989, through October 25, 1989, and listing McBride as a named insured. The billing notice reflected that no money had been received and warned that the policy would be canceled unless McBride paid half the premium by June 5, 1989. Auto Club sent McBride another notice on May 24, 1989, stating that the policy had been canceled because of nonpayment of the premium and that coverage terminated at 12:01 A.M. on April 25, 1989. McBride did not submit any further payment for the premium. The court, Michael L. Stacey, J., granted summary disposition for Auto Club and dismissed the action against it. The plaintiff appealed.

The Court of Appeals *held:*

1. The May 19 bill and declaration certificate are evidence that Auto Club accepted McBride's April 25 offer to enter into an insurance contract and communicated that acceptance to him. A reasonable factfinder could find that Auto Club had

REFERENCES

Am Jur 2d, Automobile Insurance §§ 340-368.

Validity and construction of no-fault automobile insurance plans. 42 ALR3d 229.

issued a policy that covered McBride's automobile at the time of the accident.

2. A false representation in an insurance application that materially affects the acceptance of the risk entitles the insurer to void or cancel the policy retroactively. However, the right to rescind ceases to exist once a claim by an innocent third party is involved. Therefore, any misrepresentation by McBride in the insurance application regarding the validity of the check cannot result in rescission of the policy with respect to the plaintiff's claim.

3. McBride's failure to pay the premium is not sufficient reason to excuse Auto Club from performing its obligations under the policy.

4. Auto Club, by notifying McBride, before his time for payment had expired, that it would not honor the contract, excused him from performance.

Reversed.

INSURANCE — NO-FAULT — APPLICANT'S FALSE REPRESENTATION — RESCISSION OF CONTRACT.

A false representation in an application for no-fault insurance that materially affects the acceptance of the risk entitles the insurer to void or cancel the policy retroactively; the right to rescind ceases to exist once a claim by an innocent third party is involved; public policy requires that an insurer be estopped from asserting rescission once a third party has been injured.

*Mindell, Panzer, Mulcahy & Malin* (by *Jeffrey D. Malin*), for the plaintiff.

*Brandt, Hanlon, Becker, Lanctot, McCutcheon, Schoolmaster & Taylor* (by *Joseph K. Bachrach*) (*John A. Lydick,* of Counsel), for Auto Club Insurance Association.

Before: MARILYN KELLY, P.J., and SHEPHERD and CONNOR, JJ.

CONNOR, J. Plaintiff appeals as of right the trial court's summary dismissal of his claim against defendant Auto Club Insurance Association. We reverse.

At 3:00 A.M. on Saturday, May 6, 1989, plaintiff

was injured when the motorcycle he was driving collided with an automobile stopped in the roadway. Plaintiff and a pedestrian hit by the car as it fled the scene were taken to the hospital. The police found the car involved and impounded it. The car was registered to Sean McBride.

McBride had applied for no-fault insurance on the car with the Michigan Automobile Insurance Placement Facility through an Allstate Insurance Company agent on April 25, 1989. The placement facility assigned McBride's application to Auto Club. On May 3, 1989, Auto Club deposited McBride's check. On May 17, the check was returned to Auto Club dishonored because of insufficient funds in McBride's checking account.

On May 19, 1989, Auto Club issued a "Policy Billing Notice" and a "Family Automobile Policy New Declaration Certificate." The declaration certificate showed a policy providing no-fault and other insurance coverages in effect from April 25, 1989, through October 25, 1989, and listed Sean McBride as a named insured. The billing notice reflected no money having been received from McBride. It warned that the policy would be canceled unless McBride paid half the premium by June 5, 1989.

On May 24, 1989, Auto Club sent another notice to McBride. This notice stated that the policy had been canceled because of nonpayment of the premium, and that coverage terminated at 12:01 A.M. on April 25, 1989. Apparently, McBride never submitted anything more to Auto Club.

Plaintiff filed this action against Auto Club,[1]

[1] Apparently out of fear of the one-year statute of limitations, MCL 500.3145(1); MSA 24.13145(1), plaintiff named every insurance company in the state as a defendant. However, only Auto Club and State Farm were ever served with process. State Farm's interest in the case stems from a policy it issued plaintiff on a automobile, which would

seeking a declaration that he was entitled to no-fault insurance benefits. Auto Club denied it was McBride's insurer, claiming that it had rescinded the policy it had issued because of the dishonored check. The trial court granted Auto Club's motion for summary disposition, brought pursuant to MCR 2.116(C)(10), and dismissed the claim against Auto Club.

At issue on appeal is whether an insurance company can avoid paying no-fault insurance benefits to a third party when the purchaser of the policy paid the insurance premium with a check that is dishonored. We hold that it cannot.

The May 19 bill and declaration certificate are evidence that Auto Club accepted McBride's April 25 offer to enter into an insurance contract and communicated that acceptance to McBride. See *Hagerl v Auto Club Group Ins Co,* 157 Mich App 684, 688; 403 NW2d 197 (1987). Thus, a reasonable factfinder could decide that Auto Club had issued a no-fault insurance policy that covered the automobile at the time of the accident.

Auto Club argues that it has a right to void, retroactively cancel, or rescind any policy it issued McBride because of the dishonored check. We disagree.

A false representation in an application for no-fault insurance that materially affects the acceptance of the risk entitles the insurer retroactively to void or cancel a policy. See *Auto-Owners Ins Co v Comm'r of Ins,* 141 Mich App 776, 779-780; 369 NW2d 896 (1985). However, this right to rescind ceases to exist once there is a claim involving an innocent third party. *Darnell v Auto-Owners Ins Co,* 142 Mich App 1, 9; 369 NW2d 243 (1985).

make it a lower-priority insurer. See MCL 500.3114(5)(c); MSA 24.13114(5)(c). Although listed as an appellee, State Farm filed no brief and did not participate in oral argument.

Public policy requires that an insurer be estopped from asserting rescission when a third party has been injured. *Ohio Farmers Ins Co v Michigan Mutual Ins Co,* 179 Mich App 355, 364-365; 445 NW2d 228 (1989). Therefore, any misrepresentation McBride may have made on an insurance application[2] regarding the validity of the check cannot result in rescission of the policy with respect to plaintiff's claim.

We do not find McBride's failure to pay the premium sufficient reason to excuse Auto Club from performing its obligations under the policy. In *Coburn v Fox,* 425 Mich 300, 310; 389 NW2d 424 (1986), our Supreme Court decided that an insured's failure to cooperate cannot act as a defense to a claim for no-fault benefits made by a third party. Cooperation is merely one part of the consideration that an insured promises to an insurer, payment of the premiums is another. The public policy arguments that persuaded our Supreme Court to protect innocent third parties despite the insured's noncooperation apply just as forcefully to the nonpayment of the premium. See *id.,* n 3. Moreover, by notifying McBride, before his time for payment had expired, that it would not honor the contract, Auto Club excused him from performance. We conclude that McBride's failure to pay the premium does not affect plaintiff's right to benefits.

If no-fault insurers do not want to pay third-party claims on policies for which they have not been paid a premium, they should not bind themselves to coverage until they have actually received the premiums. When an insurer issues a no-fault policy, that policy provides security that no-

[2] Auto Club attached a copy of McBride's application to its appellate brief. However, because this was not part of the trial court record, it is not properly before this Court.

fault benefits will be paid and is deemed to provide insurance for the payment of benefits. See MCL 500.3101; MSA 24.13101.

Reversed.

JACKSON v DETROIT POLICE CHIEF

Docket No. 134676. Submitted February 11, 1993, at Detroit. Decided August 16, 1993, at 9:05 A.M. Leave to appeal sought.

Charles H. Jackson, a Detroit police commander who was informed by Detroit Police Chief William L. Hart that he would be demoted to lieutenant, brought an action in the Wayne Circuit Court against the police chief, seeking a declaration regarding his rights under the veterans' preference act, MCL 35.401 *et seq.*; MSA 4.1221 *et seq.* The plaintiff was then demoted without a hearing. The court, John A. Murphy, J., granted summary disposition for the police chief, ruling that the plaintiff, as a police commander serving at the pleasure of the police chief, was not a permanent employee subject to the act. The plaintiff appealed.

The Court of Appeals *held:*

1. The position of police commander is not one of the high-level positions that are exempted from coverage by the act. The fact that the plaintiff, as a police commander, served at the pleasure of the chief of police did not make the plaintiff's employment temporary and not subject to the act. Rather, the plaintiff's employment was permanent, terminable at will, and subject to the act.

2. Section 2 of the act, MCL 35.402; MSA 4.1222, requires that any employment action against a covered veteran be preceded by notice and a hearing.

3. The remedy for a violation of the "notice and hearing" provisions of § 2 is not reinstatement with back pay. If the plaintiff filed a written protest with the Mayor of Detroit regarding the demotion, the mayor must conduct a hearing or refer the protest to the city's legal department. The plaintiff would be entitled to back pay if it is found that his allegations are true and that he should be reinstated.

Reversed.

STATUTES — VETERANS' PREFERENCE ACT — POLICE.

A veteran employed as a municipal police commander who serves

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REFERENCES

Am Jur 2d, Veterans §§ 122-126.

See ALR Index under Veterans and Veterans' Administration.

at the pleasure of the chief of police pursuant to city charter is not a temporary employee, but an employee in a permanent position whose employment is terminable at will; a demotion of a veteran in such a position without the consent of the veteran is governed by the veterans' preference act (MCL 35.402; MSA 4.1222).

*Amos E. Williams,* for the plaintiff.

*Donald Pailen,* Corporation Counsel, *Thomas L. Walters,* Deputy Corporation Counsel, and *Terri L. Hayles* and *David J. Masson,* Assistant Corporation Counsel, for the defendant.

Before: MARILYN KELLY, P.J., and SHEPHERD and CONNOR, JJ.

CONNOR, J. Charles H. Jackson brought this action against Detroit Police Chief William L. Hart, seeking a declaration of his right to protection under the veterans' preference act (VPA), MCL 35.401 *et seq.*; MSA 4.1221 *et seq.* The trial court summarily dismissed plaintiff's complaint pursuant to MCR 2.116(C)(8). Plaintiff appeals as of right. We reverse.

A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the claim by the pleadings alone. *Parkhurst Homes, Inc v McLaughlin,* 187 Mich App 357, 360; 466 NW2d 404 (1991). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.*

According to his complaint, plaintiff was a police department commander in Detroit. The city char-

ter provides that police commanders serve at the pleasure of the police chief. On July 27, 1990, defendant, then the police chief, told plaintiff that he would be demoted to the rank of lieutenant on August 16, 1990. Under department rules, the demotion would result in plaintiff being transferred from his position of commanding the second precinct.

Plaintiff had served in the armed forces during the Korean conflict, and had been honorably discharged. On August 15, 1990, he filed this action, seeking a declaration that he was entitled to the protection of the VPA. Two days later, plaintiff was demoted without a hearing.

The trial court ruled that, because the city charter specifies that police commanders serve at the pleasure of the police chief, plaintiff was not protected by the VPA. Plaintiff contends that this ruling was in error. We agree.

The VPA provides in part:

> No veteran . . . holding an office or employment in a public department . . . shall be removed or suspended, or shall without his consent be transferred from such office or employment except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency . . . . [MCL 35.402; MSA 4.1222.]

The only veterans employed by state and local governments who are not protected by the VPA are department heads, members of commissions and boards, heads of institutions appointed by the governor, officers appointed by a city's mayor under the city's charter, and first deputies of such people. *Id.* Plaintiff was neither appointed by the mayor nor a first deputy of the police chief. Consequently, the exceptions do not apply to plaintiff

and, as a covered employee, he is entitled to the protections the VPA provides.

The statute's coverage includes protection from demotion. *Cremer v Alger Co Rd Comm'rs,* 325 Mich 27, 33; 37 NW2d 699 (1949). The VPA requires notice and a hearing before taking any employment action against a veteran. MCL 35.402; MSA 4.1222. However, in *Smith v Flint City Comm,* 258 Mich 698, 701; 242 NW 814 (1932), our Supreme Court held that the VPA did not prevent a city from discharging a veteran without notice and a hearing for lack of work, reasons of economy, or because the office or position had been abolished. Furthermore, the VPA is not violated by discharge from public employment designated as temporary in authorization and appointment, because the VPA does not prolong employment beyond the public need. See *Walkling v Smith,* 276 Mich 193, 199-200; 267 NW 616 (1936).

Defendant argues that plaintiff is a temporary employee because police commanders serve at the pleasure of the police chief. We disagree. Serving at the pleasure of the police chief makes a commander's employment terminable at will. However, at-will employment is quite different from temporary employment. The office of second precinct commander existed before plaintiff occupied it, and presumably will continue to exist indefinitely into the future. Thus, although a particular police officer's hold on the office may be tenuous, the office itself is not temporary.

The VPA protects veterans holding at-will public employment positions by converting those positions to ones that are terminable only for just cause; the VPA does not regulate the terms of employment, but it does affect the status of employment as established. See *Walkling, supra* at

200. The trial court erred in finding that a commander's at-will status made plaintiff a temporary employee not protected by the statute. We reverse the trial court's dismissal of plaintiff's complaint.

Having decided that plaintiff is entitled to the protection of the VPA, we must determine what remedy is available to redress defendant's failure to abide by the VPA. We do not concur with plaintiff's conclusion that he is entitled to automatic reinstatement with back pay.

The VPA gave plaintiff a right to notice and a hearing before his demotion. The statute in clear language prohibits taking any employment action against a veteran until after there has been notice and a hearing. See MCL 35.402; MSA 4.1222.[1] Failing to give notice and a hearing is a violation of the VPA subject to criminal prosecution. See MCL 35.403; MSA 4.1223. However, the remedy the VPA provides for a violation of the right to notice and a hearing is not automatic reinstatement with back pay. Because plaintiff was demoted without a hearing, he was required to file a written protest with the mayor or he would be deemed to have waived the protections of the VPA. MCL 35.402; MSA 4.1222. If plaintiff filed such a protest, the mayor would be required to conduct a hearing, or refer the protest to the city's legal department to conduct a hearing. *Id.* Plaintiff would be entitled to back pay only if the mayor found plaintiff's allegations to be true and determined that he should be reinstated. *Id.*; see also *Valentine v Redford Twp Supervisor,* 371 Mich 138, 147; 123 NW2d 227 (1963).

Reversed.

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[1] We disagree with the conclusion reached in *Adams v Detroit,* 184 Mich App 589, 597-600; 458 NW2d 903 (1990), that holding a hearing before taking action is not required.

PEOPLE v LAMB (AFTER REMAND)

Docket No. 149047. Submitted May 11, 1993, at Lansing. Decided August 16, 1993, at 9:10 A.M.

Robert C. Lamb pleaded guilty in the Genesee Circuit Court, Thomas C. Yeotis, J., of third-degree criminal sexual conduct and was sentenced to five years' probation, with the first year to be served in the county jail. The prosecution filed a motion for resentencing, claiming the sentence of probation was invalid. The court denied the motion, and the prosecution filed a complaint for superintending control with the Court of Appeals. The Court, DANHOF, C.J., and DOCTOROFF and CAVANAGH, JJ., agreed that the sentence was invalid and, on January 31, 1991, entered an order vacating the sentence and remanding for resentencing (Docket No. 133429). However, on January 30, 1991, the trial court had signed an order discharging the defendant from probation. On remand, the defendant was resentenced to six months to fifteen years in prison. He appealed.

After remand, the Court of Appeals *held:*

The trial court erred in imposing probation. It then perpetuated its error by terminating the sentence of probation. The fact that the defendant was discharged from probation did not preclude resentencing. The circuit court had the authority to correct the invalid sentence.

Affirmed.

SENTENCES — PROBATION — INVALID SENTENCES — RESENTENCING.

A defendant who has been discharged from an invalid sentence of probation may be resentenced.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people.

REFERENCES

Am Jur 2d, Criminal Law §§ 580-586.

See ALR Index under Sentence and Punishment.

*Jerome F. O'Rourke,* for the defendant.

Before: HOLBROOK, JR., P.J., and GRIFFIN and H. A. BEACH,* JJ.

GRIFFIN, J. Defendant appeals as of right following a resentencing at which he was sentenced to six months to fifteen years in prison for a conviction of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4). We affirm.

On January 26, 1987, defendant pleaded guilty of one count of third-degree criminal sexual conduct stemming from an act of oral copulation involving a fifteen-year-old boy. On January 22, 1988, defendant was sentenced to five years' probation, with the first year to be served in the Genesee County jail. More than 2½ years later, on August 20, 1990, the prosecutor filed a motion for resentencing, claiming that defendant's sentence of probation was invalid. Following a hearing, the trial court denied the motion.

The prosecutor then filed a complaint for superintending control with this Court. Upon review, we agreed with the prosecutor's position that the sentence was invalid. Accordingly, on January 31, 1991, we issued an order vacating defendant's sentence and remanding for resentencing. Just one day before the release of the order, however, the trial court signed an order discharging defendant from his probation.

On remand, on January 15, 1992, defendant was resentenced to six months to fifteen years in prison. On appeal, defendant raises a single issue for our review. Defendant contends that his absolute discharge from probation precludes resentencing even though the original sentence of probation

* Circuit judge, sitting on the Court of Appeals by assignment.

was invalid. After thorough review, we disagree with defendant's argument.

To support his position, defendant solely relies on our decision in *People v Gregorczyk,* 178 Mich App 1; 443 NW2d 816 (1989). *Gregorczyk* involved a defendant who was given an invalid sentence and later granted an early discharge by the parole board. At issue was what effect the parole board's discharge had on the trial court's subsequent authority to impose a valid sentence. To resolve the issue, the majority in *Gregorczyk* looked to the Supreme Court's decision in *In re Eddinger,* 236 Mich 668; 211 NW 54 (1926). There, the Supreme Court observed that an absolute discharge granted by the Governor operates as a "remission of the remaining portion of [a defendant's] sentence." *Id.* at 670. Seizing on this language, the majority in *Gregorczyk* held that the parole board's actions, even though illegal, operated as a remission of whatever remained of the defendant's initial invalid sentence. *Gregorczyk, supra* at 11-12. Accordingly, the majority determined that the defendant's obligation to the state had ended and that he could not be compelled on resentencing to serve an additional sentence. *Id.* at 12.

After thorough review, we find *Gregorczyk* distinguishable from the present case. We also deem it appropriate to limit *Gregorczyk* to its facts.[1] Unlike *Gregorczyk* and *Eddinger,* the present case does not involve any executive commutation of defendant's original sentence. As noted by the majority in *Gregorczyk,* Gregorczyk's discharge by the parole board involved an exclusive exercise of executive powers. *Gregorczyk, supra* at 10. Fur-

[1] We express no opinion regarding the correctness of the decision in *Gregorczyk, supra.* We note, however, that the viability of *Gregorczyk* appears questionable. See *Michigan ex rel Oakland Co Prosecutor v Dep't of Corrections,* 199 Mich App 681; 503 NW2d 465 (1993).

ther, the majority in *Gregorczyk* declined to assume that the defendant was released for any reason other than that he was determined by the parole board to be an appropriate candidate for discharge. In short, the concerns about separation of powers that compelled the result in *Gregorczyk* are simply not implicated in the case at bar.[2] What we have before us is a case where the trial court simply perpetuated its own error by terminating a sentence of probation that it had no authority to impose in the first place.

On the basis of the foregoing, we hold that the fact that the circuit court discharge defendant from probation did not preclude resentencing. The circuit court had the authority to correct the invalid sentence, MCR 6.429(A), and we affirm the sentence of six months to fifteen years in prison.

Affirmed.

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[2] Moreover, because defendant received credit for time served on the invalid sentence, the double jeopardy concerns expressed in *Gregorczyk* are likewise not implicated here. See *Gregorczyk, supra* at 9.

NORMAN v NORMAN

Docket No. 154157. Submitted June 2, 1993, at Lansing. Decided August 16, 1993, at 9:15 A.M.

Terence L. Norman obtained a divorce from Kathleen A. Norman in the Washtenaw Circuit Court, Henry T. Conlin, J. The parties' consent judgment provided that Terence was to have a lien on the marital home in an amount that was to accrue interest at the rate of "8¾% per annum" and was to become due and payable upon the happening of any of certain listed events. Following the occurrence of one of those events, a dispute arose regarding whether the interest on the lien was to be calculated as simple or compound interest. The court, Melinda Morris, J., determined that the interest was to be compounded annually. Kathleen appealed.

The Court of Appeals *held:*

1. The consent judgment does not state explicitly whether the interest was to be simple or compound. That silence does not equal ambiguity where, as in this case, the law provides a rule to be applied in the absence of a provision to the contrary.

2. In the absence of a statute to the contrary, an explicit agreement of the parties, or some special circumstance dictating otherwise, interest must be calculated on the basis of simple interest rather than compound interest. In this case, there is no statute that specifically provides for the payment of compound interest, the consent judgment does not explicitly provide for compound interest, and there are no special circumstances dictating otherwise. This silence means that the interest must be calculated on the basis of simple interest.

3. The trial court erred in finding that, because the interest rate in the judgment was below market level, there were equitable grounds for imposing compound interest to compensate Terence adequately. The fact that the rate agreed upon may have proved to be inadequate in light of the prevailing interest rates during the time in question is immaterial. The

REFERENCES

Am Jur 2d, Divorce and Separation §§ 842-847; Interest and Usury §§ 59 *et seq.*

See ALR Index under Divorce and Separation; Interest on Money.

interest rate provided for in the consent judgment is usurious and is not inadequate. Terence received an excessive interest rate, whether it is calculated as simple or compound interest.

4. The consent judgment is not ambiguous with regard to the issue of interest and is properly construed as providing for the payment of simple interest.

Reversed and remanded.

1. INTEREST — SIMPLE INTEREST — COMPOUND INTEREST.

In the absence of a statute to the contrary, an explicit agreement of the parties, or some special circumstance dictating otherwise, interest must be calculated on the basis of simple interest rather than compound interest.

2. DIVORCE — JUDGMENTS — INTEREST — USURY.

The usury statute provides that the highest rate of interest that may be authorized in a written instrument is, with certain exceptions, seven percent per annum; the seven percent limitation applies to debts from one spouse to another established pursuant to a judgment of divorce (MCL 438.31; MSA 19.15[1]).

3. DIVORCE — JUDGMENTS — PROPERTY SETTLEMENTS — MODIFICATION.

Modifications of property settlements in divorce judgments are disfavored and, generally, cannot be ordered except under limited circumstances.

*Kidder & Wolfe* (by *C. Christopher Wolfe*), for the plaintiff.

*Law Offices of Peter B. Bundarin* (by *Peter B. Bundarin*), for the defendant.

Before: REILLY, P.J., and SAWYER and P. J. CLULO,* JJ.

SAWYER, J. The parties were divorced pursuant to a consent judgment of divorce entered on March 27, 1980. The judgment provided, inter alia, that plaintiff was to have a lien on the marital home in the amount of $14,000, which was to accrue interest and was to become due and payable upon the

* Circuit judge, sitting on the Court of Appeals by assignment.

happening of any of certain listed events. One of those triggering events has now occurred and this dispute has arisen concerning whether the interest on the lien was to be calculated as simple or compound interest. The trial court determined that the interest was to be compounded annually. Defendant now appeals, and we reverse.

The consent judgment provided that the lien was to be "with interest to accrue thereon at the rate of 8¾% per annum from the date of entry of this judgment." In reaching its conclusion, the trial court stated that the judgment was not clear regarding how the interest should be calculated and that it would exercise its equitable jurisdiction to make a discretionary decision, which decision was that, in order to adequately compensate plaintiff, it was necessary to calculate the interest as being compounded annually. In so doing, the trial court erred.

First, we have to determine whether the judgment provided for simple or compound interest, or whether it was ambiguous with regard to that point. Although the trial court apparently concluded that the judgment was ambiguous, we must disagree. It is true that the judgment did not state explicitly whether the interest was to be simple or compound, but the analysis does not end there. Silence does not equal ambiguity if the law provides a rule to be applied in the absence of a provision to the contrary. We are satisfied that the law does provide such a rule.

As a general rule, the law disfavors compound interest and will allow for the payment of compound interest only in the presence of a statute or agreement providing for the payment of compound interest, though subject to some exceptions:

> The law does not favor compound interest or

> interest on interest, but this rule will not prevail in the face of a statute authorizing it. As a general rule, in the absence of contract therefor, express or implied, or of statute authorizing it, compound interest is not allowed to be computed on a debt.
>
> This rule is subject to exceptions growing out of peculiar relations between the parties or the fraudulent conduct of the debtor, and courts of equity sometimes allow the compounding of interest, in order to accomplish a just and equitable settlement. [47 CJS, Interest & Usury, § 6, pp 31-32.]
>
> According to some decisions, compound interest can never be recovered in the absence of an express contract to pay it. On the other hand, other authorities hold that such an agreement may be implied, where the circumstances are such as to justify the implication; and such an implied contract will be as effective as if it were express.
>
> Such a contract may be implied from the established course of dealing between the parties, or from the general custom or usage of trade to charge interest on interest, although the contrary view has been taken; and the striking of a balance may be regarded as evidence of an agreement to pay interest on the interest which is included in such balance. [47 CJS, Interest & Usury, § 11, p 41.]

This general rule is consistent with the Michigan case law. In *Wallace v Glaser,* 82 Mich 190, 191; 46 NW 227 (1890), the Supreme Court recognized that partial payments were first to be applied to interest and then to principal, but that if the payment was less than the amount of interest due, "the surplus of interest must not be taken to augment the principal," or, in other words, interest is not to be compounded. The principles set forth in *Wallace* continue to be recognized to this day. See, e.g., *Niggeling v Dep't of Transportation,* 195 Mich App 163, 167; 488 NW2d 791 (1992);

*Krisfalusi v Krisfalusi,* 178 Mich App 458, 463; 444 NW2d 196 (1989).

Furthermore, this position is consistent with that taken by this Court concerning the interpretation of the judgment interest statute, MCL 600.6013; MSA 27A.6013. In *Schwartz v Piper Aircraft Corp,* 90 Mich App 324; 282 NW2d 306 (1979), this Court concluded that the statute then in effect provided for the calculation of simple interest rather than compound interest. The statute then in effect provided that judgment interest was to be calculated at the rate of "6% per year," which this Court construed to mean simple interest, not interest to be compounded on an annual basis.[1]

Unlike the current version of the judgment interest statute, however, the general interest statute, MCL 438.31; MSA 19.15(1), does not provide that the interest on debts shall be compounded annually. Rather, that statute provides for the interest to be calculated at the rate of "$5.00 upon $100.00 for a year" or, in the case of the interest provided for in a written instrument, a rate "not exceeding 7% per annum," language similar to that construed in *Schwartz, supra.* It is also similar to the language in the judgment of divorce in this case, which provided that the interest would accrue at the rate of "8¾% per annum" from the date of the judgment.

As discussed above, the general rule disfavors compound interest, allowing it only when specifically provided for. In addition to allowing or requiring compound interest by statute, it is generally recognized that parties may contract for the payment of compound interest:

[1] Since the *Schwartz* decision, MCL 600.6013; MSA 27A.6013 has been amended to explicitly provide that judgment interest is to be compounded annually.

> It is generally recognized that it is competent for parties to contract for the payment of compound interest or interest on interest, although some courts have placed important limitations on this right. To create such an obligation there must be a direct promise, and it has been held that it is not enough that the note or contract merely provide for annual payment of interest. [47 CJS, Interest & Usury, § 9, p 36.]

In light of the general rule favoring simple interest over compound interest, and in light of the case law, we reach the conclusion that there is a rule to apply regarding simple versus compound interest. Namely, in the absence of a statute to the contrary, an explicit agreement of the parties, or some special circumstance dictating otherwise, the rule in this state is that interest shall be calculated on the basis of simple interest rather than compound interest. In the case at bar, there is no statute that specifically provides for the payment of compound interest, and the parties' agreement, memorialized in the consent decree, does not explicitly provide for compound interest. This silence, rather than being ambiguous, means that the interest shall be calculated on the basis of simple interest rather than compound interest in the absence of some special circumstance dictating otherwise.

As discussed above, it is conceivable that in an equitable action there could be factors that would dictate the imposition of compound interest rather than simple interest in order to achieve equity. However, we need not determine whether such an equitable principle should be applied in Michigan because, even if it should be applied, we do not believe that this case presents such an instance. If the imposition of "equitable" compound interest is appropriate in this state, we think that it should

be limited to the most compelling situations. For example, it might be appropriate to impose equitable compound interest if the party to a divorce action that was obligated to pay the debt was significantly delinquent in paying that debt, necessitating the former spouse to seek the assistance of the court to enforce the judgment. However, in the case at bar, it does not appear that defendant was unduly dilatory in the payment of her obligations under the divorce judgment.[2]

The only basis stated in this case for which there are equitable grounds to require the payment of compound rather than simple interest is the trial court's conclusion that compound interest was necessary to adequately compensate plaintiff, particularly in light of the fact that the interest rate in the judgment was not at market level, but was below market level. We disagree with the trial court that this presents an adequate ground for the imposition of equitable compound interest for at least two reasons.

First, this judgment was a consent judgment agreed to by the parties. Therefore, the parties were free, subject to the limitations of the usury statute, to negotiate an interest rate that would adequately compensate plaintiff for the delay in the payment of his interest in the marital home. The fact that the rate agreed upon may have proved to be inadequate in light of the prevailing interest rates during the time in question is immaterial. It was not the trial court's place, in hindsight, to adjust for the fact that interest rates

[2] We also add, though not relevant to this case, that it may also be appropriate to impose compound interest where the past dealings of the parties, or the custom in the local trade or industry, or similar situation, indicates that interest should be calculated on the basis of compound interest rather than simple interest. Again, because we are not faced with such a situation in the case at bar, we need not determine whether that is an appropriate rule in this state.

proved to be higher during the time in question than that provided for in the judgment.

Second, we note that although 8¾ percent interest rate provided for in the judgment may have been less than the prevailing market rate for interest during the period in question, it was nevertheless usurious. With certain exceptions, the highest rate of interest that may be authorized in a written instrument is seven percent per annum. MCL 438.31; MSA 19.15(1). The Supreme Court has held that the seven percent limitation on interest under the usury statute is applicable to debts from one spouse to another pursuant to a divorce judgment. *Clifford v Clifford,* 434 Mich 480, 481; 453 NW2d 675 (1990). Thus, the interest rate provided for in this consent judgment of divorce is usurious. Accordingly, the interest rate was not inadequate; rather, as a matter of law, plaintiff received an excessive interest rate, whether it be calculated as simple or compound interest.[3] Therefore, because plaintiff is receiving a usurious amount of interest, it can hardly be said that the equities lie in his favor.

For the above reasons, we conclude that the judgment is not ambiguous with regard to the issue of interest. Rather, in light of silence, it must be construed as providing for the payment of simple interest rather than compound interest. Accordingly, to require the payment of compound interest would necessitate a modification of the judgment of divorce. However, modifications of property settlements in divorce judgments are disfavored and, as a general rule, cannot be ordered except under limited circumstances. *Tomblinson v*

[3] We note, however, that we do not disturb the interest rate provided for in this judgment. Although it is, in fact, usurious, defendant has not raised that issue. Because the defense of usury is waivable, *Thelen v Ducharme,* 151 Mich App 441, 448; 390 NW2d 264 (1986), we need not address it because the issue was not raised.

*Tomblinson,* 183 Mich App 589, 594-595; 455 NW2d 346 (1990). In the case at bar, the interest being paid by defendant is already usurious and, therefore, any increase in the amount of the interest to be paid by defendant must also be usurious. Clearly, there is no legal principle that would allow the trial court to modify a property settlement in order to impose a usurious rate of interest.

For the above reasons, we conclude that the trial court erred in finding that plaintiff was entitled to receive compound interest rather than simple interest. Accordingly, on remand, the trial court shall enter an appropriate order providing for the payment of simple interest rather than compound interest.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant may tax costs.

SIMKO v BLAKE

Docket No. 135977. Submitted January 12, 1993, at Lansing. Decided August 16, 1993, at 9:20 A.M. Leave to appeal sought.

Arthur L., Margaret A., and Tara M. Simko brought an action in the Wayne Circuit Court against Marvin Blake, seeking damages for legal malpractice arising out of the defendant's alleged failure to defend adequately plaintiff Arthur Simko in a criminal trial. The plaintiffs alleged that although the defendant had moved for a directed verdict on the basis of insufficiency of the evidence and had argued that same basis to the jury in the criminal trial, he had failed to present an adequate defense and that failure was the proximate cause of Arthur Simko's conviction and imprisonment until the conviction was reversed by the Court of Appeals on the basis of insufficiency of the evidence. The trial court, Robert J. Colombo, Jr., J., granted summary disposition for the defendant on the basis that the proximate cause of plaintiffs' injuries was the erroneous failure of the trial court in the criminal trial to grant the motion for a directed verdict. The plaintiffs appealed.

The Court of Appeals *held:*

A claim of legal malpractice requires a showing that the attorney owed a duty to the client. Because no amount of preparation or level of skill can anticipate every error or completely shield a client from the occasional aberrant ruling of a fallible judge or an intransigent jury, an attorney is under no duty to do more for a client than that which is legally adequate to vindicate fully the client's interests. The fact that the defendant's legally adequate defense in the criminal trial did not protect Arthur Simko from the errors of the court and the jury should not expose the defendant to liability for legal malpractice. The trial court properly dismissed the plaintiffs' action.

Affirmed.

McDONALD, J., dissenting, stated that summary disposition was granted inappropriately because, while an attorney is not a

REFERENCES

Am Jur 2d, Attorneys at Law §§ 120, 199.

Legal malpractice in defense of criminal prosecution. 4 ALR5th 273.

guarantor of a trial free from error and has no duty to do more than that which is legally adequate to vindicate fully the client's rights, the plaintiffs' complaint presented an unresolved question whether the defendant's actions were in fact legally adequate to vindicate fully Arthur Simko's rights.

ACTIONS — LEGAL MALPRACTICE — DUTY.

An attorney has no duty to do more for a client than that which is legally adequate to vindicate fully the client's interests.

*Blaske & Blaske, P.C.* (by *E. Robert Blaske*), for the plaintiffs.

*Plunkett & Cooney, P.C.* (by *Christine D. Oldani* and *Patrick M. Burrett*), for the defendant.

Before: CONNOR, P.J., and HOLBROOK, JR., and MCDONALD, JJ.

CONNOR, P.J. Plaintiffs appeal as of right the trial court's dismissal of their legal malpractice action pursuant to MCR 2.116(C)(8). We affirm.

In 1987, plaintiff Arthur Simko was tried for possession with intent to deliver more than 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). His attorney, defendant, Marvin Blake, moved for a directed verdict at the close of the prosecution's case, arguing that there was insufficient evidence of Simko's guilt. The motion was denied. Blake called only Simko to testify in his own defense, then argued to the jury that there was insufficient evidence of Simko's guilt. The jury found Simko guilty of both crimes, and he was sentenced to life in prison. Simko appealed, and this Court, almost two years later, agreed that the evidence was insufficient and reversed Simko's convictions. *People v Simko,* unpublished opinion per curiam of the Court of Appeals, decided November 29, 1989 (Docket No. 105873).

Simko sued Blake for malpractice. We accept all Simko's factual allegations as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Parkhurst Homes, Inc v McLaughlin,* 187 Mich App 357, 360; 466 NW2d 404 (1991). Therefore, we accept that Blake could have presented additional evidence to the jury that would have so convinced them of Simko's innocence that they would not have wrongfully convicted him. Proximate cause in attorney malpractice is a question for the trier of fact. *Charles Reinhart Co v Winiemko,* 196 Mich App 110, 113; 492 NW2d 505 (1992). Consequently, we accept that a trier of fact could find that it was because Blake did not present additional evidence that Simko spent two years in prison unnecessarily.

To state a claim of legal malpractice, Simko must show the existence of the client-attorney relationship, the acts constituting negligence, that the negligence was the proximate cause of injury, and the existence and extent of the injury. *Espinoza v Thomas,* 189 Mich App 110, 115; 472 NW2d 16 (1991). Central to any negligence claim is duty: the idea that a defendant was under an obligation for the benefit of a particular plaintiff. *Buczkowski v McKay,* 441 Mich 96, 100; 490 NW2d 330 (1992).

An attorney has a duty to represent a client's interests. Plaintiffs' claim tests how far that duty extends. Plaintiffs contend that an attorney has a duty to do more than that which is minimally adequate to win a client's case. Because it is foreseeable that a trial court will rule incorrectly, and because it is foreseeable that a jury will convict someone unjustly, plaintiffs argue that an attorney has a duty to protect a client from those foreseeable errors where possible.

The mere fact that something is foreseeable does not impose a duty on a defendant. *Id.* at 101.

"Duty" is an expression of the policy considerations that lead the law to say that the plaintiff is entitled to protection. *Id.* at 100-101. Factors to be considered when determining whether a duty exists include: foreseeability of the harm, degree of certainty of the injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach. *Id.* at 101, n 4.

There is no motion that can be filed, no amount of research in preparation, no level of skill, nor degree of perfection that could anticipate every error or completely shield a client from the occasional aberrant ruling of a fallible judge or an intransigent jury. To impose a duty on attorneys to do more than that which is legally adequate to fully vindicate a client's rights would require our legal system, already overburdened, to digest unnecessarily inordinate quantities of additional motions and evidence that, in most cases, will prove to be superfluous. And, because no amount of work can guarantee a favorable result, attorneys would never know when the work they do is sufficiently more than adequate to be enough to protect not only their clients from error, but themselves from liability.

We will not impose a duty on attorneys to do more for a client than that which is legally adequate to vindicate fully the client's interests. We believe it would impose an unreasonable burden to require that an attorney who has identified correctly the legal inadequacy of his opponent's case and has tendered the appropriate motions to the court also be prepared to present additional evidence in support of alternative theories just in case the trial court erroneously should deny the motions. Attorneys and clients must be free to

negotiate among themselves about how to deal with the risks of a mistake. Clients who do not want to take the risk, and can afford it, can contract with their attorneys for whatever extra work is needed to lessen the risk to a level they find acceptable. In the absence of some special agreement, defendants are entitled only to legally adequate representation, and they must accept the risk that the just resolution of their legal problem will have to wait for an appellate court's decision.

In this case, Simko retained Blake to help defend him against two criminal charges. By challenging the sufficiency of the evidence against Simko, Blake raised a complete and ultimately successful defense to both charges. It is unfortunate that the success of Blake's defense was delayed until this Court could correct the errors that had been made below. However, Blake was not Simko's insurer against all possible misfortune; he was his criminal defense lawyer. His duty was to raise an adequate defense to the criminal charges, not to protect Simko from judge and jury.

Affirmed.

HOLBROOK, JR., J., concurred.

MCDONALD, J. *(dissenting).* I respectfully dissent. I believe the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted.

The trial court granted defendant's motion for summary disposition because it found the proximate cause of plaintiffs' injuries to be the criminal trial court's error in failing to grant plaintiff Arthur Simko's motion for a directed verdict. However, it is well settled that there may be more than one proximate cause for the same injury.

*Arbelius v Ploetti,* 188 Mich App 14; 469 NW2d 436 (1991). Thus, the trial court's finding the criminal trial court's error to be a proximate cause of plaintiffs' injuries did not preclude a finding that defendant's actions likewise constituted a proximate cause of the injuries. Plaintiffs' complaint set forth a prima facie case of legal malpractice. It alleged the existence of a client-attorney relationship, negligence resulting from defendant's failure to present an adequate defense in the criminal trial, and that defendant's failure to present an adequate defense was the proximate cause of plaintiff Arthur Simko's imprisonment and related injuries. *Espinoza v Thomas,* 189 Mich App 110; 472 NW2d 16 (1991).

I agree with that portion of the majority opinion that states an attorney is not a guarantor of a trial free from error and has no duty "to do more for a client than that which is legally adequate to vindicate fully the client's interests." However, the majority's application of this principle without analysis begs the question. The question presented by plaintiffs' complaint is whether defendant's actions were in fact "legally adequate to vindicate fully" plaintiffs' rights. Plaintiffs, having set forth a valid claim, are entitled to a determination of this issue. I would find summary disposition was improperly granted.

PEOPLE v HICKS

Docket No. 149026. Submitted May 5, 1993, at Detroit. Decided August 16, 1993, at 9:25 A.M. Leave to appeal sought.

Tyrone Hicks was charged in the Detroit Recorder's Court with assault with intent to murder and possession of a firearm during the commission of a felony. A bench trial of the defendant had commenced before Daphne Means Curtis, J., and three prosecution witnesses had presented testimony before Judge Curtis was informed by the prosecutor that the defendant is the brother of Judge Curtis' friend and campaign manager. On her own motion, Judge Curtis recused herself, giving as reason the avoidance of an appearance of impropriety. The case was then assigned by the acting chief judge to Terrance K. Boyle, J., who declared a mistrial and denied the defendant's motion to dismiss on grounds of double jeopardy the charges against him. The defendant appealed by leave granted.

The Court of Appeals *held:*

Jeopardy attaches in a bench trial once the first witness is sworn. If the trial court declares a mistrial after jeopardy has attached, the state is precluded from bringing the defendant to trial a second time unless the defendant consented to the mistrial or the mistrial was of manifest necessity. In this case, a mistrial was declared over the objection of the defendant, and Judge Curtis' concern over a potential perception of bias and appearance of impropriety was insufficient to establish manifest necessity for a mistrial. Accordingly, Judge Boyle erred in denying the motion for dismissal on the asserted ground of double jeopardy.

Denial of defendant's motion to dismiss reversed.

J.T. HAMMOND, J., dissenting, stated that manifest necessity

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REFERENCES

Am Jur 2d, Criminal Law §§ 258-264.

Former jeopardy as bar to retrial of criminal defendant after original trial court's sua sponte declaration of mistrial. 40 ALR4th 741.

What constitutes manifest necessity for prosecutor's dismissal of action, allowing subsequent trial despite jeopardy's having attached. 14 ALR4th 1014.

for a mistrial was established once Judge Curtis refused further participation and that a second trial is not barred by double jeopardy.

CRIMINAL LAW — MISTRIAL — DOUBLE JEOPARDY.

If a mistrial is declared after jeopardy has attached, the state is precluded from bringing the defendant to trial a second time unless the defendant consented to the mistrial or the mistrial was of manifest necessity; a mistrial is not of manifest necessity and a retrial would be barred by double jeopardy where the mistrial is granted, over the defendant's objection, after a trial judge's own recusal based on a potential perception of bias or appearance of impropriety, as opposed to actual bias or partiality, resulting from the judge's friendship with a sibling of the defendant.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, and *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Karen M. Woodside,* Assistant Prosecuting Attorney, for the people.

*Henry M. Scharg,* for the defendant.

Before: FITZGERALD, P.J., and MICHAEL J. KELLY and J.T. HAMMOND,* JJ.

FITZGERALD, P.J. Defendant appeals by leave granted from the trial court's denial of his motion to dismiss the charges against him on double jeopardy grounds. We reverse.

Defendant was charged with assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). A bench trial was commenced before Detroit Recorder's Court Judge Daphne Means Curtis on September 9, 1991. During the morning session, three prosecution witnesses testified and the matter recessed

* Circuit judge, sitting on the Court of Appeals by assignment.

for lunch. Upon reconvening, Judge Curtis announced in open court that the trial prosecutor had just informed her that defendant was the brother of Gregory Hicks, the judge's personal friend and campaign manager.

Judge Curtis then asked the parties for their respective positions on the matter. Counsel for defendant argued that because Gregory Hicks would not be called as a witness in the case, Judge Curtis should not recuse herself. Counsel further argued that should Judge Curtis recuse herself, the case should be dismissed. The assistant prosecutor stated that he had no comment on the matter. Judge Curtis then stated that although her relationship with defendant's brother could potentially affect her objectivity in the case, she believed that such influence was unlikely. Judge Curtis noted, however, that her friendship with defendant's brother created the appearance of impropriety. She then recused herself and referred the decisions regarding a mistrial and defendant's request for dismissal to the chief judge of the court.

Acting Chief Judge Robert L. Evans reassigned the case to Judge Terrance K. Boyle, who entertained a defense motion to dismiss at a hearing held on December 4, 1991. At the hearing, Judge Boyle formally declared a mistrial, stating that Judge Curtis' recusal constituted the functional equivalent of a mistrial. Judge Boyle then denied defendant's motion to dismiss, reasoning that Judge Curtis' recusal constituted manifest necessity for a declaration of a mistrial, and thus, defendant's retrial was not barred by double jeopardy.

Defendant now argues on appeal that Judge Boyle erred in denying his motion to dismiss because there was no manifest necessity for a mis-

trial. We agree. A judge should not declare a mistrial sua sponte without first making explicit findings, after a hearing on the record, that no reasonable alternative exists. *United States v Jorn,* 400 US 470, 483-485; 91 S Ct 547; 27 L Ed 2d 543 (1971); *People v Benton,* 402 Mich 47, 61; 260 NW2d 77 (1977). *People v Wilcox,* 183 Mich App 616, 619-620; 456 NW2d 421 (1990).

The United States and Michigan Constitutions prohibit a defendant from being placed twice in jeopardy. *People v Dawson,* 431 Mich 234, 250; 427 NW2d 886 (1988); *Wilcox, supra* at 620. Jeopardy attaches in a bench trial once the first witness is sworn. *People v Brower,* 164 Mich App 242, 246; 416 NW2d 397 (1987). If the trial court declares a mistrial after jeopardy has attached, the state is precluded from bringing the defendant to trial a second time unless the defendant consented to the mistrial or the mistrial was of manifest necessity. *Dawson, supra* at 252; *Wilcox, supra* at 620; *People v Little,* 180 Mich App 19, 22; 446 NW2d 566 (1989). The trial court is afforded considerable deference with respect to its decision regarding the existence of manifest necessity. *Benton, supra* at 65. Cf. *Little, supra* at 23 (citing *Downum v United States,* 372 US 734, 738; 83 S Ct 1033; 10 L Ed 2d 100 [1963], for the proposition that any doubt regarding the existence of manifest necessity should be resolved in favor of the defendant).

"Manifest necessity" is not a precisely defined concept, but is usually determined case by case with reference to various factors, such as the failure of the jury to agree upon a verdict, misconduct on the part of a juror, or an incurable defect in an indictment or the proceedings. *Benton, supra* at 56-57; *Wilcox, supra* at 621. "An important consideration is whether the nature of the defect perceived by the judge was such that, if a guilty

verdict had been rendered, the conviction would have had to have been reversed on appeal." *Wilcox, supra* at 621.

Courts have generally recognized that where circumstances actually impair a trial judge's ability to impartially preside over a trial, there is manifest necessity for the court to declare a mistrial. See, e.g., *State v Pierce,* 459 A2d 148 (Me, 1983), *State v Workman,* 60 Ohio App 2d 204; 396 NE2d 777 (1977), *Lewis v Anderson,* 94 Idaho 254; 486 P2d 265 (1971), and *State v Puckett,* 92 Ariz 407; 377 P2d 779 (1962). In the absence of any actual bias or partiality, however, the mere appearance of partiality is generally held insufficient to establish manifest necessity. See, e.g., *Little, supra, Torres v State,* 614 SW2d 436 (Tex Crim App, 1981), *Douglas v State,* 32 Md App 311; 360 A2d 474 (1976), and *Ferlito v Judges of County Court,* 39 AD2d 17; 331 NYS2d 229 (1972), aff'd 31 NY2d 416; 340 NYS2d 635; 292 NE2d 779 (1972).

In the instant case, when apprised of the familial relationship between defendant and her campaign manager, Judge Curtis conferred with counsel for the respective parties in open court. Counsel for defendant unequivocally opposed Judge Curtis' suggestion that she should recuse herself. Nevertheless, in deciding to recuse herself, Judge Curtis stated, in pertinent part:

> The problem with sitting as a judge, particularly in a waiver trial is that not only do I have to be concerned about whether I might be influenced in my rulings or in my findings by knowing someone in the defendant's family but also whether or not it looks improper, the appearance of impropriety and the Cannons [sic] refer to both of those situations as it applies to judges. I might be influenced by knowing his brother now that I know that I know his brother. I don't really think that I would

> be, but I think just as important is the fact that it would not look good, that the appearance of impropriety could certainly result from my continuing as the trier of fact in this case.

After the case was reassigned to Judge Boyle, he found that Judge Curtis' recusal alone constituted manifest necessity warranting a mistrial. We disagree. Under the circumstances, it was not necessary for Judge Curtis to recuse herself from this case. Although the assistant prosecutor brought the potential conflict to the judge's attention, he did not ask the judge to recuse herself, nor did he move for a mistrial. Furthermore, counsel for defendant adamantly opposed the judge's recusal. Because Judge Curtis stated that it was unlikely that her objectivity would be affected, it appears that her decision to recuse herself was essentially based on the potential for bias and the appearance of impropriety. We find under these facts that such grounds did not constitute "manifest necessity" requiring a mistrial.[1] As this Court in *Little, supra,* stated:

> While we recognize the desirability of avoiding the appearance of judicial partiality whenever possible, this potential for the appearance of judicial partiality must be balanced against the deprivation of defendant's "valued right to have his trial completed by a particular tribunal." This valued right is more compelling where the defendant, as here, actively opposed the declaration of a mistrial. [*Id.* at 27, quoting *Jorn, supra* at 484.]

[1] In *People v McCline,* 442 Mich 127; 499 NW2d 341 (1993), a factually distinguishable case, the Court noted that it is preferable that a single judge preside over all aspects of a trial to insure that the judge who hears the testimony regarding the facts also applies the law. In *McCline,* the Court held that substitution of a judge before opening argument or the admission of evidence is not an automatic ground for reversal, and that the defendant in that case failed to demonstrate prejudice.

In his decision, Judge Boyle stated that although he "would not have recused myself under these circumstances mid-trial absent a request by either party," he felt that Judge Curtis' decision could not be called error and was, "in constitutional terms," manifest necessity. Judge Boyle appears to have distinguished this case from *Little* because a bench trial was involved and defendant would be minimally prejudiced by a retrial. We believe this is too tenuous a consideration. Even in bench trials, courts have declined to find manifest necessity for disqualification where the trial judge's personal relationships, or those of the judge's family, present a hypothetical possibility or an appearance of influence as opposed to actual bias or partiality. In *Ferlito, supra,* a very similar relationship between the affected parties existed and the court found no manifest necessity. The court stated:

> In the appraisal of judicial conduct it is recognized, of course, that the appearance of impropriety may sometimes be as devastating as the reality; but the mistrial procedure is not designed to afford an escape hatch from the performance of an unpleasant duty. A mistrial such as this, declared as in the public interest, and against the defendant's will, must have some basis of demonstrable substance— for, as the rule has it, the necessity must be 'manifest.' Here, the remote possibility of unfair treatment and the clear showing of prejudice to the defendant conjoined to interject the mistrial which the court proposed and, over objection, granted. [31 NY2d 419-420.]

We fully agree with the New York court and can find no substantial or meaningful difference between *Ferlito* and this case. There was no manifest necessity to declare a mistrial over defendant's objection, and the state is barred from

placing defendant in jeopardy a second time on these charges. We do not disagree with Judge Boyle's conclusion that Judge Curtis' recusal was the functional equivalent of a mistrial, but we disagree with his conclusion that it cannot be called error. We find constitutional error requiring reversal.

The February 7, 1992, order of the Recorder's Court denying defendant's motion to dismiss on double jeopardy grounds is reversed and the case is dismissed.

MICHAEL J. KELLY, J., concurred.

J. T. HAMMOND, J. *(dissenting).* I respectfully dissent.

The facts are accurately stated in the lead opinion. The lead opinion states, "A judge should not declare a mistrial sua sponte without first making explicit findings, after a hearing on the record, that no reasonable alternative exists." *Ante* at 200. I agree.

The lead opinion also states: "Under the circumstances it was not necessary for Judge Curtis to recuse herself from this case. Although the assistant prosecutor brought the potential conflict to the judge's attention, he did not ask the judge to recuse herself, nor did he move for a mistrial. Furthermore, counsel for defendant adamantly opposed the judge's recusal. Because Judge Curtis stated that it was unlikely that her objectivity would be affected, it appears that her decision to recuse herself was essentially based on the potential for bias and the appearance of impropriety. We find under these facts that such grounds did not constitute 'manifest necessity' requiring a mistrial." *Ante* at 202. Again, I agree.

I believe that the correct analysis of this case

requires that we look at precisely what did happen. Judge Curtis did not grant a mistrial. She did not dismiss the case.

If Judge Curtis had dropped dead during the course of the trial, there would be no question but that some successor judge would be forced to declare a mistrial. Under those circumstances, Judge Curtis would not be able to proceed further (being then before a much higher court), and there would thus be manifest necessity requiring a mistrial. See *Christopher v Nelson,* 50 Mich App 710; 213 NW2d 867 (1973).

In this case, Judge Curtis fortunately did not die, but simply refused to participate further in the proceedings. Her reason was that continuing to preside over the case after the prosecutor had revealed her connection with defendant's brother might have resulted in the appearance of impropriety if she acquitted the defendant or convicted him and imposed a lenient sentence. I suggest that Judge Curtis' reason was not insignificant or frivolous.

The point, however, is not why she refused to participate. Her personal motivation, for purposes of this proceeding, does not matter. She simply refused to proceed further. In light of that refusal to proceed further, Judge Boyle had absolutely no choice but to declare a mistrial. He tried in every way possible to avoid it, but the defendant, as was his right, declined the several alternatives presented, leaving Judge Boyle with no choice but to do that which the chief judge (or acting chief judge, in the absence of the chief judge), ought to have done: declare the mistrial. Again, the manifest necessity for the mistrial was the fact that the trial judge, in the middle of a bench trial of a felony case, simply refused to participate further.

It was this, and not the appearance of impro-

priety, that constitutes the manifest necessity with which Judge Boyle was faced.

We had here, I suggest, a "breakdown in judicial machinery." Justice Douglas, in his dissent in *Gori v United States,* 367 US 364, 372; 81 S Ct 1523; 6 L Ed 2d 901 (1961), said:

> Once a trial starts jeopardy attaches. The prosecution must stand or fall on its performance at the trial. I do not see how a mistrial directed because the prosecutor has no witness is different from a mistrial directed because the prosecutor abuses his office and is guilty of misconduct. In neither is there a *breakdown in judicial machinery such as happens when the judge is stricken, or a juror has been discovered to be disqualified* to sit, or when it is impossible or impractical to hold a trial at the time and place set. [Emphasis added.]

In this case, Judge Curtis was the judge of the facts as well as the law and might therefore be analogized to a juror. If a juror in a criminal prosecution becomes ill during the trial, the jury may be discharged and the accused may be tried again for the same offense without contravening the double jeopardy provision of the Fifth Amendment. *United States v Potash,* 118 F2d 54 (CA 2, 1941).

Similarly, if, during a federal criminal trial, the trial judge discovers facts that indicate that one or more of the jurors is "disqualified or biased against the government" or the defendant, the judge may discharge the jury and direct a retrial and in such event the subsequent trial does not violate the double jeopardy provision of the Fifth Amendment. *Wade v Hunter,* 336 US 684; 69 S Ct 834; 93 L Ed 974 (1949); *Thompson v United States,* 155 US 271; 15 S Ct 73; 39 L Ed 146 (1894); *Simmons v United States,* 142 US 148; 12 S Ct 171; 35 L Ed 968 (1891).

In *United States v McCunn,* 36 F2d 52 (SD NY, 1929), after the jury was sworn, it was discovered that one of the defendants was a "brother of the husband of the juror's aunt," and it was held that the discharge of the jury was within the discretion of the trial court and that the defendants could be retried without subjecting them to double jeopardy.

The propriety of the reasons for a judge's own recusal in the middle of a trial may well be a proper subject of inquiry for the Michigan Judicial Tenure Commission, but those considerations are not determinative or dispositive in this case.

In *United States v Perez,* 22 US (9 Wheat) 579, 580; 6 L Ed 165 (1824), the *manifest necessity* rule was stated, holding that the discharge of the jury did not always bar a future trial for the same offense:

> We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is *manifest necessity* for the act, *or the ends of public justice would otherwise be defeated.* . . . [S]uch a discharge constitutes no bar to further proceedings and gives no right of exemption to the prisoner from being again put upon trial. [Emphasis added.]

Judges often have to make rulings that, at first glance, appear to many in the general public to be irrational, unreasonable, unfair, or even stupid. There is simply no way that all of us can make all of our decisions palatable to everyone. We can, however, explain the reasons for our actions. For the sake of engendering support for the rule of law, we have an obligation to do so. This is not merely an obligation to satisfy the appellate

courts, but also an obligation to explain our actions so that the public can, and will, understand why we have been forced to do that which they would rather we not do.

For just a moment, then, let us look at this case through the jaundiced eyes of a general public that may not trust public officials, nor care particularly for some of the technical details that are so central to our judicial system. Let us look at a worst case example, from a public relations standpoint.

This case runs the danger of looking to the public as follows: The judge has a close relationship with a brother of the defendant. She says nothing about that, perhaps hoping that no one will find out. The prosecutor reminds her of this relationship, therefore telling her that the cat is out of the bag. It now is apparent that there will be problems because of the known relationship between the judge and the defendant's family. The prosecution does not move for a mistrial, to disqualify the judge, or for anything else. The judge refuses to participate further and, if the double jeopardy claim is upheld the defendant gets off absolutely free from a life offense (and from a charge of possession of a firearm during the commission of a felony) because the trial judge, by some legal mumbo jumbo, made it forever impossible for the prosecution to continue the case against the defendant to judgment and sentence. If that doesn't evoke the "appearance of impropriety," I do not know what does.

While I do not suggest or believe that any of this is, or even might be, true, or that Judge Curtis was involved in any such conspiracy or impropriety of any sort (beyond recusing herself at a time when she should not have done so), there are likely to be those who might think that she did

conspire to obstruct justice in this case. Only Judge Curtis is in a position to deny it. There may be those who, on the basis of these facts, will not believe her. Had she recused herself before the first witness was sworn and began to testify, there would have been no problem. What really matters in this case is that the whole situation casts a grave shadow on the perception of the integrity of the judiciary in this state.

Judge Boyle, as the fourth Recorder's Court judge to have this case before him, declared a mistrial because of manifest necessity, and in doing so committed no error. This matter can and should proceed to trial.

HURON TOWNSHIP v CITY DISPOSAL SYSTEMS, INC

HURON TOWNSHIP v INLAND WATERS POLLUTION CONTROL, INC

Docket Nos. 140087, 142089. Submitted April 7, 1993, at Detroit. Decided August 16, 1993, at 9:30 A.M. Leave to appeal sought.

In separate proceedings in the 34th District Court, William Szlinis, J., City Disposal Systems, Inc., admitted responsibility for four civil infractions for violating a Huron Township ordinance that regulates the wheel and axle loads and gross vehicle weights of certain motor vehicles, and Inland Waters Pollution Control, Inc., admitted responsibility for a single civil infraction of the same ordinance. The ordinance adopts by reference the provisions of the Vehicle Code that govern the same subject matter, including the graduated fines that can exceed $500, MCL 257.722; MSA 9.2422 and MCL 257.724; MSA 9.2424. The court imposed fines that exceeded $500 on both defendants. On appeal to the Wayne Circuit Court, John H. Hausner, J., affirmed the fines imposed on City Disposal and John R. Kirwan, J., reduced the fine imposed on Inland Waters to no more than $500. In both appeals, the respective judges were asked to determine whether § 21 of the charter township act, MCL 42.21; MSA 5.46(21), applied so as to limit assessable fines to no more than $500. City Disposal and Huron Township appealed by leave granted. The appeals were consolidated.

The Court of Appeals *held:*

Section 21 of the charter township act limits penalties for criminal violations of township ordinances to fines of no more than $500, imprisonment for not longer than ninety days, or both. Because a violation of the ordinance at issue constitutes a civil infraction, not a criminal offense, the penalty limitations of § 21 do not apply and the schedule of penalties in MCL 257.722; MSA 9.2422 and MCL 257.724; MSA 9.2424, as adopted in the ordinance, may be assessed for violations of the ordinance.

Circuit court order with respect to City Disposal affirmed.

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REFERENCES

Am Jur 2d, Municipal Corporations §§ 414-422.

See ALR Index under Municipal Corporations.

Circuit court order with respect to Inland Waters reversed.

TOWNSHIPS — CHARTER TOWNSHIP ACT — ORDINANCES — PENALTIES.

The provision of the charter township act that limits punishment for criminal violations of township ordinances to fines of no more than $500, imprisonment for no longer than ninety days, or both does not apply to ordinance violations that are civil infractions (MCL 42.21; MSA 5.46[21]).

*Allen, James, Tanner & Foley, P.C.* (by *Kevin J. Foley*), for the plaintiff.

*Thomas H. O'Connor,* for the defendants.

Before: MARILYN KELLY, P.J., and SHEPHERD and CONNOR, JJ.

SHEPHERD, J. The issue in these consolidated cases involves the assessment of fines for the operation of overweight vehicles in violation of plaintiff Huron Township's Ordinance 88-6, which incorporates by reference provisions of the Vehicle Code, MCL 257.722; MSA 9.2422 and MCL 257.724; MSA 9.2424.

In Docket No. 140087, plaintiff issued four tickets against defendant City Disposal Systems, Inc., for operating overweight vehicles in violation of the ordinance. Defendant pleaded responsibility for all four violations. In an order dated January 29, 1991, the district court assessed defendant $14,004.50 in fines. On April 12, 1991, Wayne Circuit Judge John H. Hausner issued an order affirming the decision of the district court. Defendant now appeals by leave granted.

In Docket No. 142089, plaintiff issued one ticket against defendant Inland Waters Pollution Control, Inc., for violating the ordinance. Defendant pleaded responsibility for the violation. On January 29, 1991, the district court assessed defendant $6,915 in fines. In an order dated June 5, 1991,

Wayne Circuit Judge John R. Kirwan granted defendant's motion to set aside the district court order and reduced the fine to no more than $500 pursuant to MCL 42.21; MSA 5.46(21). Plaintiff appeals that order by leave granted.

The issue in these consolidated appeals involves a question of statutory interpretation. Where a statute is clear and unambiguous, judicial construction or interpretation is precluded. *Lorencz v Ford Motor Co,* 439 Mich 370, 376; 483 NW2d 844 (1992). If judicial construction or interpretation is necessary, the primary goal is to ascertain and give effect to the intent of the Legislature. *Id.; People v Hawkins,* 181 Mich App 393, 396; 448 NW2d 858 (1989). If two statutes address the same subject, courts must strive to read them harmoniously in order to give both statutes a reasonable effect. *House Speaker v State Administrative Bd,* 441 Mich 547, 568; 495 NW2d 539 (1993). Where two statutes conflict, and one is specific to the subject matter while the other is generally applicable, the specific statute prevails as an exception to the general one. *People v Tucker,* 177 Mich App 174, 179; 441 NW2d 59 (1989). The rules of statutory construction also apply to ordinances. *Albright v Portage,* 188 Mich App 342, 350, n 7; 470 NW2d 657 (1991).

Plaintiff Huron Township's Ordinance 88-6, effective September 28, 1988, provides in pertinent part:

> An ordinance to protect the Public Heath, Safety and General Welfare . . . by Regulating the Wheel and Axle Loads and Gross Vehicle Weights of certain vehicles operating within the Township of Huron, Wayne County, Michigan: to adopt by reference certain sections of the Michigan Vehicle Code being MCL 257.1 *et seq.* to provide for the

> enforcement of said Ordinance and Penalties for the violation of same.

In addition, § 2 of the ordinance adopts by reference MCL 257.722; MSA 9.2422, which provides for graduated penalties for violation of wheel and axle restrictions, and MCL 257.724; MSA 9.2424, which provides the same for excessive loads.

Plaintiff claims that the calculation of fines in accordance with §§ 722 and 724 of the Vehicle Code is permissible because § 23 of the charter township act, MCL 42.23; MSA 5.46(23), expressly allows a township to adopt "any provision of state law or any detailed technical regulations as a township ordinance or code by citation of such provision of state law." Because Ordinance 88-6 was adopted in conformity with MCL 42.23; MSA 5.46(23), plaintiff argues that it must be presumed proper and lawful. *Watnick v Detroit,* 365 Mich 600; 113 NW2d 876 (1962).

Defendants City Disposal and Inland Waters both argue that pursuant to § 21 of the Charter Township Act, MCL 42.21; MSA 5.46(21), the maximum fine that plaintiff Huron Township can impose for a violation of a township ordinance is limited to $500. Section 21 provides:

> The township board shall provide in each ordinance for the punishment of those who violate the township's provisions. Punishment for the violation of a township ordinance shall not exceed a fine of $500.00, or imprisonment for 90 days, or both, in the discretion of the court. Fines collected for the violation of the ordinances of a charter township shall be distributed as provided in section 8379 of Act No. 236 of the Public Acts of 1961, being section 600.8379 of the Michigan Compiled Laws.

Notwithstanding that Huron Township adopted its

ordinance by incorporating provisions of the Vehicle Code, defendants maintain that plaintiff may not impose penalties that exceed $500. We disagree.

As is apparent from the language of the statute, MCL 42.21; MSA 5.46(21) is a criminal statute providing for criminal penalties. MCL 750.5; MSA 28.195 defines "crime" in part as follows:

> "Crime" means an act or omission forbidden by law which is not designated as a civil infraction, and which is punishable upon conviction by any 1 or more of the following:
> (a) Imprisonment
> (b) Fine not designated a civil fine.

MCL 42.21; MSA 5.46(21) provides for punishment not to exceed $500 or imprisonment for ninety days, and thus is a criminal statute.

Here the violations of Ordinance 88-6 regarding overweight vehicles are civil, not criminal, infractions, because they are not punishable by imprisonment or penal fines. MCL 600.113; MSA 27A.113; *Library Bd v District Judges,* 118 Mich App 379; 325 NW2d 777 (1982). Thus, even though MCL 42.21; MSA 5.46(21) specifies the general rule that no township ordinance may provide for a criminal penalty in excess of $500, a township may nonetheless impose fines for civil infractions in excess of that amount by adopting the appropriate state law. By adopting §§ 722 and 724 of the Vehicle Code regarding the method for calculating fines for overweight vehicles pursuant to MCL 42.23; MSA 5.46(23), plaintiff Huron Township is therefore allowed to impose penalties that exceed the $500 limitation.

In this regard, we note that defendants' reliance upon *Renne v Waterford Twp,* 73 Mich App 685;

252 NW2d 842 (1977), is misplaced because that case does not stand for the proposition that MCL 42.21; MSA 5.46(21) limits a township ordinance from imposing a *civil* fine in excess of $500. In *Renne,* the defendants were charged with a *misdemeanor* offense because they failed to comply with an ordinance that mandated septic sewer connections. There, this Court held that the township was not prevented from enforcing the ordinance by fine or imprisonment so long as the penalty, i.e., criminal sanction, was not greater than that authorized under MCL 42.21; MSA 5.46(21).

In addition, we note that although MCL 257.605; MSA 9.2305 provides that local units of government cannot enact laws that conflict with the Vehicle Code, plaintiff's ordinance does not conflict with state law because the penalties imposed in these cases are not greater than the state penalties for overweight vehicles under §§ 722 and 724.

Accordingly, in Docket No. 140087, we affirm the circuit court's affirmance of the district court's order assessing defendant City Disposal Systems, Inc., $14,004.50 in fines for operating overweight vehicles in violation of the ordinance. In Docket No. 142089, we reverse the circuit court's order and reinstate the district court's order assessing defendant Inland Waters $6,915 in fines for violating the ordinance.

PEOPLE v TODD (ON REMAND)

Docket No. 161268. Submitted February 12, 1993, at Lansing. Decided August 16, 1993, at 9:35 A.M. Leave to appeal sought.

Lola M. Todd was convicted after a bench trial in the Detroit Recorder's Court, William L. Cahalan, J., of two counts of second-degree child abuse. The Court of Appeals, DOCTOROFF, C.J., and MICHAEL J. KELLY and BRENNAN, JJ., reversed, concluding that the prosecution had failed to present sufficient evidence of wilful malnourishment of the children involved. 196 Mich App 357 (1992). The Supreme Court, in lieu of granting leave to appeal, vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration in light of *People v Wolfe,* 440 Mich 508 (1993). 441 Mich 1201 (1993).

On remand, the Court of Appeals *held:*

Viewing all the evidence presented in a light most favorable to the prosecution, and resolving any factual dispute in favor of the prosecution, there is still no direct or circumstantial evidence on the record that would permit any rational trier of fact to conclude that the defendant had wilfully failed to nourish the children.

Reversed.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Janet A. Napp,* Assistant Prosecuting Attorney, for the people.

*Paul F. Semperger,* for the defendant on appeal.

ON REMAND

Before: DOCTOROFF, C.J., and MICHAEL J. KELLY and BRENNAN, JJ.

DOCTOROFF, C.J. This matter was returned to us by our Supreme Court for reconsideration of our previously released opinion in light of *People v Wolfe,* 440 Mich 508; 489 NW2d 748 (1993).[1] In that opinion, we reversed defendant's convictions of two counts of second-degree child abuse, MCL 750.136b(3); MSA 28.331(2)(3), having concluded that the prosecution failed to present sufficient evidence to permit a rational trier of fact to find that the element of wilful malnourishment of the children at issue had been proven beyond a reasonable doubt. *People v Todd,* 196 Mich App 357, 362; 492 NW2d 521 (1992). We have once again reviewed the evidence and the issue presented in light of *Wolfe, supra,* and in light of the supplemental briefs filed after remand, and conclude that a different result is not warranted.

Viewing all the evidence presented in a light most favorable to the prosecution, and resolving any factual dispute in favor of the prosecution, we are still unable to find any direct or circumstantial evidence on the record that would permit any rational trier of fact to conclude that defendant had wilfully failed to properly nourish her grandchildren. See *Wolfe, supra* at 514-515. Accordingly, we once again reverse defendant's convictions because the prosecution failed to present sufficient evidence.

Reversed.

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[1] *People v Todd,* 441 Mich 922 (1993).

DABROWSKI v SECRETARY OF STATE

NIGRO v SECRETARY OF STATE

Docket Nos. 138744, 140121. Submitted April 7, 1993, at Detroit. Decided August 16, 1993, at 9:40 A.M.

Dennis Dabrowski and Nick A. Nigro, whose driver's licenses were revoked following conviction of operating a motor vehicle while under the influence of liquor, third offense, petitioned the Oakland Circuit Court for restricted licenses within five years after conviction. Dabrowski and Nigro had sustained their respective two prior convictions of OUIL within seven years of the OUIL, third offense, conviction, and their licenses had been revoked after each of the prior convictions. Robert C. Anderson, J., granted Dabrowski a restricted license, and Francis X. O'Brien, J., granted Nigro a restricted license. The Secretary of State appealed in each case. The appeals were consolidated.

The Court of Appeals *held:*

At the times applicable in these cases, MCL 257.625(6); MSA 9.2325(6) required license revocation as part of a sentence for OUIL, third offense, where the conviction occurred within ten years of one or both the prior convictions, and MCL 257.303(1)(d); MSA 9.2003(1)(d) provided that the Secretary of State could not issue a license to a person whose license had been revoked within seven years of a prior revocation until five years after the subsequent revocation. MCL 257.323(5); MSA 9.2023(5) provides that judicial review of a license revocation by the Secretary of State is not available where such revocation is pursuant to court order as part of a sentence for conviction of OUIL or impaired driving. Accordingly, the circuit court lacked authority to grant restricted licenses to Dabrowski and Nigro.

Reversed.

AUTOMOBILES — RESTRICTED DRIVER'S LICENSES — DRIVING WHILE INTOXICATED, THIRD OFFENSE.

A circuit court may not grant a restricted license to a person

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REFERENCES

Am Jur 2d, Automobiles and Highway Traffic §§ 115 *et seq.*, 133 *et seq.*, 310.

See ALR Index under Driving While Intoxicated.

convicted of operating a motor vehicle while under the influence of liquor, third offense, until five years after the conviction if it occurred within seven years of one or both of the prior convictions (MCL 257.303[1][d], now [4][a], 257.323[56], 257.625[6]; MSA 9.2003[1][d], now [4][a], 9.2023[5], 9.2325[6]).

*Schnelz & Bondy* (by *Kurt E. Schnelz*), for Dennis Dabrowski.

*Clarence R. Charest, Jr.,* for Nick A. Nigro.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, and *Mary Louise Pridmore,* Assistant Attorney General, for Secretary of State.

Before: MARILYN KELLY, P.J., and SHEPHERD and CONNOR, JJ.

MARILYN KELLY, P.J. These consolidated appeals concern whether circuit courts may order restricted driving privileges once the Secretary of State has revoked an operator's license pursuant to court order in OUIL, third offense, cases. Respondent appeals from two Oakland Circuit Court orders requiring him to partially restore driving privileges to Dennis Dabrowski and Nick Nigro. Respondent argues that, by amending the sentencing orders, the circuit judges contravened the license revocation period required by the Vehicle Code. We agree and reverse.

FACTS IN CASE NO. 138744

Petitioner Dabrowski was convicted of operating a motor vehicle under the influence of liquor (OUIL) in 1984 and 1986. MCL 257.625; MSA 9.2325. His operator's license was revoked from August 19, 1986, until August 19, 1991. On August 15, 1989, Dabrowski was charged with OUIL, third offense,

and driving with a revoked license. On January 4, 1990, the circuit court ordered revocation of Dabrowski's license. Pursuant to that order, respondent revoked Dabrowski's license from December 13, 1989, until December 13, 1994.

On February 1, 1991, Dabrowski filed a motion for modification of his sentence. Respondent was not represented at the evidentiary hearing, apparently because of lack of notice. The circuit court modified Dabrowski's sentence by granting him a restricted license until August 27, 1991, when his driving privileges could be fully restored.

FACTS IN CASE NO. 140121

On October 7, 1985, petitioner Nick Nigro was sentenced on two separate OUIL convictions. His license was revoked for one year. In 1988, Nigro was charged with OUIL, third offense. After he pled guilty, the circuit court ordered that his license be revoked. Respondent revoked Nigro's license from February 12, 1988, until February 12, 1993. Plaintiff filed a petition for restoration of his license in 1991, and the circuit court granted him a restricted license on April 5, 1991.

THE CIRCUIT COURT ERRED IN AMENDING THE SENTENCES

Nigro and Dabrowski were both convicted of OUIL, third offense. The sentencing judges were required under the Vehicle Code[1] to order the Secretary of State to revoke their licenses. MCL 257.625(6); MSA 9.2325(6).[2] Because petitioners'

[1] The Vehicle Code was extensively revised effective January 1, 1992. The amendments do not apply to this consolidated appeal.

[2] The statute then provided:

licenses had been revoked within the previous seven years, the mandatory revocation period for each was five years. *Rodgers v Secretary of State,* 159 Mich App 808, 810-811; 407 NW2d 80 (1987), citing MCL 257.303(1)(d); MSA 9.2003(1)(d).[3]

Petitioners argue that they are entitled under the Vehicle Code to seek circuit court review of their license revocations. MCL 257.323(1); MSA 9.2023(1). In fact, they assert, a circuit court is allowed to modify or set aside the Secretary of State's revocation or denial of a driver's license. MCL 257.323(3); MSA 9.2023(3).

There is an important limitation on the court's authority:

> This section shall not apply to a denial, revocation, suspension, or restriction imposed pursuant to a court order issued as part of the sentence for of [sic] a conviction of a violation of section 625 or 625b, or a local ordinance substantially corresponding to section 625(1) or (2) or 625b. [MCL 257.323(5); MSA 9.2023(5).]

Section 323(5) of the Vehicle Code clearly prohibits a person convicted of violating § 625 from appealing the revocation of his operator's license if the revocation was part of his sentence. *Rodgers,*

> A person who violates subsection (1) or (2) or a local ordinance substantially corresponding to subsection (1) or (2) within 10 years of 2 or more prior convictions, as defined in subsection (5), is guilty of a felony. As part of the sentence, the court shall order the secretary of state to revoke the operator's or chauffeur's license of the person. [MCL 257.625(6); MSA 9.2325(6).]

[3] The Secretary of State shall not issue a license:

> To a person whose license has been revoked under this act until the later of the following:
>
> (i) The expiration of not less than 1 year after the license was revoked.
>
> (ii) The expiration of not less than 5 years after the date of a subsequent revocation occurring within 7 years after the date of any prior revocation. [MCL 257.303(1)(d); MSA 9.2003(1)(d).]

810-811; *Paulson v Secretary of State,* 154 Mich App 626, 633; 398 NW2d 477 (1986).

In these cases, the Secretary of State revoked petitioners' licenses for five years pursuant to court orders issued as part of their sentences for OUIL, third offense. Cf. *Matheson v Secretary of State,* 170 Mich App 216; 428 NW2d 31 (1988). Therefore, under § 323(5), the circuit court lacked jurisdiction to modify the sentences imposed.

The orders granting Nick Anthony Nigro and Dennis Dabrowski restricted driving privileges are reversed.

MAURER v OAKLAND COUNTY PARKS AND RECREATION DEPARTMENT (ON REMAND)

Docket No. 163080. Submitted April 7, 1993, at Lansing. Decided August 16, 1993, at 9:45 A.M. Leave to appeal sought.

Kathleen and Roger Maurer brought an action in the Oakland Circuit Court against the Oakland County Parks and Recreation Department, seeking damages for injuries sustained when Kathleen fell on steps leading to a restroom at the defendant's park. The court, Robert C. Anderson, J., granted summary disposition for the defendant, finding that the defendant did not breach a duty owed to the plaintiffs. The plaintiffs appealed, and the Court of Appeals, MURPHY, P.J., and SHEPHERD and T. S. EVELAND, JJ., reversed and remanded in an unpublished opinion per curiam, decided August 11, 1992 (Docket No. 133237). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on rehearing granted, instructing the Court of Appeals to reconsider its decision that summary disposition was inappropriate with respect to the question of the defendant's duty to the plaintiffs and, if the Court of Appeals again concludes that summary disposition was inappropriate with respect to the duty issue, to address the defendant's governmental immunity argument as an alternative ground for affirmance of the trial court's decision. 442 Mich 882 (1993).

On remand, the Court of Appeals *held:*

The trial court erred in granting summary disposition in favor of the defendant.

1. Summary disposition on the ground that the defendant owed no duty to the plaintiffs was improper because there exists a genuine issue of material fact whether the danger posed by the steps could have been discovered upon casual inspection by a reasonable person in Kathleen's position. Reasonable minds could differ regarding whether the danger pre-

REFERENCES

Am Jur 2d, Negligence §§ 89 *et seq.*; 387.

See ALR Index under Governmental Immunity or Privilege; Guests, Invitees, or Licensees.

sented by the steps was so open and obvious that an invitee in Kathleen's position reasonably might be expected to discover it.

2. Summary disposition in favor of the defendant on the ground of governmental immunity also would be improper. The plaintiffs have alleged facts showing that the steps leading to the defendant's building constitute a dangerous or defective condition of the building that warrants the application of the public building exception to governmental immunity. The public building exception applies because the steps formed part of the building and thus constituted an allegedly dangerous or defective condition of the building itself. The steps provide the building's only means of ingress and egress, are not merely adjacent to the building, and are related to the permanent structure or physical integrity of the building.

Reversed and remanded.

SAWYER, J., dissenting, stated that the defendant did not have a duty to warn Kathleen Maurer of the open and obvious dangers of the steps.

1. NEGLIGENCE — INVITEES — DUTY TO WARN — KNOWN OR OBVIOUS DANGERS.

Possessors of land do not have a duty to warn invitees of open and obvious dangers unless the invitor anticipated the harm despite the invitee's knowledge of it; whether a danger is open and obvious depends upon whether it is reasonable to expect that an average user with ordinary intelligence would have discovered the danger upon casual inspection.

2. GOVERNMENTAL IMMUNITY — PUBLIC BUILDING EXCEPTION — DANGEROUS OR DEFECTIVE STEPS.

The public building exception to governmental immunity applies where injury occurs as the result of a dangerous or defective condition of the steps of a public building if the steps constitute a stairway leading into the building, provide the only means of ingress and egress, are not merely adjacent to the building, and are related to the permanent structure or physical integrity of the building (MCL 691.1406; MSA 3.996[106]).

*Lakin, Worsham & Victor, P.C.* (by *Lori A. Young-Barker* and *Larry A. Smith*), for the plaintiffs.

*Vandeveer Garzia* (by *John J. Lynch* and *David B. Timmis*), for the defendant.

ON REMAND

Before: MURPHY, P.J., and SHEPHERD and SAWYER, JJ.

SHEPHERD, J. This case is before us on remand by order of the Supreme Court for consideration as on rehearing granted. 442 Mich 882 (1993). Plaintiffs initially appealed from an order of the circuit court granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We reversed and remanded for a trial or other proceedings in an unpublished opinion per curiam, decided August 11, 1992 (Docket No. 133237). Thereafter, defendant filed an application for leave to appeal to the Supreme Court.

In lieu of granting leave to appeal, the Supreme Court remanded to the Court of Appeals for consideration as on rehearing granted. The Supreme Court instructed us to reconsider on remand our decision that summary disposition was inappropriate with respect to the question of defendant's duty to plaintiffs in light of the Supreme Court's decisions in *Riddle v McLouth Steel Products Corp,* 440 Mich 85; 485 NW2d 676 (1992), and *Wade v Dep't of Corrections,* 439 Mich 158; 483 NW2d 26 (1992). If we again conclude on remand that the trial court erred in granting summary disposition in favor of defendant with respect to the duty issue under MCR 2.116(C)(10), the Court directed us to address defendant's governmental immunity argument as an alternative ground for affirmance of the trial court's decision under MCR 2.116(C)(7).

In this case, plaintiffs claimed that defendant was negligent in failing to mark, or otherwise warn of, a cement step that caused Kathleen

Maurer (hereafter plaintiff) to fall as she left a washroom at defendant's park.

In *Riddle, supra,* the Supreme Court held that possessors of land do not have a duty to warn invitees of open and obvious dangers unless the invitor anticipated the harm despite the invitee's knowledge of it. In *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 474-475; 499 NW2d 379 (1993), this Court stated that whether a danger is open and obvious depends upon whether it is reasonable to expect that an average user with ordinary intelligence would have discovered the danger upon casual inspection.

After a careful review of Kathleen Maurer's deposition testimony and the photographs of the entrance to the restrooms submitted by plaintiffs, we conclude that summary disposition was improper on the ground that defendant owed no duty to plaintiffs, because there exists a genuine issue of material fact whether the danger posed by the steps could have been discovered upon casual inspection by a reasonable person in plaintiff's position. See *Radtke v Everett,* 442 Mich 368, 385-394; 501 NW2d 155 (1993), where the Court, after discussing the reasonable person standard, defined an objective reasonableness standard in a case involving a hostile work environment as pertaining to a reasonable person in the plaintiff's position.

As the photographs show, plaintiff had to step up and down three steps in order to enter and leave the building containing the restrooms and a concession stand. After the first step, which was approximately seven inches higher than the sidewalk leading to the building, there was an elevated walkway leading to the second step. After the second step, there was another elevated walkway, where there was a refuse bin and a public

telephone booth. Access to the building was gained by stepping up a third and final step. We note that these three steps are not normal steps, as in a conventional staircase, but are separated by two elevated walkways.

Plaintiff testified that after leaving the darker restroom and encountering the bright, glaring sun, she did not see that the walkway's elevation had changed between the second and first steps. As a result, plaintiff fell when, without any kind of warning, she encountered the seven-inch dropoff.

Giving the benefit of reasonable doubt to plaintiffs, we believe that there exists a genuine issue of material fact whether the danger presented could have been discovered upon casual inspection by a reasonable person in plaintiff's position. We note that it is quite normal not to pay attention or think about the nature of steps going into a restroom, particularly where the steps are separated by two elevated walkways. Here plaintiff entered the restroom while accompanying her two children. She stated that, when she came out of the darker restroom into the bright sunlight, she did not see the change in elevation between the first and second steps leading to the building. As the photographs taken from inside the restroom building show, there is the impression that the entire area is flat. In view of the deposition testimony and the photographs, summary disposition in favor of defendant with respect to the issue of duty was thus not proper because reasonable minds could differ regarding whether the danger presented by the steps was so open and obvious that an invitee in plaintiff's position might reasonably be expected to discover it.

In addition, summary disposition in favor of defendant would also be improper on the ground

of governmental immunity. MCL 691.1407; MSA 3.996(107).

MCR 2.116(C)(7) tests whether a claim is barred by governmental immunity, and requires consideration of all documentary evidence filed or submitted by the parties. MCR 2.116(G)(5); *Wade, supra,* p 162. All well-pleaded allegations are accepted as true and construed most favorably to the nonmoving party under this subrule. *Id.,* pp 162-163. Governmental immunity is an affirmative defense that must be stated in the party's responsive pleading. *Id.,* p 163. To survive a motion for summary disposition, the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Id.*

Plaintiffs allege that defendant is not shielded from liability for its alleged negligence by governmental immunity. Plaintiffs state that under MCL 691.1406; MSA 3.996(106), governmental agencies are responsible for the repair and maintenance of public buildings under their control. As provided by this section:

> Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had . . . knowledge of the defect and . . . failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

In *Wade, supra,* p 163, the Court reviewed Michigan case law regarding the public building exception to governmental immunity under MCL 691.1406; MSA 3.996(106). The Court noted that in *Reardon v Dep't of Mental Health,* 430 Mich 398; 424 NW2d 248 (1988), it had held:

> The duty to repair and maintain relates to the

> structural condition of the premises, and a government engaged in a governmental function is open to liability only where the injury results from a dangerous or defective condition *of* a building. [*Wade,* p 163.]

In *Wade,* p 164, the Court stated that the holding in *Reardon* regarding the public building exception was controlling. In *Wade,* the Court, citing *Reardon,* further stated that the public building exception to governmental immunity under MCL 691.1406; MSA 3.996(106) is to be narrowly construed and that the statute applies to injuries related to the "permanent structure or physical integrity of the building." *Wade,* p 168.

The question presented in the instant case is whether plaintiffs have alleged facts showing that the steps leading to defendant's building constitute a dangerous or defective condition of the building so as to warrant the application of the public building exception to governmental immunity. We believe that the public building exception applies to this case because the steps in question formed part of the building and thus constituted an allegedly dangerous or defective condition of the building itself.

In concluding that the steps leading to defendant's building must be considered as part of the building itself, we note that the steps constitute a stairway leading into the building and provide the building's only means of ingress and egress. These steps are not merely adjacent to the restroom building, but are related to the "permanent structure or physical integrity of the building." *Wade, supra,* p 168.

We note that in *Reardon,* pp 410-411, the Court, in concluding that the public building exception applies in cases where the physical condition of

the building causes the injury, observed that the word "of" is defined as:

> A term denoting that from which anything proceeds; indicating origin, source, descent, and the like; as, he is of noble blood. Associated with or connected with, usually in some casual relation, efficient, material, formal, or final. The word has been held equivalent to after; at, or belonging to; in possession of; manufactured by; residing at; from. [Black's Law Dictionary (5th ed), p 975.]

In the instant case, the steps must be viewed as part *of* the building itself because they are intimately associated, or connected, with the building itself, because it is impossible to enter or leave the building without going up or down them. Cf. *Eberhard v St Johns Public Schools,* 189 Mich App 466; 473 NW2d 745 (1991), where this Court ruled that the public building exception did not apply to dangers presented on school property where the plaintiff was injured while playing basketball on an adjacent elementary school playground.

Accordingly, we conclude that the trial court erred in granting summary disposition in favor of defendant. Summary disposition in favor of defendant was not proper under MCR 2.116(C)(10), because there exists a genuine issue of material fact whether the danger presented by the steps was so open and obvious that an invitee in plaintiff's position might reasonably be expected to discover it. In addition, summary disposition is not proper under MCR 2.116(C)(7), because the steps in question formed part of the building itself and thus warranted the application of the public building exception to governmental immunity.

Reversed and remanded for trial.

MURPHY, P.J., concurred.

SAWYER, J. *(dissenting).* I respectfully dissent. I find no meaningful basis to distinguish this case from *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The logic and reasoning applied in *Novotney* clearly apply in this case. I conclude that there exists no genuine issue of material fact that the danger presented was, in fact, open and obvious.

I would, therefore, affirm.

MOODY v CHEVRON CHEMICAL COMPANY

Docket No. 143967. Submitted April 7, 1993, at Detroit. Decided August 16, 1993, at 9:50 A.M. Leave to appeal sought.

David Moody, as personal representative of the estate of David M. Moody, deceased, brought a wrongful death action in the Wayne Circuit Court against Chevron Chemical Company and Leroy Miller, alleging that the decedent suffered a fatal allergic reaction to a bee sting after Miller sprayed a nest of bees with a pesticide manufactured by Chevron. The plaintiff contended that Chevron failed to warn that bees sprayed with less than a lethal dose of the pesticide may engage in unprovoked stinging and that Miller was negligent in failing to use the pesticide according to the instructions on the packaging and labels of the pesticide. The court, William J. Giovan, J., granted summary disposition for Chevron and Miller. The plaintiff appealed.

The Court of Appeals *held:*

1. The plaintiff's claim under the common law of this state of a failure to warn by Chevron is preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 USC 136 *et seq.* Section 136v(b) of that act, 7 USC 136v(b), provides that a state may not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under the act. In addition to preempting state regulation of pesticide labeling and packaging, the act may preempt common-law actions based on inadequate warnings where, as here, the additional warnings for which a duty is claimed would constitute a requirement for labeling or packaging that is in addition to or different from the warnings required under the act.

2. Summary disposition of the negligence claim against Miller was proper in light of the plaintiff's inability to establish an issue of fact regarding causation. Because the bee that stung the decedent was not recovered, the plaintiff could not establish that the bee came from the nest that was sprayed, that the bee

REFERENCES

Am Jur 2d, Products Liability §§ 27, 158, 311.

Federal pre-emption of state common-law products liability claims pertaining to pesticides. 101 ALR Fed 887.

came in contact with the pesticide, or that the bee's behavior was caused by exposure to the pesticide.

Affirmed.

AGRICULTURE — FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT — PRODUCT LABELING AND PACKAGING — PREEMPTION OF STATE REGULATION AND COMMON-LAW CLAIMS OF FAILURE TO WARN.

The Federal Insecticide, Fungicide, and Rodenticide Act preempts state regulation of pesticide labeling and packaging and may preempt common-law actions based on inadequate warnings where the warnings for which a duty is claimed would constitute a requirement for labeling or packaging that is in addition to or different from the warnings required under the act (7 USC 136v[b]).

*Mark Granzotto,* for David Moody.

*Gage, Beach & Ager* (by *Eugene H. Beach, Jr.*), for Chevron Chemical Company.

*Brandt, Hanlon, Becker, Lanctot, McCutcheon, Schoolmaster & Taylor* (by *Joseph K. Bachrach*), and *Gross & Nemeth* (by *James G. Gross* and *Paul L. Kaliszewski*), of Counsel, for Leroy Miller.

Before: HOOD, P.J., and BRENNAN and CORRIGAN, JJ.

HOOD, P.J. This is a wrongful death action arising from the tragic death of plaintiff's son from an allergic reaction to a bee sting. Plaintiff appeals as of right from the trial court's grant of summary disposition to defendants under MCR 2.116(C)(8) and (10). We affirm.

Plaintiff's decedent, Dave Moody, was an employee of his father's landscape business. The business was hired by defendant Leroy Miller to landscape his property. During the day of the landscaping job, Miller sprayed a nest of bees located at the back of the property with a pesticide manufac-

tured by defendant Chevron Chemical Company. The directions for the pesticide stated that it should not be used during the daytime. Plaintiff's decedent was stung at the front of the property shortly thereafter, allegedly by a bee that had received less than a lethal dose of the pesticide. He suffered a severe allergic reaction and died ten days later.

On appeal, plaintiff first argues that the trial court erred in finding that his claim against Chevron of a failure to warn was preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 USC 136 *et seq.* We disagree.

Section 136v(b) of the FIFRA provides that a "[s]tate shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." The FIFRA, however, preserves the power of states to regulate the "sale and use" of pesticides. 7 USC 136v(a). Plaintiff's claim is based on allegedly inadequate warnings, presumably on the product's label, that bees sprayed with less than lethal doses of the pesticide may engage in erratic behavior, including unprovoked stinging.

Under Article VI of the United States Constitution, the Supremacy Clause, federal law preempts any state law that Congress decides to preempt or that actually conflicts with any federal law. *Cipollone v Liggett Group, Inc,* 505 US —; 112 S Ct 2608, 2617; 120 L Ed 2d 407 (1992). It also preempts state laws where "federal law has so thoroughly occupied a legislative field" that there is no room left for state regulation. *Id.*

Where, as here, a preemption clause has been included in the legislation and such a provision provides a reliable indication of congressional intent, the scope of preemption intended will be determined from the language of the clause itself

rather than being implied from the substantive provisions of the statute. *Id.* at 2618. In other words, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Id.* The problem then becomes discovering the "domain expressly pre-empted by" the statutory provision in question. *Id.*

The majority of federal circuit courts of appeal that have considered the issue agree that the FIFRA preempts not only state regulation of pesticide labeling and packaging but also common-law actions based on inadequate warnings. See *Shaw v Dow Brands Inc,* 994 F2d 364 (CA 7, 1993); *Papas v Upjohn Co,* 985 F2d 516 (CA 11, 1993); *Arkansas-Platte & Gulf Partnership v Van Waters & Rogers, Inc,* 981 F2d 1177 (CA 10, 1993); see also *Yowell v Chevron Chemical Co,* 836 SW2d 62 (Mo App, 1992); *Davidson v Velsicol Chemical Corp,* — Nev —; 834 P2d 931 (1992); *Fitzgerald v Mallinckrodt, Inc,* 681 F Supp 404 (ED Mich, 1987); but see *Ferebee v Chevron Chemical Co,* 237 US App DC 164; 736 F2d 1529 (1984). *Shaw, Yowell,* and *Davidson* were decided after the Supreme Court's decision in *Cipollone* regarding the preemption provisions of the Federal Cigarette Labeling and Advertising Act, 15 USC 1331-1340. *Papas* and *Arkansas-Platte* were decided, after being vacated and remanded by order of the Supreme Court, after *Cipollone. Ferebee,* on the other hand, was decided six years before *Cipollone.* It is the only published federal circuit court of appeals decision finding no preemption.[1]

[1] A majority of published federal district court decisions issued after *Cipollone* have also found preemption of common-law actions for failure to warn. See *King v E I Du Pont de Nemours & Co,* 806 F Supp 1030 (D Me, 1992); *Casper v E I Du Pont de Nemours & Co,* 806 F Supp 903 (ED Wash, 1992); *Jordan v Southern Wood Piedmont Co,* 805 F Supp 1575 (SD Ga, 1992); *Burke v Dow Chemical Co,* 797 F

In *Cipollone,* the Supreme Court found that a provision stating that "[n]o statement relating to smoking and health . . . shall be required on any cigarette package," other than those mandated by the act, "merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements" and did not preempt common-law actions for damages. *Cipollone, supra,* 112 S Ct 2616, 2618-2619. On the other hand, the Court found that a provision that stated that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" preempted not only state regulation but also common-law causes of action that fit the wording of the clause. *Id.* at 2617, 2620-2621. The difference, the Court said, was the use of words "requirement or prohibition" rather than "statement." *Id.* at 2619-2621.

As noted before, the FIFRA prohibits the imposition of "any requirements for labeling or packaging in addition to or different" from those required by that statute. Under *Cipollone,* the word "requirement" "sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Id.* at 2620 (citations omitted). The Supreme Court recognized that common-law actions are "a potent method of governing conduct and controlling policy" but noted that, although "common law would not normally require a vendor to use any specific *statement* on its package . . . it is the essence of the common law to enforce duties that are either affirmative *requirements* or nega-

Supp 1128 (ED NY, 1992); but see *MacDonald v Monsanto Co,* 813 F Supp 1258 (ED Tex, 1993); *Couture v Dow Chemical USA,* 804 F Supp 1298 (D Mo, 1992).

tive *prohibitions*." *Id.* (emphasis in original). Further, the Court noted, the phrase "state law" usually includes common-law as well as express regulation. *Id.* at 2620-2621.

This does not end our inquiry, however. "That the preemptive scope of [the FIFRA] cannot be limited to positive enactments does not mean that that section pre-empts all common law claims." *Id.* at 2621. Rather, we must decide "whether the legal duty which is the predicate of the common law damages action" asserted here fits the language of the FIFRA's preemption provision. *Id.* at 2621. That is, whether Chevron's asserted duty to warn consumers regarding the behavior of bees exposed to less than lethal doses of the pesticide would constitute a "requirement[ ] for labeling or packaging in addition to or different from" the warnings required by the FIFRA.

To establish liability for negligent failure to warn, plaintiff would have to show that defendant Chevron knew of the claimed danger, that the danger was not obvious to users of the product, and that defendant failed to use reasonable care to warn such users. *Glittenberg v Doughboy Recreational Industries (On Rehearing),* 441 Mich 379, 387-390; 491 NW2d 208 (1992). He must also show that defendant Chevron's negligent failure to warn was the proximate cause of the decedent's injuries. *Schutte v Celotex Corp,* 196 Mich App 135, 138; 492 NW2d 773 (1992). Thus, because plaintiff's claim would require a showing that defendant Chevron behaved negligently in failing to include additional or different warnings on the label or packaging of the product, it is preempted by the FIFRA. The trial court did not err in dismissing plaintiff's claim of failure to warn.

Plaintiff next argues that the trial court improperly resolved questions of fact in dismissing his

negligence claim against defendant Miller. We again disagree.

Contrary to plaintiff's assertion, we find that the trial court did not decide whether defendant Miller's conduct was in fact negligent. Rather, our review of the record discloses that the trial court found that, as a matter of law, plaintiff could not prove proximate causation. That is, because the stinging bee was not recovered, plaintiff could not prove that the bee that stung his son came from the nest that was sprayed, that it came in contact with the pesticide, or that its behavior was caused by exposure to the pesticide. Therefore, the causal sequence of events posited by plaintiff, although conceivably true, was not based on any evidence and was instead wholly speculative. Summary disposition was proper under MCR 2.116(C)(10) because plaintiff failed to create an issue of material fact regarding causation. See *Serafin v Peoples Community Hosp Authority,* 67 Mich App 560, 564; 242 NW2d 438 (1976); *Meli v General Motors Corp,* 37 Mich App 514, 518-519; 195 NW2d 85 (1972); see also *Fort Wayne Mortgage Co v Carletos,* 95 Mich App 752, 759; 291 NW2d 193 (1980).

Affirmed.

WEAVER v UNIVERSITY OF MICHIGAN BOARD OF REGENTS

Docket No. 132952. Submitted April 6, 1993, at Detroit. Decided August 16, 1993, at 9:55 A.M.

Marguerite Weaver, as next friend of Bobbie Weaver, a minor, brought a medical malpractice action in the Court of Claims against the University of Michigan Board of Regents, which operates the University of Michigan Medical Center. Bobbie had been treated by a neurosurgeon at the medical center and examined there periodically until October 1982. Bobbie's treatment and medical records were then transferred to another neurosurgeon, not associated with the medical center. In February 1987, Bobbie began experiencing problems, and her current neurosurgeon examined her and concluded that no emergency existed, but recommended that a second opinion be obtained from the medical center. Bobbie's father called the medical center and made an appointment. On the day of the appointment, the surgeon who originally treated Bobbie, examined her and performed emergency surgery, but she suffered a permanent and nearly total loss of vision. The court, Thomas L. Brown, J., granted summary disposition for the defendant, determining that the telephone call by Bobbie's father to a secretary in the medical center, during which the appointment for Bobbie's medical examination was set, did not revive the previously terminated physician-patient relationship between Bobbie and the medical center staff and that in the absence of such a relationship no liability can be ascribed to the defendant. The plaintiff appealed.

The Court of Appeals *held:*

A telephone call made for the purpose of scheduling an appointment with a physician does not by itself establish a physician-patient relationship where, as here, the caller, or the person on whose behalf the call is made, has no ongoing relationship with the physician and does not seek or obtain medical advice during the conversation.

Affirmed.

*Sommers, Schwartz, Silver & Schwartz, P.C.* (by *David R. Getto, Norman D. Tucker,* and *Ann M. Schoepfle*), for the plaintiff.

*Boothman, Hebert, Eller & Yockey, P.C.* (by *Dale L. Hebert*), for the defendant.

Before: HOOD, P.J., and BRENNAN and CORRIGAN, JJ.

CORRIGAN, J. In this medical malpractice action, plaintiff appeals the grant of summary disposition to defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was diagnosed as hydrocephalic when she was six months old. In hydrocephalus, the normal flow of cerebrospinal fluid around the brain is impaired. If the condition remains untreated, permanent brain damage usually results. Plaintiff's condition was treated by the insertion of a shunt that drained the excess fluid from the area around the brain. The shunt was implanted in October 1980 by Dr. Dauser, a pediatric neurosurgeon associated with the University of Michigan Medical Center (hereafter the medical center), which is operated by defendant.

Following the surgery, plaintiff was periodically examined as an outpatient at the pediatric neurosurgery clinic until October 1982. Sometime after October 1982, but no later than 1985, plaintiff's mother transferred her neurological supervision and all medical records from the medical center to a neurosurgeon, Dr. Jakubiak, who was located closer to the plaintiff's family home. Dr. Jakubiak saw plaintiff twice before the events that gave rise to the present action.

On February 27, 1987, plaintiff complained to her mother that she could not see. The episode passed. Plaintiff saw her pediatrician on March 2. The pediatrician scheduled a skull x-ray and a CAT scan on March 9 at a local hospital. Dr. Jakubiak saw plaintiff the same day. He concluded that the

shunt had become disconnected, that the disconnection was unrelated to plaintiff's vision disturbance, and that no emergency existed. He recommended that plaintiff seek "a second opinion" from the medical center and that she see an ophthalmologist regarding her vision disturbance.

On the same day, plaintiff's father called Dr. Dauser's office at the medical center and spoke to a secretary, Geraldine O'Neill. Plaintiff's father knew that Ms. O'Neill was not a member of the medical staff. He told her that plaintiff's shunt had become disconnected and that she was experiencing intermittent vision problems. He then requested an appointment for a second opinion. He also told Ms. O'Neill that plaintiff had already seen Dr. Jakubiak, who did not consider the case an emergency. Ms. O'Neill initially offered plaintiff an appointment for about one month later, but Mr. Weaver asked for an earlier date. After a brief interruption in their conversation, Ms. O'Neill offered plaintiff an appointment for March 16, 1987. On March 16, Dr. Dauser saw plaintiff, diagnosed an elevation in intracranial pressure, and recommended emergency surgery. The surgery was performed, but plaintiff unfortunately suffered a permanent and nearly total loss of vision.

Plaintiff brought suit in the circuit court against her pediatrician, Dr. Jakubiak, and the local hospital where the x-ray and CAT scan were performed. She filed a separate action against the medical center in the Court of Claims. The two actions were later joined. All defendants in the circuit court action settled the claims and are no longer parties to the suit. The court granted the medical center's motion for summary disposition on the grounds that no physician-patient relationship existed between it and plaintiff on March 9, 1987.

A motion for summary disposition under MCR

2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *AFL-CIO v Civil Service Comm,* 191 Mich App 535, 546-547; 478 NW2d 722 (1991); *Panich v Iron Wood Products Corp,* 179 Mich App 136, 139; 445 NW2d 795 (1989).

It is hornbook law that no cause of action for negligence exists unless the defendant owes a legal duty to the plaintiff. See, e.g., *Lorencz v Ford Motor Co,* 439 Mich 370, 375; 483 NW2d 844 (1992). The term "malpractice" denotes a breach of the duty owed by one rendering professional services to a person who has contracted for such services. *Hill v Kokosky,* 186 Mich App 300, 303; 463 NW2d 265 (1990); *Malik v William Beaumont Hosp,* 168 Mich App 159, 168; 423 NW2d 920 (1988). A professional physician-patient relationship is a legal prerequisite of a cause of action for medical malpractice. *Hill, supra* at 303. See, generally, anno: *What constitutes physician-patient relationship for malpractice purposes,* 17 ALR4th 132.

Plaintiff contends that a telephone call to schedule an appointment with a provider of medical services gives rise to a physician-patient relationship that can serve as the basis for a claim of medical malpractice. The question is one of first impression in Michigan. We hold that a telephone call merely to schedule an appointment with a provider of medical services does not by itself establish a physician-patient relationship where the caller has no ongoing physician-patient relationship with the provider and does not seek or obtain medical advice during the conversation.

Cases governed by MCL 600.5805(4); MSA

27A.5805(4) and MCL 600.5838a; MSA 27A.5838(1), relating to limitation of actions for medical malpractice, provide a starting point for analysis. In *Thomas v Golden (Amended Opinion),* 51 Mich App 693; 214 NW2d 907 (1974), aff'd but reasoning not adopted 392 Mich 779; 220 NW2d 677 (1974), the plaintiff had been fitted for contact lenses by the defendant, an optometrist, in February 1968. *Id.* at 694. She experienced problems with the lenses and requested an appointment on March 7. The defendant's office scheduled a March 8 appointment. Plaintiff's condition worsened, so she instead sought treatment at a hospital emergency room on the night of March 7. *Id.* She filed suit on March 5, 1970. At the relevant time, the applicable statute, MCL 600.5838; MSA 27A.5838, provided that "[a] claim based on . . . malpractice . . . accrues at the time that person discontinues treating or otherwise serving the plaintiff." This Court held that the suit was timely because making an appointment constituted "otherwise serving" "within the meaning of the statute." *Id.* at 695. The Court did not decide, however, whether the defendant had been "treating" the plaintiff when he made the appointment for her.

The value of the *Thomas* decision is clouded because the Supreme Court expressly declined to affirm this Court's reasoning. See also *Rice v Zimmer Mfg Co,* 180 Mich App 681, 687; 447 NW2d 771 (1989) ("mere suggestion" that the plaintiff return for further care did not constitute treatment or professional service); *Stapleton v Wyandotte,* 177 Mich App 339, 344; 441 NW2d 90 (1989) (advice to make an appointment for a checkup did not extend the physician-patient relationship).

This Court has also examined the effect of a telephone call on the physician-patient relationship in several other cases involving the statute of

limitations. In *Shane v Mouw,* 116 Mich App 737; 323 NW2d 537 (1982), the defendant had last examined the plaintiff on May 3, 1977, when the plaintiff's son called the defendant on August 7. *Id.* at 741 (MACKENZIE, J., dissenting). The defendant offered the plaintiff a prescription, but declined to hospitalize her. She was then treated by another physician. In her suit filed on August 2, 1979, she argued that the phone call constituted "treatment or other services." *Id.* at 742. In a split decision, this Court concluded that the phone call "appear[ed] to have been an attempt by defendant to continue treating plaintiff's condition," and that the suit was timely. *Id.* at 741.

The *Shane* Court relied in part on *DeGrazia v Johnson,* 105 Mich App 356; 306 NW2d 512 (1981). In that case, the plaintiff had knee surgery in February and March of 1976. In June 1976, he spoke by telephone to the defendant doctor about his knee. He filed suit in May of 1978. This Court held that the statutory period of limitation did not begin to run until the June phone call. "[I]t was not until that time that defendant discontinued 'treating or otherwise serving the plaintiff.' " *Id.* at 360.

Recently, however, this Court rejected a single telephone conversation as a basis for extending the accrual date for a medical malpractice claim. In *Griffith v Brant,* 177 Mich App 583, 586-587; 442 NW2d 652 (1989), the plaintiff called her surgeon regarding her postsurgical progress in June 1984 and filed suit in August 1986. The Court concluded that the telephone conversation did not constitute "treatment or otherwise serving" within the meaning of MCL 600.5838(1); MSA 27A.5838(1).

All this Court's "telephone" cases are easily distinguishable from the situation in the present case. In all the other cases, the plaintiffs sought

and received medical advice over the phone. The telephone calls could thus be considered another form of consultation with the professional involved, an extension of an existing physician-patient relationship. Compare *Hill v Kokosky, supra,* where the Court found that a phone call from one physician to another did not create a physician-patient relationship between the first doctor's patient and the second doctor. 186 Mich App 304.

Plaintiff's father admitted that he did not seek or expect medical advice when he called the medical center on March 9. He simply asked Ms. O'Neill for an appointment for a second opinion. He specifically told her that a doctor had stated that no emergency existed. He also testified that he knew defendants maintained an emergency room. Plaintiff's mother and father had, in fact, taken plaintiff there in the past. Where a plaintiff has not sought or received medical advice or treatment from a physician, the physician does not owe such a duty of care as will subject him to liability for malpractice. *Rogers v Horvath,* 65 Mich App 644, 647; 237 NW2d 595 (1975) (no cause of action where the defendant only examined the plaintiff for her employer in connection with a workers' compensation hearing).

The plaintiff and her parents had terminated their relationship with defendant several years before their 1987 telephone call and had arranged to have plaintiff's medical records transferred. When a patient decides to obtain care from a different physician, the physician-patient relationship terminates. See *Antal v Porretta,* 165 Mich App 238, 241; 418 NW2d 395 (1987) (relationship ceased when the plaintiff decided he did not want the defendant to treat him any longer and went to an emergency room instead); *Bosel v Babcock,* 153 Mich App 592, 596; 396 NW2d 448 (1986) (physi-

cian-patient relationship terminated when the plaintiff was transferred to a different hospital for treatment by a different doctor). See also *Heisler v Rogers,* 113 Mich App 630, 633; 318 NW2d 503 (1982) (cessation of physician-patient relationship marks the point when statutory period of limitation begins to run).

To prevail on her claim, plaintiff had to establish either an ongoing relationship with the medical center, of which the March 9 phone call was a part, or a revival of the previous physician-patient relationship because of the March 9 phone call. Because the prior relationship had ended, the phone call could not have been part of an ongoing physician-patient relationship. Plaintiff's father did not seek or receive medical advice or treatment during his call. Under existing Michigan cases, the telephone call did not establish a new relationship.

The setting of an appointment, by itself, did not initiate or revive a relationship between plaintiff and the medical center. Plaintiff would not, for example, have been expected to pay for merely having an appointment made. Alternatively, if the medical center later canceled the appointment, plaintiff would not have a malpractice claim.[1] Plaintiff asks us to broaden the duty of doctors to include potential patients, i.e., those who only have appointments for examination or treatment. We decline to take this step.

Other states also have hesitated to find that a second-hand telephone contact alone is sufficient to establish a physician-patient relationship. See *Mozingo v Pitt Co Memorial Hosp,* 101 NC App

[1] With the exception of certain emergency settings not relevant here, a physician is not required to render services to anyone. See, generally, 17 ALR4th 132, 137-140; *Childs v Weis,* 440 SW2d 104, 107 (Tex Civ App, 1969).

578; 400 SE2d 747 (1991), aff'd 331 NC 182; 415 SE2d 341 (1992) (no physician-patient relationship between "on-call" obstetrician and maternity patient); *Fought v Solce,* 821 SW2d 218, 219 (Tex Civ App, 1991) (no relationship between on-call specialist and emergency room patient where the defendant declined to come in and examine the plaintiff); *Fabian v Matzko,* 236 Pa Super 267; 344 A2d 569 (1975) (no relationship where the plaintiff's husband spoke to the doctor on the phone, trying to have the plaintiff admitted to the hospital); *Childs v Weis,* 440 SW2d 104, 107 (Tex Civ App, 1969) (no relationship where a doctor, contacted about an emergency room patient, told an emergency room nurse to have the patient contact her own doctor in another city).

In *Rizk v Cohen,* 73 NY2d 98; 538 NYS2d 229; 535 NE2d 282 (1989), the plaintiff had been a patient of the defendant, an otolaryngologist. The plaintiff consulted the defendant for an ear problem in 1980. An examination neither established nor ruled out whether the plaintiff had a tumor of the auditory nerve. The plaintiff was advised to return to the hospital in six months. More than three years later, the defendant came across the plaintiff's medical records and called him "to see what he had done about his ear condition." *Id.* at 101. When the defendant found out that the plaintiff had done nothing, the defendant suggested that the plaintiff come in for an examination. The 1983 tests revealed the existence of a tumor. The surgery to remove it caused permanent injury. *Id.* at 101-102.

The plaintiff sued approximately seven months after the 1983 phone call. Dismissal of the suit as untimely was upheld. The phone call did not bring the case within a "continuous treatment" excep-

tion to New York's statute of limitations for medical malpractice:

> That a degree of continuity exists by virtue of Dr. Cohen's unilateral initiative in October 1983 is unhelpful to plaintiff's position because that contact does not establish the continuing trust *on the plaintiff's part* that the continuous treatment doctrine requires. [*Id.* at 104; emphasis in original.]

*Doyle v Planned Parenthood of Seattle-King Co, Inc,* 31 Wash App 126; 639 P2d 240 (1982), is similar. The plaintiff had an intauterine device inserted in 1970, but did not return to the clinic after that procedure. In 1975, the defendant attempted but failed to locate her to advise that the device be removed. When the plaintiff attempted to sue after developing problems associated with the IUD, the court rejected the claim as untimely.

> [The plaintiff] *last contacted Planned Parenthood in 1970;* she consulted other doctors about her pelvic-area pains in April 1975. The physician-patient relationship had ended by that time and was not revived by the attempts to telephone [the plaintiff]. [*Id.* at 130; emphasis in original.]

See also *Giles v Sanford Memorial Hosp & Nursing Home,* 371 NW2d 635, 637 (Minn App, 1985), where the court held that a telephone call that did not discuss medication or treatment and in which the plaintiff received no advice was not part of a continuing physician-patient relationship; and *Lyons v Grether,* 218 Va 630; 239 SE2d 103 (1977), which held that the plaintiff's allegation that she had an appointment with the defendant would have been insufficient by itself to create a physician-patient relationship, but that an appointment to treat a specific condition alleged a consensual transaction giving rise to such a relationship.

We decline to recognize a physician-patient relationship from the single telephone call from the plaintiff's father to Dr. Dauser's office.

Affirmed.

SIMMONS v APEX DRUG STORES, INC

Docket No. 141038. Submitted August 4, 1993, at Detroit. Decided August 16, 1993, at 10:00 A.M. Leave to appeal sought.

Alton Simmons brought an action in the Wayne Circuit Court against Apex Drug Stores, Inc., alleging medical malpractice as a result of the defendant's negligent filling of a prescription with the wrong medication. The prescription was filled on December 10, 1988, and the plaintiff suffered an adverse reaction to the medication on February 8, 1989. Within a few months, he engaged an attorney and negotiated with the defendant regarding a possible claim, but did not file suit until December 18, 1990. The court, John R. Kirwan, J., denied the defendant's motion for summary disposition, which alleged that the claim was barred because it was not filed within the applicable two-year period of limitation. The defendant appealed by leave granted.

The Court of Appeals *held:*

1. For claims charging malpractice arising after October 1, 1986, the period of limitation is two years. MCL 600.5805(4); MSA 27A.5805(4). The limitation period applies to an action where it is alleged that a licensed pharmacist mistakenly dispensed the wrong drug. The claim accrues at the time of the act or omission that is the basis for the claim of medical malpractice regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

2. The plaintiff may not avoid the two-year malpractice period of limitation by attempting to couch his action in terms of ordinary negligence where the alleged negligence occurred within the course of a professional relationship.

3. The three-year period of limitation applicable to an action alleging products liability does not apply in this case because this is not an action alleging the sale of a defective product.

4. A medical malpractice claim is discovered for purposes of the application of the six-month rule of MCL 600.5838a(2); MSA 27A.5838(1)(2) when the act or omission of the defendant becomes known and the plaintiff has reason to believe that the medical treatment was improper or was performed in an improper manner.

5. The plaintiff did not discover his claim any later than

February 8, 1989. Therefore, he had either two years from the date on which the claim accrued, December 10, 1988, or six months after he discovered the claim on February 8, 1989, to file his claim. His complaint was untimely, and the defendant's motion for summary disposition should have been granted.

Reversed.

*Kevin A. McNulty,* for the plaintiff.

*Sommers, Schwartz, Silver & Schwartz, P.C.* (by *Joseph E. Grinnan, Patrick Burkett,* and *Kimberly S. Hauser*), for the defendant.

Before: BRENNAN, P.J., and CORRIGAN, and R. C. ANDERSON,* JJ.

CORRIGAN, J. In this action for malpractice by a licensed pharmacist, defendant appeals by leave granted from the trial court's denial of its motion for summary disposition pursuant to MCR 2.116(C)(7) (claim barred by the statute of limitations). We reverse.

On December 10, 1988, plaintiff presented a prescription for Tepanil Tentabs (an appetite suppressant) to a pharmacist at one of defendant's stores. The prescription was filled but, allegedly as a result of defendant's negligence, plaintiff instead received another medication, Tofranil (an antidepressant). On February 8, 1989, plaintiff suffered an adverse reaction to the Tofranil. Within the following few months, he engaged an attorney and negotiated with defendant regarding a possible claim, but he did not file suit until December 18, 1990.

Defendant moved for summary disposition, citing MCL 600.5838a; MSA 27A.5838(1), on the ground that plaintiff's claim was untimely. The court denied the motion and defendant sought

* Circuit judge, sitting on the Court of Appeals by assignment.

leave to appeal to this Court. Defendant's application was granted and the proceedings in the lower court were stayed pending the resolution of this appeal.

The applicable standard of review under MCR 2.116(C)(7) requires us to accept plaintiff's well-pleaded allegations as true and to construe them most favorably to the plaintiff. *Beauregard-Bezou v Pierce,* 194 Mich App 388, 390-391; 487 NW2d 792 (1992); *Bonner v Chicago Title Ins Co,* 194 Mich App 462, 469; 487 NW2d 807 (1992). In reviewing a motion under MCR 2.116(C)(7), the court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties. The motion should not be granted unless no factual development could provide a basis for recovery. *Harrison v Director of Dep't of Corrections,* 194 Mich App 446, 449; 487 NW2d 799 (1992); MCR 2.116(C)(7) and (G)(5).

The period of limitation is two years for an action charging malpractice for claims arising after October 1, 1986. MCL 600.5805(4); MSA 27A.5805(4). The accrual date for malpractice claims is determined by MCL 600.5838a; MSA 27A.5838(1):

> (1) A claim based on the medical malpractice of a person who is . . . a licensed health care professional . . . *accrues at the time of the act or omission which is the basis for the claim of medical malpractice,* regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. As used in this subsection:
>
> * * *
>
> (b) "Licensed health care professional" means an individual licensed under [MCL 333.16101-333.18838; MSA 14.15(16101)-14.15(18838)]. [Emphasis added.]

Pharmacists are considered health care providers for the purposes of our malpractice statutes. *Becker v Meyer Rexall Drug Co,* 141 Mich App 481, 485; 367 NW2d 424 (1985), citing MCL 333.17711; MSA 14.15(17711) ("A person shall not engage in the practice of pharmacy unless licensed or otherwise authorized by this article."). The limitation period of MCL 600.5805(4); MSA 27A.5805(4) applies to an action where it is alleged that a licensed pharmacist mistakenly dispensed the wrong drug, thus harming the plaintiff. *Id.*

The cases plaintiff relies on are inapposite. Plaintiff's action accrued after October 1, 1986, and, thus, is governed by the present version of MCL 600.5838a; MSA 27A.5838(1). That statute explicitly provides that a claim for medical malpractice accrues "at the time of the act or omission which is the basis for the claim." Decisions relating to cases that arose before October 1, 1986, then, are inapplicable.

Plaintiff also attempts to avoid the bar of § 5805(4) by characterizing defendant's alleged negligence as something other than professional malpractice. This maneuver will not succeed. A plaintiff may not evade the appropriate limitation period by artful drafting. *MacDonald v Barbarotto,* 161 Mich App 542, 550; 411 NW2d 747 (1987), citing *State Mutual Cyclone Ins Co v O & A Electric Cooperative,* 381 Mich 318; 161 NW2d 573 (1968). The gravamen of an action is determined by reading the claim as a whole. *Aldred v O'Hara-Bruce,* 184 Mich App 488, 490; 458 NW2d 671 (1990). The type of interest allegedly harmed is the focal point in determining which limitation period controls. *Id.*

The key to a malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship. *Bronson v*

*Sisters of Mercy Health Corp,* 175 Mich App 647, 652; 438 NW2d 276 (1989). A complaint may not avoid application of the two-year malpractice period of limitation merely by couching its causes of action in terms of ordinary negligence. *Bell v Mikkola,* 193 Mich App 708, 710; 485 NW2d 143 (1992) (action against nonlicensed employee of licensed health care facility governed by two-year statute); *MacDonald, supra* at 549-550 (complaint of negligence was "transparently" based on malpractice).

Plaintiff also attempts to characterize his action as one alleging products liability, to which a three-year period of limitation would apply. MCL 600.5805(9); MSA 27A.5805(9). Plaintiff's analysis is incorrect. This is not an action alleging the sale of a defective product. As in *Atkins v Hartford Accident & Indemnity Co,* 7 Mich App 414, 418; 151 NW2d 846 (1967), "[t]here was nothing inherently dangerous about the pills, if [properly] used . . . . [B]ut for the negligent sale of the pills, the injury would not have occurred" (holding that the exclusion for "products hazard" did not relieve a pharmacy's general liability insurer of its duty to defend against a claim it negligently sold barbituates to the plaintiff).

Summary disposition under MCR 2.116(C)(7) should not be granted if there are factual disputes regarding when discovery occurred or reasonably should have occurred. *Griffith v Brant,* 177 Mich App 583, 587; 442 NW2d 652 (1989). A court may nonetheless conclude that no genuine issue of fact exists as to when the plaintiff discovered, or should have discovered, his claim. *Mascarenas v Union Carbide Corp,* 196 Mich App 240, 245; 492 NW2d 512 (1992). A medical malpractice claim is discovered for purposes of the application of the six-

month rule of MCL 600.5838a(2); MSA 27A.5838(1)(2) when (1) the act or omission of the defendant becomes known, and (2) the plaintiff has reason to believe that the medical treatment was improper or was performed in an improper manner. *Stapleton v Wyandotte,* 177 Mich App 339, 350; 441 NW2d 90 (1989).

It cannot reasonably be disputed that plaintiff discovered his claim against defendant any later than February 8, 1989. He suffered a reaction to the Tofranil and was hospitalized. Furthermore, he began "negotiating his claim" with defendant's representatives in the summer of 1989. No additional discovery could change these facts or the conclusion that the court must draw from them. MCL 600.5838a(1); MSA 27A.5838(1)(1) provides that a claim accrues "at the time of the act or omission which is the basis for the claim of medical malpractice." Plaintiff, therefore, had either two years from the date on which his claim accrued (when the wrong drug was dispensed), December 10, 1988, or six months after he discovered the claim on February 8, 1989. Plaintiff filed suit on December 18, 1990, i.e., more than two years after December 10, 1988. His complaint was untimely. The circuit court should have granted defendant's motion for summary disposition.

Reversed.

PEOPLE v COTTRELL

Docket No. 162474. Submitted July 27, 1993, at Lansing. Decided August 17, 1993, at 9:00 A.M.

Darryl J. Cottrell pleaded guilty in the Jackson Circuit Court of retail fraud, Charles A. Nelson, J.; assault with intent to do great bodily harm less than murder, James G. Fleming, J.; and escape from jail, Alexander C. Perlos, J. More than forty-two days after sentencing but less than eighteen months after the judgments of conviction, the defendant requested but was denied, on the basis of untimeliness, appointment of appellate counsel. The defendant filed a delayed application for leave to appeal in the Court of Appeals, challenging the refusal of the request for appointed counsel. In lieu of granting leave, the Court of Appeals decided the matter by peremptory opinion.

The Court of Appeals *held:*

A trial court abuses its discretion in denying a defendant's request for appointment of appellate counsel made within the eighteen-month period after the entry of the judgment of conviction and sentence during which the defendant may file an application for leave to appeal, MCR 7.205(F)(3), if the only reason for denial is that the request was not made within forty-two days after sentencing, MCR 6.425(E)(3).

Reversed and remanded.

CRIMINAL LAW — APPOINTMENT OF APPELLATE COUNSEL — TIMELINESS.

A trial court may not deny a request for the appointment of appellate counsel solely on the basis that the request was not made within forty-two days after sentencing if the request is made within eighteen months after the entry of the judgment of conviction and sentence (MCR 6.425[E][3], [F][1][b], 7.205[F][3]).

Darryl J. Cottrell, in propria persona.

REFERENCES

Am Jur 2d, Criminal Law §§ 732-736, 743-746, 763, 975, 976-983.

Supreme Court's views as to accused's federal constitutional right to counsel on appeal. 102 L Ed 2d 1049.

Before: MICHAEL J. KELLY, P.J., and SHEPHERD and TAYLOR, JJ.

PER CURIAM. Defendant has filed a delayed application for leave to appeal a circuit court order denying as untimely his request for the appointment of counsel.

Defendant pleaded guilty of three felonies on June 29, 1992, and was sentenced on August 12 and 13, 1992, to prison for each conviction. His request for the appointment of counsel was due within forty-two days, MCR 6.425(E)(3), and was submitted slightly more than one hundred days late. The circuit court denied the request, checking the box indicating that denial was based solely on the untimeliness of the request, using form CC 402 (12/89), which form is promulgated by the State Court Administrative Office.

The issue concerning the propriety of denying untimely requests for the appointment of counsel in criminal cases has come before this Court repeatedly, prompting us to conclude that, although plenary consideration and its attendant delays would be neither necessary nor helpful to proper resolution of the issue, precedential guidance for the benefit of the bench and bar is necessary. Therefore, in lieu of granting leave, we resolve the issue with this peremptory opinion pursuant to MCR 7.205(D)(2). *People v Smith,* 200 Mich App 237; 504 NW2d 21 (1993).[1]

The issue presented is governed by MCR 6.425(F)(1)(b), which provides:

> Untimely Request. If an indigent defendant's request is not timely,

[1] In the past eighteen months there have been several dozen such cases. Twenty-three of the twenty-four judges on this Court have made rulings consistent with this opinion.

(i) the court must grant the request if it is filed within the time for filing an appeal of right;

(ii) the court should liberally grant the request as long as the defendant may file an application for leave to appeal.

An application for leave to appeal, as referenced in MCR 6.425(F)(1)(b)(ii), may be filed within eighteen months of sentencing, MCR 7.205(F)(3). While the Supreme Court has not defined in the rule what it means by "liberally grant," a similar "great liberality" standard has for many years applied to the granting of requests to withdraw guilty pleas before sentencing. See *People v Zaleski,* 375 Mich 71, 79; 133 NW2d 175 (1965). Unfortunately those precedents are not directly applicable to this area of jurisprudence.

Nonetheless, some of what the courts have done in such cases provides a relevant guideline. In *Zaleski* and its progeny, the issue was whether the request was "obviously frivolous" and whether it was made before a specified deadline, which in those cases was sentencing, but here is eighteen months. The problem we face is that there is nothing "obviously frivolous" with respect to the appointment of counsel. If the trial courts were to make a preliminary assessment of the merits of a potential appeal, they would first have to analyze the issues that might be raised by means of something analogous to *Anders v California,* 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967). Not only would this require the trial court to judge for itself the propriety of its own rulings and decisions in the case, in violation of the constitutional principle that no person can be a judge in his own case. *In re Murchison,* 349 US 133; 75 S Ct 623; 99 L Ed 942 (1955), but the mental process involved would also be excessively time consuming. The use of

such a yardstick to determine whether discretion has been abused in exercising "liberality" would be both circuitous and needlessly profligate in view of scarce judicial resources.

A more workable standard suggests that delay alone can never be a reason for denying the appointment of counsel in conjunction with a first appeal. Where lateness alone is the characteristic that calls for the exercise of judicial discretion, the denial of a request for no reason other than delay constitutes an abuse of discretion. *Ben P Fyke & Sons v Gunter Co,* 390 Mich 649, 663-664; 213 NW2d 134 (1973). Accordingly, it is error requiring reversal to deny a request for the appointment of counsel in these circumstances solely on the basis that the request is untimely, if it is otherwise filed within the eighteen months allowed by MCR 7.205(F)(3), or any other applicable time constraint governing leave to appeal.

The decision of the circuit court in this cause, denying defendant's request for the appointment of counsel as untimely, is reversed. The trial court abused its discretion by giving no reason other than tardiness for denying defendant's request for appointment of counsel made within the eighteen months allowed for appeal by leave. On remand, the circuit court shall appoint counsel to assist defendant in postconviction and appellate proceedings upon a proper showing of indigency, MCR 2.002.

Reversed and remanded. This Court retains no further jurisdiction.

TEODORESCU v BUSHNELL, GAGE, REIZEN & BYINGTON (ON REMAND)

Docket No. 133474. Submitted February 2, 1993, at Detroit. Decided August 17, 1993, at 9:05 A.M.

Anahid Teodorescu brought an action in the Macomb Circuit Court against Bushnell, Gage, Reizen & Byington, alleging malpractice by the defendant law firm in its representation of her in her divorce, particularly with regard to the defendant's failure to take the steps necessary to insure that she would receive as part of the property settlement the marital home free and clear of all encumbrances. As a result of the defendant's failure to do so, the marital home was lost through foreclosure. The action subsequently was removed and, following trial in the 37th District Court, George E. Montgomery, J., denied the defendant's motion for a directed verdict and entered judgment on a jury verdict of $128,000 for the plaintiff. The Macomb Circuit Court, Kathleen Jansen, J., affirmed the award of $100,000 for the loss of the marital home, but reversed the award of $28,000 for legal fees. The Court of Appeals denied the defendant's application for leave to appeal. The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 436 Mich 871 (1990).

On remand, the Court of Appeals *held:*

The trial court did not err in denying the defendant's motion for a directed verdict.

1. The plaintiff's proofs showed acts of negligence by the defendant. Although foreclosure occurred after the defendant had terminated its attorney-client relationship with the plaintiff, the loss of the house was a manifestation of an injury caused by the defendant during its representation of the plaintiff.

2. Because the loss of the marital home was a foreseeable

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REFERENCES

Am Jur 2d, Attorneys at Law §§ 197-236; Damages §§ 492-504.

Legal malpractice: negligence or fault of client as defense. 10 ALR5th 828.

Attorney's liability for negligence in cases involving domestic relations. 78 ALR3d 255.

result of the failure to represent the plaintiff properly in the divorce proceedings, there was proof that the defendant's negligence was a proximate cause of the plaintiff's loss.

3. The burden of proof with respect to the claim that the plaintiff failed to mitigate her damages by failing to pursue other means of recovery was on the defendant.

4. The plaintiff was not required to show as part of the proof of a prima facie case that a judgment against her former husband, had it been pursued by the defendant in the divorce action, would have been collectible. The fact that a judgment against the underlying defendant would have been uncollectible was an affirmative defense that had to be pleaded and proved by the defendant.

5. The plaintiff's possession of an unsatisfied money judgment against her former husband for the loss of the marital home through foreclosure did not preclude her from pursuing this malpractice action. Although only one satisfaction for a single injury is permitted, a plaintiff may pursue and recover separate judgments from multiple tortfeasors.

Affirmed.

MICHAEL J. KELLY, J., concurring, wrote separately to emphasize that the plaintiff was not required to establish as part of her prima facie case that a judgment against her former husband would have been collectible.

1. ATTORNEY AND CLIENT — MALPRACTICE — TERMINATION OF ATTORNEY-CLIENT RELATIONSHIP.

An attorney may be liable in a malpractice action for a loss incurred by a former client after termination of the attorney-client relationship where the loss is a manifestation of an injury caused by the attorney's negligence during the attorney-client relationship.

2. ATTORNEY AND CLIENT — MALPRACTICE — DAMAGES — MITIGATION — BURDEN OF PROOF.

The defendant in a legal malpractice action bears the burden of proving that the client failed to mitigate damages by failing to seek alternative means of avoiding the losses that allegedly resulted from the defendant's malpractice.

3. ATTORNEY AND CLIENT — MALPRACTICE — COLLECTIBILITY.

A plaintiff in order to establish a prima facie case of legal malpractice need not show collectibility of a judgment against the defendant in the underlying action that gave rise to the malpractice action; the fact that a judgment against the under-

lying defendant may be uncollectible is an affirmative defense that must be pleaded and proved by the defendant in the malpractice action.

*Samuel H. Gun,* for the plaintiff.

*Plunkett & Cooney* (by *Christine D. Oldani* and *Frank W. Brochert*), for the defendant.

ON REMAND

Before: WAHLS, P.J., and MICHAEL J. KELLY and CONNOR, JJ.

PER CURIAM. This is a legal malpractice claim that arose out of defendant's representation of plaintiff in a divorce action. A 37th District Court jury found in favor of plaintiff and awarded her damages of $128,000. Defendant appealed to the Macomb Circuit Court, which affirmed the judgment's award of $100,000 for plaintiff's loss of the marital home, but reversed the award of $28,000 for legal fees. This Court denied defendant's application for leave to appeal, but the case was subsequently remanded to this Court for consideration as on leave granted. 436 Mich 871 (1990). On appeal, defendant claims that the trial court erred in denying its motion for a directed verdict, raising numerous arguments. We disagree and affirm.

According to the testimony presented by plaintiff, she retained defendant in October 1976. She was told that her trial, if one occurred, would be handled by Mr. Gage or Mr. Reizen, attorneys with defendant. Mr. Henry, another attorney with defendant, was responsible for reviewing the business records of plaintiff's husband. Henry told plaintiff that her husband, a medical doctor, had substantial assets. The husband had been ordered

to continue paying the mortgage on the marital home during the proceedings. Just before trial commenced in November 1977, plaintiff received notice that her husband had stopped making mortgage payments. Plaintiff informed another of defendant's attorneys, Chrys Kotsis, of this, and was told, "We'll handle it."

Gage, Reizen, and Henry were not present at trial. Instead, the trial was handled by Kotsis and David Kohl. Kotsis did not recall whether any of the husband's business records were offered as evidence at trial, while Kohl admitted that he did not review the records. No expert testimony was presented regarding the value of the husband's practice. At the conclusion of the trial on December 2, 1977, the trial judge indicated from the bench that plaintiff would be awarded the house, free and clear of the mortgage, alimony, and other things. The house was the most valuable asset awarded.

Plaintiff received a notice of foreclosure on December 28, 1977. Kotsis knew the following day that proceedings for foreclosure and a sheriff's sale had begun. Defendant took no action concerning the foreclosure. Plaintiff consulted with other attorneys, but did not hire them. After plaintiff met with defendant's attorneys on January 19, 1978, defendant decided to withdraw as plaintiff's counsel and filed its motion on January 31. The parties to the divorce appeared in court on February 6. Plaintiff had other counsel present at the hearing, but he did not file an appearance. The trial court informed those present that it would not allow counsel for either side to substitute or withdraw until after the judgment was entered, which occurred the same day.

Eleven days after the judgment was entered, foreclosure occurred. Despite her efforts to retain

the house, plaintiff was evicted the following year. Plaintiff filed the present action on February 6, 1980, alleging attorney malpractice in that defendant had inadequately represented her in the divorce and had failed to protect from foreclosure the marital home that had been awarded to her.

Directed verdicts are disfavored in most negligence cases. *Vsetula v Whitmeyer,* 187 Mich App 675, 679; 468 NW2d 53 (1991). In reviewing the denial of a motion for a directed verdict, we will examine the evidence presented up to the time of the motion in a light most favorable to the plaintiff. The plaintiff is given the benefit of every reasonable inference that may be drawn from the evidence. If reasonable minds could differ with regard to whether the plaintiff has met the burden of proof, a motion for a directed verdict should not be granted. *Howard v Canteen Corp,* 192 Mich App 427, 431; 481 NW2d 718 (1992); *Goldman v Phantom Freight, Inc,* 162 Mich App 472, 477; 413 NW2d 433 (1987). A defendant is entitled to a directed verdict where a plaintiff has failed to establish a prima facie case. *Stoken v J E T Electronics & Technology, Inc,* 174 Mich App 457, 463; 436 NW2d 389 (1988). In an action for legal malpractice, a plaintiff must establish (1) the existence of an attorney-client relationship, (2) the acts that are alleged to constitute negligence, (3) that the negligence was a proximate cause of the injury, and (4) the fact and extent of the injury alleged. *Coleman v Gurwin,* 195 Mich App 8, 10-11; 489 NW2d 118 (1992); *Lowman v Karp,* 190 Mich App 448, 451; 476 NW2d 428 (1991).

Defendant first claims plaintiff failed to show any acts of negligence. In particular, defendant argues that it cannot be held liable for plaintiff's loss of the house because the attorney-client rela-

tionship had ended before the sheriff's sale.[1] We disagree. First, the testimony of defendant's expert witness that defendant refers to on appeal is irrelevant to our review of the denial of a motion for a directed verdict. Evidence of numerous acts of negligence were presented in plaintiff's case in chief, including defendant's failure to take any steps to prevent foreclosure and its allowing the house to be included in the judgment, without objection, despite the pending foreclosure. The trial court in the divorce action awarded plaintiff the house free and clear, and, had the court been made aware of the status of the house, it would probably have awarded plaintiff unencumbered assets to achieve an equitable division of property. The ultimate loss of the house was merely the manifestation of the injury caused by defendant's negligence.[2] We also find defendant's reliance on *Boyle v Odette,* 168 Mich App 737; 425 NW2d 472 (1988), to be misplaced.[3] *Boyle* does not hold that an attorney may cut off his liability for negligent acts by ending the attorney-client relationship

[1] While the point is not important to the resolution of this argument, we note that defendant's claim that the relationship ended on January 19, 1978, the date upon which defendant decided to cease representing plaintiff, is without merit. The relationship ended on February 6, 1978, the day the trial court granted defendant's motion to withdraw. Until that time, defendant was obligated to exert its best efforts to wholeheartedly advance plaintiff's legitimate interest with fidelity and diligence. *State Bar of Michigan v Daggs,* 384 Mich 729, 732; 187 NW2d 227 (1971).

[2] On appeal, plaintiff rather colorfully summarizes defendant's position: "Having admitted to severing Plaintiff's arm, Defendant seems to suggest that it is not liable for any damages resulting therefrom simply because it managed to leave the scene before the exact instant when the victim actually bled to death."

[3] Defendant points to the following passage in *Boyle, supra,* p 745:

> We agree with defendant Odette that he cannot be held liable for failing to file a social-host action prior to expiration of the period of limitation where he ceased to represent plaintiff and was replaced by other counsel before the statutory period ran on her underlying action.

before the harm caused by the acts reaches its full extent.

Defendant next claims that plaintiff failed to show that defendant's negligence was a proximate cause of her damages. Proximate cause is a question of fact that is generally to be decided by a jury. *Fiser v Ann Arbor,* 417 Mich 461, 474-475; 339 NW2d 413 (1983). Defendant does not specifically discuss the substance of plaintiff's proofs in connection with this argument, but rather casts the issue of proximate cause as one of law. That is, defendant argues that irrespective of whether plaintiff's proofs showed causation in fact, defendant should not be held legally responsible. Again, the testimony of defendant's experts regarding proximate cause, noted in defendant's appellate brief, is irrelevant to whether plaintiff established a prima facie case.

With regard to the legal component of proximate cause, legal cause is often stated in terms of foreseeability. *Richards v Pierce,* 162 Mich App 308, 317; 412 NW2d 725 (1987). We hold that it is readily foreseeable that defendant's failure to take steps to prevent foreclosure or to seek the inclusion of other unencumbered assets in the judgment would cause plaintiff financial harm. Defendant also argues that plaintiff's failure to avail herself of the judgment's "fraud provision" should bar this action. The fraud provision was concerned only with concealed assets. The marital home was not a concealed asset, nor is there any indication that the business assets of plaintiff's husband were concealed. Rather, defendant failed to attempt to discover them or present evidence of their value at trial. Furthermore, we do not consider resort to the fraud provision to be an element of a prima facie case of legal malpractice. If defendant's argument is understood to be that plaintiff failed to

mitigate her damages, then it was defendant's burden to prove so, not plaintiff's. *Brooks v Rose,* 191 Mich App 565, 571-572; 478 NW2d 731 (1991); *Dep't of Civil Rights v Horizon Tube Fabricating, Inc,* 148 Mich App 633, 637; 385 NW2d 685 (1986). The same is true with regard to the 1983 money judgment that the plaintiff obtained against her former husband, which will be discussed *infra,* and the apparent failure of plaintiff's subsequent counsel to seek a contempt order against her husband. Nor is the "suit within a suit" doctrine applicable to this case. See *Coleman, supra,* p 12, for a brief discussion of the limited scope of the doctrine.

Defendant also claims that plaintiff "failed in her proximate causation burden because she omitted to prove the collectibility of any so-called judgment she would have received but for Defendant Law Firm's negligence." While acknowledging that no Michigan authority holds that a "collectibility" element must be shown in order to establish a prima facie case of legal malpractice, defendant does draw our attention to authorities from other jurisdictions that impose this requirement. The gist of the argument is that if plaintiff's husband could not have satisfied a greater judgment, then plaintiff is left in the same position she would have been in had there been no attorney malpractice. Although this argument is made in connection with the proximate cause issue, it is more accurately an argument relating to the damages element of the claim.

Several jurisdictions impose a collectibility requirement on legal malpractice claims, at least where an attorney is engaged to prosecute an action and does so negligently. See anno: *Measure and elements of damages recoverable for attorney's negligence in preparing or conducting litigation—Twentieth Century cases,* 90 ALR4th 1033,

§ 17, pp 1071-1076. In the majority of those jurisdictions, the burden of showing collectibility is on the plaintiff. We decline to follow these authorities. Rather, we choose to follow the minority view and hold that collectibility is an affirmative defense to an action for legal malpractice that must be pleaded and proved by the defendant. The burden of showing complete or partial uncollectibility is on the defendant.[4] *Jourdain v Dineen,* 527 A2d 1304 (Me, 1987). Because we are at present concerned only with whether plaintiff established a prima facie case of legal malpractice, this holding does not require that the judgment be reversed.

In 1983, plaintiff obtained a money judgment against her former husband in the Macomb Circuit Court, Judge Kenneth Sanborn presiding. Among other things, the judgment awarded plaintiff a sum certain for the loss of the marital home. There is no indication in the record that the judgment was ever satisfied, nor is there any argument that it was. Defendant now argues that reversal is required because "being in possession of such a Judgment, it must be said that Plaintiff suffered no damages for loss of the marital home and that the Jury Verdict of $100,000.00 for the marital home amounted to double compensation to which Plaintiff is not entitled." This argument merits little discussion. Being in possession of an unsatisfied judgment is a far different matter than being in possession of an unencumbered house.[5] Moreover, at common law a plaintiff is permitted to pursue and recover separate judgments from

[4] If, for example, a defendant could show that a judgment would have been only partially collectible, then a plaintiff's damages would be limited to the amount collectible.

[5] For example, an unsatisfied judgment does not keep the rain off one's head.

multiple tortfeasors, but may only recover one compensation or satisfaction for a single injury. *Kaminski v Newton,* 176 Mich App 326, 328; 438 NW2d 915 (1989).[6] Defendant's argument would have merit had the judgment been satisfied, and whether defendant now possesses any claim to that judgment is a question that is not before us.

Affirmed.

MICHAEL J. KELLY, J. *(concurring).* While I concur in the result, I write separately to emphasize that plaintiff was not required to establish that her husband was "collectible." This was not an element of plaintiff's primá facie case. The fact that a judgment may not be collectible at the time of its entry does not mean that it will not become collectible at some time during the ten-year enforcement or renewal period. MCL 600.5809(3); MSA 27A.5809(3).

Just as defendant had the burden to show uncollectibility, it also had the burden of proving that the Sanborn judgment had been paid, because satisfaction is also an affirmative defense. MCR 2.111(F)(3)(a).

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[6] *Bourke v Warren,* 118 Mich App 694; 325 NW2d 541 (1982), a case relied upon by defendant, is consistent with this rule. Unlike the present case, the plaintiffs in *Bourke* "recovered" a judgment, which implies satisfaction.

PEOPLE v McDONALD

Docket No. 156546. Submitted July 7, 1993, at Lansing. Decided August 17, 1993, at 9:10 A.M. Leave to appeal sought.

James L. McDonald was convicted by a jury in the 71-B District Court of operating a vehicle while having an unlawful blood alcohol level. He appealed, and the Tuscola Circuit Court, Patrick R. Joslyn, J., reversed the conviction on the basis that MCL 257.625a; MSA 9.2325(1), which permits the introduction of evidence of a defendant's refusal to submit to a chemical breath analysis and requires a cautionary instruction, is an invasion of a power that is vested exclusively in the judicial branch of government and violates Const 1963, art 6, § 5. The people appealed by leave granted.

The Court of Appeals *held:*

1. The district court did not err in allowing the prosecutor to ask the arresting officer whether the defendant submitted to a chemical breath analysis and in submitting a cautionary instruction to the jury, as permitted by MCL 257.625a; MSA 9.2325(1).

2. MCL 257.625a(7); MSA 9.2325(1)(7), which is now MCL 257.625a(10); MSA 9.2325(1)(10), does not violate Const 1963, art 6, § 5.

3. The Legislature may enact statutory rules of evidence that do not conflict with the Michigan Rules of Evidence, and those statutory rules are enforceable until superseded by the Supreme Court.

Reversed and remanded.

1. CONSTITUTIONAL LAW — EVIDENCE — CRIMINAL LAW — UNLAWFUL BLOOD ALCOHOL LEVEL — CHEMICAL TESTS.

The section of the Vehicle Code that provides that evidence of a defendant's refusal to submit to a chemical test is admissible in a criminal prosecution for certain violations of the Vehicle Code only for the purpose of showing that the test was offered,

REFERENCES

Am Jur 2d, Automobiles and Highway Traffic §§ 121-132, 297, 305-308, 375, 379; Courts §§ 82-86; Trial § 582.

Admissibility in criminal case of evidence that accused refused to take test of intoxication. 26 ALR4th 1112.

but not as evidence in determining the guilt of the defendant, and that requires that the jury be instructed accordingly, is not unconstitutional and does not violate the Supreme Court's rule-making powers (Const 1963, art 6, § 5; MCL 257.625a[7]; MSA 9.2325[1][7], now MCL 257.625a[10]; MSA 9.2325[1][10]).

2. COURTS — PROCEDURE — RULE-MAKING POWER — STATUTORY RULES OF EVIDENCE.

The Supreme Court's rule-making power in matters of court practice and procedure is superior to that of the Legislature; however, the Legislature may enact statutory rules of evidence that do not conflict with the Michigan Rules of Evidence, and those statutory rules are enforceable until superseded by the Supreme Court (Const 1963, art 6, § 5; MRE 101).

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *James R. Reed,* Prosecuting Attorney, and *David M. Delaney,* Assistant Prosecuting Attorney, for the people.

*Professional Law Offices of Frank & Forster* (by *Stuart W. Hyvonen*), for the defendant.

Before: MACKENZIE, P.J., and GRIFFIN and W. L. CAHALAN,* JJ.

PER CURIAM. Following a district court jury trial, defendant was convicted of operating a vehicle while having an unlawful blood alcohol level (OUIL/UBAL), MCL 257.625; MSA 9.2325. During defendant's trial, the prosecutor was allowed, over defense objection, to ask the arresting officer whether defendant submitted to a chemical breath analysis. The question was allowed and a cautionary instruction was given pursuant to MCL 257.625a(7); MSA 9.2325(1)(7) [now MCL 257.625a(10); MSA 9.2325(1)(10)]. That statute provides in relevant part:

A person's refusal to submit to a chemical test

* Circuit judge, sitting on the Court of Appeals by assignment.

> . . . shall be admissible in a criminal prosecution for [OUIL/UBAL] only for the purpose of showing that a test was offered to the defendant, but not as evidence in determining innocence or guilt of the defendant. The jury shall be instructed accordingly.

The circuit court reversed defendant's conviction on the basis that this subsection of MCL 257.625a; MSA 9.2325(1) is an unconstitutional legislative "invasion of a power that is vested exclusively in the judicial branch of government." The court reasoned that under Const 1963, art 6, § 5—which authorizes the Supreme Court to promulgate rules of court practice and procedure—the Legislature has neither the "power to control the practice and procedure of the Courts of this State" nor "the power to control what evidence is admissible in the Courts of this State."

The people appeal by leave granted. We hold that the above-quoted subsection of MCL 257.625a; MSA 9.2325(1) does not violate Const 1963, art 6, § 5. Accordingly, we reverse.

Under Const 1963, art 6, § 5, the Supreme Court's rule-making power in matters of court practice and procedure is superior to that of the Legislature. *Mumaw v Mumaw,* 124 Mich App 114, 120; 333 NW2d 599 (1983). The rules of practice and procedure include the rules of evidence. *Id.* This does not mean, however, that the Legislature is wholly without power to enact statutes governing the admissibility of evidence, as was suggested by the circuit court in this case.

MRE 101 provides:

> These rules govern proceedings in the courts of this state to the extent and with the exceptions stated in Rule 1101. *A statutory rule of evidence not in conflict with these rules* or other rules adopted by the Supreme Court *is effective until*

*superseded by rule or decision of the Supreme Court.* [Emphasis added.]

Thus, the Legislature may enact statutory rules of evidence that do not conflict with the Michigan Rules of Evidence, and those statutory rules are enforceable until superseded by the Supreme Court.

Defendant contends that MCL 257.625a(7); MSA 9.2325(1)(7) conflicts with the Michigan Rules of Evidence because it allows the introduction of irrelevant, immaterial, and prejudicial evidence, contrary to MRE 401, 402, and 403. This argument might have merit if the statute allowed evidence of a defendant's refusal to submit to a chemical breath analysis for purposes of establishing guilt. See *People v Stratton,* 148 Mich App 70; 384 NW2d 83 (1985); *People v Hayes,* 64 Mich App 203; 235 NW2d 182 (1975). However, the statute does not allow the evidence for that purpose; rather, it specifically limits admissibility of evidence of a refusal to instances where the prosecution seeks to show that a test was offered to a defendant, and, as a further precaution, expressly requires an accompanying jury instruction to prevent any potential prejudice.

Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Caterpillar, Inc v Dep't of Treasury,* 440 Mich 400, 413; 488 NW2d 182 (1992); *People v Trinity,* 189 Mich App 19, 21; 471 NW2d 626 (1991). The circuit court in this case clearly erred in finding MCL 257.625a(7); MSA 9.2325(1)(7) unconstitutional as a usurpation of judicial power under Const 1963, art 6, § 5. We therefore reverse the court's opinion and order, and remand for reinstatement of defendant's district court conviction.

Reversed and remanded. We retain no further jurisdiction.

BUTZER v CAMELOT HALL CONVALESCENT CENTRE, INC (AFTER REMAND)

Docket No. 136247. Submitted January 12, 1993, at Detroit. Decided May 20, 1993; approved for publication August 18, 1993, at 9:00 A.M.

Grace L. Butzer brought a wrongful discharge action in the Wayne Circuit Court against Camelot Hall Convalescent Centre, Inc., alleging that termination of her employment was in violation of a policy of termination for just cause only. Mediation concluded in an evaluation of $20,000 for the plaintiff, which was accepted by the plaintiff but rejected by the defendant. The court, Harry J. Dingeman, J., granted summary disposition for the defendant on the basis that there was no genuine issue of material fact. The Court of Appeals, MACKENZIE, P.J., and MARILYN KELLY and T.M. BURNS, JJ., reversed, holding that a genuine issue of material fact existed regarding whether the plaintiff had a reasonable expectation of employment that was terminable for just cause only. 183 Mich App 194 (1989). On remand, the defendant offered to stipulate the entry of a $3,500 judgment for the plaintiff. The plaintiff rejected the offer, and a jury subsequently returned a verdict of no cause of action. The defendant moved for, and the trial court, Edward M. Thomas, J., denied, attorney fees under MCR 2.405(D) for the plaintiff's rejection of the defendant's offer to stipulate the entry of a judgment and sanctions under MCR 2.114(E) for the plaintiff's filing of pleadings for an improper purpose. The defendant appealed.

After remand, the Court of Appeals *held:*

1. A trial court abuses its discretion by denying a motion for costs and attorney fees under MCR 2.405(D) where, as in this case, the only reason for the denial is that the rejection of the offer of judgment was reasonable.

2. The circumstances of this case do not support a finding

REFERENCES

Am Jur 2d New Topic Service, Alternate Dispute Resolution § 24; Attorneys at Law §§ 237, 264.

See ALR Index under Attorney or Assistance of Attorney; Attorneys' Fees; Fines, Penalties, and Forfeitures.

that the plaintiff's pleadings were filed for an improper purpose and therefore do not warrant an imposition of sanctions under MCR 2.114(E).

Affirmed in part, reversed in part, and remanded for an award of reasonable attorney fees to the defendant.

WHITE, J., concurring in part and dissenting in part, stated that the denial of sanctions under MCR 2.114(E) was proper, but the case should be remanded to the trial court for reconsideration of the question of attorney fees under MCR 2.405(D) in light of *Gudewicz v Matt's Catering, Inc,* 188 Mich App 639 (1991).

JUDGMENTS — OFFERS TO STIPULATE ENTRY OF JUDGMENT — REJECTION — ATTORNEY FEES.

A trial court abuses its discretion by denying a motion for attorney fees as a sanction for the refusal of an offer to stipulate the entry of a judgment where the only reason for the denial is that the rejection of the offer of judgment was reasonable (MCR 2.405[D]).

*Daryle Salisbury,* for the plaintiff.

*Roger H. Leemis,* for the defendant.

AFTER REMAND

Before: DOCTOROFF, C.J., and WEAVER and WHITE, JJ.

PER CURIAM. Defendant appeals a December 5, 1990, Wayne Circuit Court order denying its motion for attorney fees and costs pursuant to MCR 2.405 and sanctions pursuant to MCR 2.114(E). On appeal, defendant contends that the trial court abused its discretion when it refused to grant its request for reasonable attorney fees and erred in denying its request for sanctions. We affirm in part, reverse in part, and remand the matter to the trial court.

Plaintiff was employed by defendant as a nursing supervisor beginning on May 10, 1982. On

September 20, 1983, defendant terminated plaintiff's employment on the basis of what it claimed was her failure to provide adequate care for her patients. Plaintiff subsequently filed this wrongful discharge action alleging breach of contract, termination without just cause, and age discrimination. Plaintiff sought damages for loss of wages and loss of employee benefits, and also requested injunctive relief in the form of immediate reinstatement. The case was mediated at $20,000, which plaintiff accepted and defendant rejected.

Thereafter, defendant moved for summary disposition pursuant to MCR 2.116(C)(10), claiming that there was no genuine issue of material fact. The trial court granted defendant's motion for summary disposition, but this Court reversed the order on appeal, concluding that there existed a genuine issue of material fact whether plaintiff had a reasonable expectation of employment terminable for just cause only. See *Butzer v Camelot Hall Convalescent Centre, Inc,* 183 Mich App 194; 454 NW2d 122 (1989). On April 23, 1990, the case having been remanded, defendant submitted an offer to stipulate the entry of a judgment for plaintiff in the amount of $3,500. Plaintiff rejected the offer without filing a counteroffer. Following a seven-day jury trial, a verdict was returned for defendant, the jury concluding that plaintiff had no cause of action.

Defendant filed a motion for costs and attorney fees as permitted under MCR 2.405(D)(1) and also requested sanctions under MCR 2.114. Following a hearing, the trial court stated:

> Recalling this case very well and remembering the facts of it, the emotion that was involved in it, the Court is of the opinion that both parties proceeded to trial and made their rejections in good

> faith and this Court is of the opinion that Ms. Butzer should not be penalized to a point of having to pay over ten thousand dollars in attorney fees for seeking her day in court.

The trial court awarded defendant $1,216.98 in costs, to which plaintiff did not object, but denied the request for attorney fees and sanctions.

The purpose of imposing costs under MCR 2.405 is to encourage the parties to settle before trial. *Freysinger v Taylor Supply Co,* 197 Mich App 349, 353; 494 NW2d 870 (1992); *Brooks v Gough,* 189 Mich App 623, 625; 473 NW2d 771 (1991). MCR 2.405(D)(3) states that the court may, in the interest of justice, refuse to award a fee under the rule. In *Gudewicz v Matt's Catering, Inc,* 188 Mich App 639, 645; 470 NW2d 654 (1991), this Court expressly rejected the trial court's denial of fees under MCR 2.405 based solely upon an offeree's "reasonable rejection" of a counteroffer of judgment. This Court concluded that the public policy behind the rule would not be served by denying fees on the basis of an offeree's reasonable rejection. *Id.*

As in *Gudewicz, supra,* we conclude that the trial court's denial of defendant's motion for reasonable attorney fees in this case was an abuse of discretion. The fact that plaintiff may have proceeded to trial in good faith does not excuse liability for fees when she knowingly denied the offer at the risk of having to pay those fees. See *Sanders v Monical Machinery Co,* 163 Mich App 689, 693; 415 NW2d 276 (1987). The better position is that a grant of fees under MCR 2.405 should be the rule rather than the exception. *Gudewicz, supra* at 644-645; *Stamp v Hagerman,* 181 Mich App 332, 338-339; 448 NW2d 849 (1989). To conclude otherwise would be to expand the "interest of justice" excep-

tion to the point where it would render the rule ineffective. See *Gudewicz, supra* at 644 (quoting 2 Martin, Dean & Webster, Michigan Court Rules Practice [3d ed], pp 455-456).

Regarding defendant's argument that it is entitled to sanctions under MCR 2.114(E), we disagree. The signature requirement under this rule seeks to ensure that pleadings are verified and filed in conformity with MCR 2.114(D). *Warden v Fenton Lanes, Inc,* 197 Mich App 618, 626; 495 NW2d 849 (1992). Although it is true that the rule provides that the signature is a certification that the pleadings are not filed for an improper purpose, we are not convinced that the pleadings in this case were in violation of this rule. A mediation panel recommended a $20,000 award in favor of plaintiff, and this Court previously determined that plaintiff's pleadings and other evidence were sufficient to raise a genuine issue of material fact. See *Butzer, supra.* Under these circumstances, we find unpersuasive defendant's contention that it is entitled to sanctions under MCR 2.114.

Affirmed in part, reversed in part, and remanded for a determination of reasonable attorney fees. We do not retain jurisdiction. No costs are taxable, neither party having prevailed in full.

WHITE, J. *(concurring in part and dissenting in part).* I concur in the majority's affirmance of the trial court's denial of sanctions under MCR 2.114(E). I dissent from its reversal of the denial of attorney fees under MCR 2.405. Rather than reversing, I would remand the case to the trial court for reconsideration in light of *Gudewicz v Matt's Catering, Inc,* 188 Mich App 639; 470 NW2d 654 (1991).

After trial, defendant moved for costs and attorney fees pursuant to MCR 2.405 and 2.114. The

trial court awarded defendant $1,216.98 in routine fees and costs, but denied the request for $12,410.07 in attorney fees under both court rules. The court stated:

> Recalling this case very well and remembering the facts of it, the emotion that was involved in it, the Court is of the opinion that both parties proceeded to trial and made their rejections in good faith and this Court is of the opinion that Ms. Butzer should not be penalized to a point of having to pay over ten thousand dollars in attorney fees for seeking her day in court.
>
> I believe that the assessment of attorney fees is discretionary with the Court and under the circumstances of this case, the Court is not going to assess attorney fees in the bill of costs, but will assess the one thousand, two hundred and six dollars and ninety-eight cents.

Defendant argues that MCR 2.405 is unambiguous and requires imposition of reasonable attorney fees except in very limited circumstances. Defendant asserts that this case is unremarkable and presents no special circumstances to justify the court's decision not to award attorney fees.

In *Sanders v Monical Machinery Co,* 163 Mich App 689, 693; 415 NW2d 276 (1987), this Court affirmed the trial court's award of attorney fees to the defendant under MCR 2.405. The Court stated that the purpose of MCR 2.405 is to encourage parties to settle matters before trial. If an offer to settle is made and the offer is not patently frivolous, the rule creates an obligation to accept, make a counteroffer, or reject. A litigant who rejects or fails to respond and goes on to lose before a jury is at risk of paying costs and attorney fees as provided in MCR 2.405.

In *Stamp v Hagerman,* 181 Mich App 332; 448

NW2d 849 (1989), this Court affirmed the court's refusal to award attorney fees to the defendant under MCR 2.405(D)(1). The Court said:

> However, MCR 2.405(D)(3) provides that the "court may, in the interest of justice, refuse to award an attorney fee under this rule." In *Sanders, supra,* this Court concluded that the trial court's decision to allow attorney fees under this subrule is discretionary, although the grant of attorney fees was thought to be preferred under the subrule as indicated by the language requiring that the trial court's refusal to grant the attorney fees be in the "interest of justice." The *Sanders* Court went on to uphold the trial court's grant of attorney fees to the defendant as a reasonable exercise of discretion where the plaintiffs failed to respond to the defendant's offer of judgment of $5,000 and a jury subsequently returned a verdict of no cause of action. The *Sanders* Court rejected the plaintiffs' claim that the discretionary language "in the interest of justice" only permits attorney fees in exceptional circumstances where there has been bad faith or unreasonable conduct. Finally, the *Sanders* Court expressed its opinion that attorney fees should be routinely granted under this subrule.
>
> In the instant case, by contrast, the trial court refused to award attorney fees for the reason that plaintiffs had not rejected either of the mediation evaluations and thereafter negotiated reasonably and in good faith in an effort to reach a settlement. The trial court concluded that these facts did not indicate that the discretionary sanction against plaintiffs in the form of attorney fees was appropriate. Hence, on its face, the trial court appeared to apply the very standards of good faith and reasonable conduct that the *Sanders* Court suggests would not preclude an award of attorney fees to the opposing party.
>
> We are, however, of the opinion that what constitutes "in the interest of justice" must be decided on a case-by-case basis. While not controlling, a

> trial court may properly consider the good faith or reasonable conduct of the parties in resolving whether attorney fees are appropriate. [181 Mich App 338-339.]

The Court went on to discuss cases dealing with the concept of judicial discretion. The Court concluded:

> Given the fact that plaintiffs proceeded to trial only after rejecting an offer which was substantially less than the prior two mediation evaluations, we conclude that the trial court did not abuse its discretion in refusing to award attorney fees to defendants. Although an award of attorney fees is favored under MCR 2.405(D)(3), we do not find that a consideration of the "interest of justice" standard precluded the trial court from refusing to award attorney fees to defendants under the circumstances of this case. [*Id.* at 342.]

In *Gudewicz, supra,* this Court reversed the trial court's ruling that under MCR 2.405(D)(3) attorney fees should be denied to the defendant in the interest of justice. The basis for the trial court's decision was that the plaintiff's decision to reject the counteroffer was reasonable in view of the mediation.

The *Gudewicz* Court quoted from 2 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), pp 455-456:

> As to attorney fees, the rule itself gives no guidance as to the kinds of situations in which a court may determine that the interests of justice preclude an award of attorney fees. . . . [S]hould the courts liberally interpret the subrule, and routinely deny the imposition of attorney fees, trial counsel will quickly realize that the cost provisions and monetary sanctions imposed by rule 2.403(O) [mediation sanctions] may be readily ne-

gated by the submission of an offer of settlement under 2.405. See MCR 2.405(D)(6). If the imposition of sanctions under rule 2.403 is mandatory (which it is), but only discretionary under rule 2.405 (which they are), the authors have little doubt as to which rule the parties will elect to control in the action. Unless the imposition of costs under rule 2.405 is equally as certain as they are [sic] under rule 2.403, Michigan's mediation rule will quickly be rendered useless. [188 Mich App 644.]

The Court discussed *Sanders* and *Stamp, supra*:

Similar concerns were expressed by this Court in *Sanders, supra.* The *Sanders* panel concluded that the sanctions provisions of the court rule should be routinely enforced and attorney fees granted, except in the event of an unusually large verdict, or in the event of a defense verdict rendered in the face of catastrophic damages. 163 Mich App 692-693. In *Stamp v Hagerman,* 181 Mich App 332, 339; 448 NW2d 849 (1989), another panel concluded that, while not controlling, the good faith or reasonable conduct of the parties properly may be considered by a trial court in resolving the question whether attorney fees are appropriate. [188 Mich App 644-645.]

The Court concluded:

In this case, the sole reason given by the trial court for denial of attorney fees was that plaintiffs reasonably refused the counteroffer. This was insufficient justification under *Stamp* and *Sanders, supra,* and runs contrary to the policy of *Sanders* and the commentators which favors the award of attorney fees absent unusual circumstances. [188 Mich App 645.]

While the *Gudewicz* Court recognized the rule set forth in *Stamp, supra,* it applied a far more stringent standard for determining when attorney

fees can properly be denied under MCR 2.405(D)(3).

In the instant case, the trial court's decision not to grant attorney fees would not constitute an abuse of discretion under *Stamp,* because the facts are very similar to those in *Stamp* and the decision apparently was based on plaintiff's good faith and reasonable conduct. The enunciation of the decision on the record in November 1990, after *Stamp* had been decided but before *Gudewicz,* would have been sufficient under *Stamp.* However, *Gudewicz,* which is controlling under Administrative Order No. 1990-6, requires more.

It is unclear whether the trial court would have awarded or denied attorney fees under *Gudewicz.* In other words, had *Gudewicz* been decided before the trial court rendered its decision, it may have granted fees or denied fees, setting forth reasons believed to be sufficient under *Gudewicz.* Because the trial court did not have the benefit of *Gudewicz* when it made the decision and because we do not know how it would have applied the *Gudewicz* standard to the instant case, I think a remand for reconsideration, rather than a reversal, is appropriate. I would remand to the trial court for reconsideration in light of *Gudewicz,* with instructions that if the trial court continues to be of the view that attorney fees should be denied under MCR 2.405(D)(3) and *Gudewicz,* it should fully set forth its reasons on the record.

McDONALD v HOLLAND MOTOR EXPRESS, INC

Docket No. 141701. Submitted March 4, 1993, at Grand Rapids. Decided March 31, 1993; approved for publication August 18, 1993, at 9:05 A.M. Leave to appeal denied, 443 Mich —.

Arthur McDonald was injured during the course of his employment with Holland Motor Express, Inc., on December 11, 1979. He continued to work until April 22, 1985, when he retired on the advice of his physician and accepted a nondisability pension. He filed a claim for workers' disability compensation benefits on July 8, 1985. A hearing referee denied the claim, finding that although the plaintiff was partially disabled from common labor, he had failed to rebut the retiree presumption of the Workers' Disability Compensation Act, MCL 418.373(1); MSA 17.237(373)(1). The Workers' Compensation Appeal Board concluded that the retiree presumption did not apply, and reversed the referee's decision. The defendant appealed by leave granted.

The Court of Appeals *held:*

1. Where an employee continues active employment until retirement and receipt of a nondisability pension, the employee's reason for retiring is irrelevant in determining whether MCL 418.373(1); MSA 17.237(373)(1) applies.

2. Because the plaintiff was actively employed when he retired, § 373(1) applies in this case. The Workers' Compensation Appeal Board erred as a matter of law in concluding otherwise.

Reversed.

1. WORKERS' COMPENSATION — RETIREE PRESUMPTION — ACTIVE EMPLOYMENT — NONDISABILITY PENSIONS.

Where an employee continues active employment until retirement and receipt of a nondisability pension, the reason for retiring is irrelevant in determining whether the retiree presumption of the Workers' Disability Compensation Act, that such an employee does not have a loss of earnings or earning

REFERENCES

Am Jur 2d, Workers' Compensation §§ 139-153.
See ALR Index under Workers' Compensation.

capacity as the result of a compensable injury or disease, applies to the employee (MCL 418.373[1]; MSA 17.237[373][1]).

2. WORKERS' COMPENSATION — RETIREE PRESUMPTION — ACTIVE EMPLOYMENT.

"Active employment" for purposes of the retiree presumption of the Workers' Disability Compensation Act means actually being engaged in performing work for an employer at the time of retirement, i.e., being actively on the job and performing the customary work of the job (MCL 418.373[1]; MSA 17.237[373][1]).

*McCroskey, Feldman, Cochrane & Brock, P.C.* (by *J. Walter Brock*), for the plaintiff.

*Smith, Haughey, Rice & Roegge* (by *Lance R. Mather*), for the defendant.

Before: MCDONALD, P.J., and REILLY and FITZGERALD, JJ.

PER CURIAM. Defendant appeals by leave granted a May 21, 1991, order of the Workers' Compensation Appeal Board that reversed a hearing referee's decision denying plaintiff's claim for benefits because of his failure to rebut the retiree presumption of § 373(1) of the Workers' Disability Compensation Act, MCL 418.373(1); MSA 17.237(373)(1). The WCAB concluded that the retiree presumption did not apply. We reverse.

Plaintiff began working as a truck driver for defendant in February 1959. On December 11, 1979, he injured his back when he fell between a loading dock and the rear of a trailer. Plaintiff's last day of work with defendant was on April 22, 1985, when he retired on the advice of his physician and accepted a nondisability pension.

On July 8, 1985, plaintiff filed a claim for disability compensation benefits. The referee denied the claim, finding that although plaintiff was partially disabled from common labor, he had failed

to rebut the retiree presumption of § 373(1), which provides:

> An employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the social security act, 42 USC 301 to 1397f, that was paid by or on behalf of an employer from whom weekly benefits under this act are sought shall be presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under either this chapter or chapter 4. This presumption may be rebutted only by a preponderance of the evidence that the employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience. This standard of disability supersedes other applicable standards used to determine disability under either this chapter or chapter 4.

The referee found § 373(1) applicable because plaintiff terminated active employment and was receiving a nondisability pension. Plaintiff appealed and the WCAB reversed. Citing *Frasier v Model Coverall Service, Inc,* 182 Mich App 741; 453 NW2d 301 (1990), the WCAB concluded that the retiree presumption did not apply because plaintiff retired because of his disability.

Defendant argues that where an employee continues to engage in active employment until the time he retires and receives a nondisability pension, the employee's reason for retiring is irrelevant in determining whether § 373(1) applies. We agree. As we stated in *Frasier, supra* at 744:

> When statutory language is clear and unambiguous, judicial interpretation to vary the plain meaning of the statute is precluded. The Legislature

> must have intended the meaning it plainly expressed, and the statute must be enforced as written. *Hiltz v Phil's Quality Market,* 417 Mich 335, 343; 337 NW2d 237 (1983). The legislative intent behind § 373 was to reform the statute and limit the number of retired workers who were eligible to collect compensation along with a nondisability retirement. *Franks v White Pine Copper Div,* 422 Mich 636, 657; 375 NW2d 715 (1985). Therefore, in determining what the Legislature meant by "active employment" we must define "active" in its ordinary sense and meaning. Placing the "active" before employment must have been for the purpose of adding some further meaning—distinguishing between employees who were actually engaged in performing work for an employer at the time of retirement and those who were not. It follows, therefore, that "active employment" means one who is actively on the job and performing the customary work of his job, as opposed to one who terminates inactive employment.

In *Frasier,* this Court affirmed the Workers' Compensation Appellate Commission's decision that the plaintiff was not engaged in active employment at the time of his retirement because he had not been working for five months before taking a reduced, nondisability retirement. See also *Dezwaan v Holland Motor Express,* 189 Mich App 575, 579; 473 NW2d 788 (1991) (because the plaintiff retired while he was disabled and had not worked for an extended period of time before taking a nondisability retirement, the presumption of § 373[1] did not apply). In both *Frasier* and *Dezwaan,* neither plaintiff was actively employed at the time of retirement.

In this case, however, plaintiff continued to work until the time he took a nondisability retirement. Thus, plaintiff was actively employed when he

retired[1] and § 373(1) applies.[2] To hold otherwise in a situation where a plaintiff continued to engage in active employment until the time of retirement would defeat the intent of the Legislature. As the referee in this case pointed out:

> [I]t must be plaintiff who terminates active employment. . . . The Legislature did not require that plaintiff's termination of active employment be "voluntary."

The WCAB erred as a matter of law in concluding that § 373(1) did not apply in this case.[3]

Reversed.

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[1] This case is factually distinguishable from *Frasier, supra,* and *Dezwaan, supra.*

[2] We agree that the timing of the filing of the workers' compensation claim is not relevant in determining whether § 373(1) applies. See *Frasier, supra* at 746.

[3] The WCAB did not decide whether plaintiff rebutted the retiree presumption because it found that the presumption did not apply. However, the fact that the WCAB found plaintiff partially but not totally disabled implies that he cannot defeat the presumption. If plaintiff is partially disabled, he retains some capacity to work in common or unskilled labor. If so, he cannot show that he is "unable, because of a work-related disability, to perform work suitable" to his qualifications, i.e., unskilled labor, within the meaning of § 373(1).

*In re* MENSINGER ESTATE

(LESTER v ROBINSON)

Docket No. 137041. Submitted December 9, 1992, at Detroit. Decided February 23, 1993; approved for publication August 23, 1993, at 9:00 A.M.

Fern Lester and Carleton Robinson, as the co-trustees of the Emily Mensinger inter vivos trust, petitioned the St. Clair County Probate Court for authority to distribute the proceeds from a redemption of Series E United States treasury bonds that had been transferred to the trust by Mensinger before she died intestate. Carleton Robinson, as the personal representative of Mensinger's estate, opposed the petition, claiming that the bonds and their proceeds belonged to the estate. The court, John R. Monaghan, J., denied the petition, determining the estate to be the owner of the bonds. The petitioners appealed.

The Court of Appeals *held:*

Mensinger made a valid gift of the bonds to her inter vivos trust. She intended to pass title to the trust and the bonds were delivered to and accepted by the co-trustees. Accordingly, it is the trust, and not the estate, that is entitled to the proceeds from the redemption of the bonds.

Reversed.

GIFTS — TITLE — DELIVERY — ACCEPTANCE.

To constitute a valid gift, the donor must intend to pass title to the donee, there must be actual or constructive delivery, and the donee must accept the gift.

*Luce, Henderson, Bankson, Heyboer, Lane, Burleigh, Currier & Martinek* (by *Peter Shane Burleigh*), for the petitioners.

Before: SHEPHERD, P.J., and BRENNAN and L. P. BORRELLO,* JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

REFERENCES

Am Jur 2d, Gifts §§ 16-35, 54-62.

See ALR Index under Bonds and Securities; Gifts.

PER CURIAM. This is an appeal as of right from a probate court order denying the petition of the co-trustees of the Emily Mensinger inter vivos trust for authority to distribute the proceeds of treasury bonds pursuant to the terms of the trust. The court awarded the proceeds to her estate. We reverse.

This case involves the disposition of Series E United States treasury bonds with a face value of $8,500, which were held by Emily Mensinger at the time of her death. The bonds, originally owned by her husband, passed automatically to Mrs. Mensinger as the pay-on-death beneficiary upon the death of her husband on September 12, 1986. Shortly thereafter, on October 14, 1986, Mrs. Mensinger revoked her will, executed the Emily Mensinger inter vivos trust, and delivered her entire estate to the trustees as the trust corpus. At the time the trust was executed, her estate consisted of the treasury bonds. During her lifetime, Mrs. Mensinger never changed the registration of the treasury bonds. Upon her death, the bonds were redeemed for $38,479.63 by the personal representative of the estate of Emily Mensinger.

On appeal, the petitioners argue that the proceeds of the treasury bonds should pass to the Emily Mensinger inter vivos trust, and not her estate. We agree.

In this case, we find that Mrs. Mensinger made a valid gift inter vivos of the treasury bonds to the Emily Mensinger inter vivos trust. To constitute a valid gift (1) the donor must intend to pass title to the donee, (2) there must be actual or constructive delivery, and (3) the donee must accept the gift. *Osius v Dingell,* 375 Mich 605, 611; 134 NW2d 657 (1965); *Stinebaugh v Bristol,* 132 Mich App 311, 316; 347 NW2d 219 (1984).

The record shows that Mrs. Mensinger intended

to pass title of the bonds to the trust, as provided in § 1.2 of the trust. Further, she delivered the treasury bonds in question to the trustees at the time the trust was executed. Finally, the co-trustees, upon executing the trust, acknowledged receipt of her entire estate, which consisted of the treasury bonds. Thus, a completed gift of the bonds to the trust occurred.

Notwithstanding the fact that United States Treasury regulations would not recognize any interest of the trust in the bonds, *In re Freedland Estate,* 38 Mich App 592; 197 NW2d 143 (1972), we note that these regulations simply state the party to whom the United States Treasury will pay the money. The regulations have nothing to do with who has a greater claim to the money once it has been paid to one party or another. Even though Mrs. Mensinger failed to change the registration of the treasury bonds or to designate a pay-on-death beneficiary, we believe that there was a completed transfer of the right to the money when the bonds were transferred to and received by the trust. Once that occurred, the trust had a greater right to the bonds as between the trust and the estate.

Reversed.

PERNICK v BRANDT

Docket No. 132950. Submitted November 10, 1992, at Lansing. Decided May 24, 1993; approved for publication August 24, 1993, at 9:00 A.M. Leave to appeal denied, 444 Mich —.

Cynthia L. Pernick brought an action in the Oakland Circuit Court against Jeraldine E. Brandt, seeking the proceeds from a contract of insurance on the life of Stanley C. Brandt, deceased. The plaintiff claimed an equitable interest in the proceeds of a life insurance policy that named the defendant as the beneficiary on the basis that the decedent had been required by a judgment of divorce from the plaintiff to maintain a $50,000 life insurance policy on his life that named the plaintiff as beneficiary. The trial court, Alice L. Gilbert, J., granted summary disposition for the plaintiff, holding that the plaintiff had an equitable interest in $50,000 of the proceeds of the $100,000 policy that had been acquired by the decedent after he had married the defendant. The defendant appealed.

The Court of Appeals *held:*

The trial court correctly held that the plaintiff had an equitable interest in the proceeds of the insurance policy even though the policy had been acquired several years after the entry of the judgment of divorce. Further, the record does not support the defendant's assertion that the plaintiff was guilty of laches. However, it was error for the trial court to grant summary disposition for the plaintiff without first considering whether the defendant had a superior equitable interest in the proceeds of the policy because of her alleged payment of the premiums on the policy from her own funds without knowledge of the decedent's obligation to maintain a policy in favor of the plaintiff.

Reversed and remanded.

*Butzel Long, P.C.* (by *Edward D. Gold* and *Susan K. Friedlaender*), for the plaintiff.

*Bassey & Selesko, P.C.* (by *Robert C. Zack*), for the defendant.

Before: GRIBBS, P.J., and MICHAEL J. KELLY and REILLY, JJ.

PER CURIAM. Defendant appeals as of right from a circuit court order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) in an action to determine plaintiff's rights to proceeds from a contract of insurance on the life of Stanley C. Brandt, now deceased. We reverse and remand.

Mr. Brandt and plaintiff were divorced in January 1979. Pursuant to the terms of the judgment of divorce, Mr. Brandt was ordered to "maintain a Fifty Thousand Dollar life insurance policy naming Plaintiff, CYNTHIA L. BRANDT, as beneficiary." Neither party contends that at the time of the divorce there was a life insurance policy purchased or held by Mr. Brandt that designated plaintiff as beneficiary. Defendant and Mr. Brandt were married in September 1979. Stanley Brandt initially complied with the terms of the judgment of divorce in November 1979 when he purchased a $50,000 life insurance policy naming plaintiff as beneficiary. However, in March 1981, the policy was canceled. In October 1983, Mr. Brandt purchased another life insurance policy in the amount of $100,000 and named defendant as the beneficiary.

Upon Mr. Brandt's death in February 1989, defendant collected life insurance proceeds in the amount of $100,000. Plaintiff brought this action in June 1989, seeking to collect $50,000 of the insurance proceeds pursuant to the judgment of divorce.[1] Defendant asserted that she had spent

[1] Plaintiff brought the action against defendant individually and as the personal representative of Stanley Brandt's estate. However, in her motion and verified complaint for a temporary restraining order plaintiff acknowledged that the estate of Stanley Brandt had not yet

approximately $75,000 of the proceeds to pay for expenses associated with her husband's illness. At plaintiff's request, the trial court issued a preliminary injunction preventing defendant from using any of the remaining proceeds. The court denied defendant's motion to dismiss plaintiff's claim. Subsequently, the court granted plaintiff's motion for summary disposition and ordered that plaintiff was entitled to recover $50,000 from defendant.

A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) where, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment or partial summary judgment as a matter of law. *Featherly v Teledyne Industries, Inc,* 194 Mich App 352, 357; 486 NW2d 361 (1992). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. The opponent must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Amorello v Monsanto Corp,* 186 Mich App 324, 329-330; 463 NW2d 487 (1990). The trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence presented. *Id.* Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Featherly, supra.*

Defendant argues that the trial court erred in granting plaintiff's motion for summary disposition

been submitted for probate and that defendant had been named in the complaint as the personal representative only as a contingency. It is not clear from the record whether Mr. Brandt's estate was ever submitted to probate or if defendant was ever named as personal representative. However, the arguments of the parties suggest that plaintiff seeks to recover against defendant in her individual capacity. Therefore, we need not consider whether plaintiff could have or should have proceeded against the decedent's estate.

because plaintiff did not have a vested right in the 1983 insurance policy that named defendant as beneficiary. Defendant also claims that she had the superior equitable interest in the insurance proceeds because she used a portion of her inheritance after her father's death to discharge Stanley Brandt's debts, and she agreed to pay the premiums on the policy when Brandt agreed to name her as beneficiary of the 1983 policy.

Initially, we must determine whether, as a matter of law, plaintiff could have any vested interest in the proceeds of the 1983 insurance policy. In the case of *Wiltz v John Hancock Life Ins Co,* 58 Mich App 604; 228 NW2d 484 (1975), this Court addressed a similar issue. In that case, the judgment of divorce provided that the husband was not to change the beneficiary of any life insurance policies under which his first wife was designated as beneficiary at the time of the divorce. Furthermore, the husband was ordered to maintain the life insurance policy. The husband in that case subsequently remarried and, in direct violation of the judgment of divorce, changed the beneficiary on the life insurance policy from his first wife to his second wife. *Id.* at 606. This Court effectively found that the first wife had an equitable interest in the policy. Further, the trial court had authority, under its equitable jurisdiction, to set aside transfers, such as the change in beneficiary, that violate a divorce judgment and to return the parties to the status quo. *Id.* at 608.

We acknowledge that the present case is distinguishable from the situation in *Wiltz,* because in this case there was no life insurance policy naming plaintiff as beneficiary at the time of the divorce. Nor was plaintiff ever named beneficiary of the policy at issue in this case. Nevertheless, having reviewed cases from other jurisdictions

involving factual situations similar to that presented here, we conclude that pursuant to the judgment of divorce, plaintiff was vested with an equitable interest in $50,000 of the proceeds of any insurance policy subsequently purchased by Mr. Brandt on his life.

Plaintiff has presented an uncontroverted affidavit indicating that the parties negotiated and agreed upon a property settlement, including the insurance provision, which was incorporated into the default judgment of divorce.[2] Mr. Brandt was ordered to maintain a $50,000 life insurance policy naming plaintiff as beneficiary. Because neither of the parties claim that there was a $50,000 life insurance policy in existence at the time of the judgment, we read this provision as requiring Brandt to "acquire and maintain" such a policy. See *Equitable Life Assurance Society of the United States v Flaherty,* 568 F Supp 610, 614-615 (SD Ala, 1983). Although Mr. Brandt complied with the judgment of divorce for a short period of time, the life insurance policy in effect at the time of his death named defendant, not plaintiff, as beneficiary. Therefore, we conclude that Mr. Brandt failed to comply with the express terms and intent of the default divorce judgment.

We believe the approach taken in *Travelers Ins Co v Johnson,* 579 F Supp 1457 (D NJ, 1984), is appropriate here. In that case, the judgment of divorce provided that the husband would maintain the policy then in effect and make his wife, as trustee for their children, the primary beneficiary under the policy. The divorce decree also ordered

[2] Contrary to defendant's argument on appeal, there is no indication from the language of the judgment of divorce that the parties intended that the life insurance policy should serve only as security for Mr. Brandt's child support obligation. Compare *In re Monreal Estate,* 126 Mich App 60; 337 NW2d 312 (1983), aff'd 422 Mich 704; 375 NW2d 329 (1985).

that if the husband were to leave his employment he would be required to obtain another life insurance policy and name the wife as beneficiary. *Id.* at 1458. The husband left his employment and obtained other employment and a new life insurance policy. However, his second wife, not his first wife, was designated as the beneficiary on the subsequent policy. *Id.* at 1459.

The court in *Travelers* rejected the second wife's argument that the first wife and children of the decedent had no interest in the proceeds of the life insurance policy because the policy was a different one than had existed at the time of the divorce settlement. The court noted:

> Thus, the recovery of the first wife (or children) from a life insurance policy has not been limited to the narrow situation in which the husband *changes* the beneficiary of his existing life insurance policy from the first wife (or children) in contravention to the divorce decree. Rather, courts have found that the first wife (or children) has a superior equitable interest in the proceeds of a life insurance [sic] even when the husband has *failed to act* - by not naming the first wife as a beneficiary and/or by not even acquiring the insurance required by the divorce decree. [*Id.* at 1463; emphasis in original.]

See also *Equitable Life, supra, Rogers v Rogers,* 63 NY2d 582; 483 NYS2d 976; 473 NE2d 226 (1984) (constructive trust imposed in favor of first wife and children where husband allowed life insurance policy to lapse and obtained another policy naming his second wife as beneficiary), and *Nat'l Benefit Life Ins Co v Kelly,* 160 App Div 2d 570; 554 NYS2d 523 (1990) (a promise in a separation agreement to maintain an insurance policy designating a spouse as beneficiary vests in the spouse

an equitable interest in the policy specified that will prevail over the interest of a person in whose favor the decedent executed a gratuitous change in beneficiary). But see *Larson v Larson,* 226 Ga 209; 173 SE2d 700 (1970).

We reject defendant's argument that laches prevented plaintiff from asserting her equitable claim. We cannot find that plaintiff failed to diligently pursue her claim after Mr. Brandt's death. Likewise, there is no support in the record for defendant's allegation that plaintiff knew before Mr. Brandt's death of his failure to comply with the terms of the divorce decree. See *Torakis v Torakis,* 194 Mich App 201; 486 NW2d 107 (1992); *Great American Reserve Ins Co v Maxwell,* 38 Colo App 305; 555 P2d 988 (1976).

However, we believe that the trial court erred in granting summary disposition without determining to what extent, if any, defendant also had an interest in the proceeds of the insurance policy and whether plaintiff's equitable interest is superior to any interest held by defendant.

In *Wiltz, supra,* it was determined that a trial court had authority, pursuant to its equitable powers, to order that the first wife receive the proceeds of a life insurance policy even though the husband, in violation of the property settlement, had named his second wife as beneficiary of that policy. The Court noted that the trial court's power in this regard was "especially true in cases, such as the present one, where there has been no change in position of the subsequently named beneficiary in reliance upon the transfer." *Wiltz, supra,* 608. Additionally, in both *Rogers, supra,* and *Nat'l Benefit, supra,* the courts determined that the first wife had an equitable interest in life insurance proceeds that was superior to the interest of a *gratuitous* beneficiary. However, in *Green-*

*berg v Greenberg,* 264 Cal App 2d 896; 71 Cal Rptr 38 (1968), the court found that a second wife and her son acquired superior title, akin to that of a bona fide purchaser, to the proceeds of a life insurance policy. In that case, the second wife, without knowledge of the first wife's rights under a property settlement, agreed to pay the premiums on life insurance policies in exchange for the husband's offer to name her and their son as beneficiaries.

In this case, defendant presented an affidavit that indicated that she had no knowledge of the insurance provision of the judgment of divorce and that she used funds from her inheritance to pay premiums on the life insurance policy purchased in 1983. Although the argument at the hearing on the motion for summary disposition was somewhat disjointed, defendant essentially argued that she had a superior interest in the proceeds because she was unaware of Brandt's obligation to maintain life insurance for plaintiff and had used her inheritance to pay for premiums for the 1983 policy.

We believe that the trial court erred in granting summary disposition in favor of plaintiff without first considering the extent to which defendant had an interest in the insurance proceeds. Until that issue is resolved, the trial court is unable to determine whether plaintiff's equitable interest in the policy is superior to any interest held by the defendant or to exercise its equitable powers. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

ROYAL YORK OF PLYMOUTH ASSOCIATION v COLDWELL BANKER SCHWEITZER REAL ESTATE SERVICES

Docket No. 137147. Submitted December 10, 1992, at Detroit. Decided September 7, 1993, at 9:00 A.M.

Royal York of Plymouth Association, a judgment creditor of real estate agent Pamela S. Richards, served a writ of garnishment on Coldwell Banker Schweitzer Real Estate Services, seeking payment of its judgment from sales commissions Coldwell Banker owed to Richards. After Coldwell Banker paid Richards commissions from sales consummated after service of the writ of garnishment, the Wayne Circuit Court, William J. Giovan, J., entered a judgment for the plaintiff against Coldwell Banker in the amount of the commissions plus court costs. Coldwell Banker appealed.

The Court of Appeals *held:*

An obligation owed by a garnishee defendant to a principal defendant is subject to garnishment under MCL 600.4011(1)(b); MSA 27A.4011(1)(b) and MCR 3.101 only if it is owed or payable at the time the writ of garnishment is served on the garnishee defendant. A real estate commission is a one-time payment to an agent that only becomes due once the sale has been consummated. In this case, the commissions at issue were from sales consummated after service of the writ of garnishment. Accordingly, the commissions are not subject to garnishment because they were not owed or payable at the time the writ of garnishment was served.

Reversed.

GARNISHMENT — OBLIGATIONS — WRITS OF GARNISHMENT — REAL ESTATE COMMISSIONS.

An obligation of a garnishee defendant to the principal defendant must be owed or payable at the time the writ of garnishment is served on the garnishee defendant in order to be subject to garnishment under that writ; because real estate commissions are one-time payments to a broker or agent that only become

REFERENCES

Am Jur 2d, Attachment and Garnishment §§ 94, 120, 129.
See ALR Index under Attachment or Garnishment.

due once a sale has been consummated, real estate commissions on sales consummated after the service of a writ of garnishment are not obligations owed or debts owing at the time the writ was served and, thus, are not subject to that writ of garnishment (MCL 600.4011[1][b]; MSA 27A.4011[1][b]; MCR 3.101).

*Steven C. Sowell,* for Royal York of Plymouth Association.

*Kistner & Troyanovich, P.C.* (by *Michael G. Troyanovich* and *Julie M. Strawn*), for Coldwell Banker Schweitzer Real Estate Services.

Amicus Curiae:

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

Before: SHEPHERD, P.J., and BRENNAN and L. P. BORRELLO,* JJ.

L. P. BORRELLO, J. Garnishee defendant, Coldwell Banker Schweitzer Real Estate Services, appeals from a January 4, 1991, judgment in favor of plaintiff, Royal York of Plymouth Association, in the amount of $4,464.75. The judgment was entered after plaintiff successfully argued that garnishee defendant violated the terms of a writ of garnishment served upon it on August 10, 1990, when it paid real estate commissions to the principal defendant, Pamela Richards. We reverse.

Plaintiff sued Richards for payment of delinquent service fees assessed for administration, maintenance, and repair of the condominium complex where she owned a unit. Richards failed to defend the action, and on August 4, 1989, plaintiff

* Circuit judge, sitting on the Court of Appeals by assignment.

obtained a default judgment against her in the amount of $7,410.66, representing the delinquent fees plus attorney fees and costs. In an effort to collect the judgment, plaintiff filed a series of garnishments precluding garnishee defendant from paying Richards any obligation owed or transferring any property to Richards.

On August 13, 1990, garnishee defendant executed a disclosure and calculation sheet in which it stated that Richards was "a licensed real estate sales associate and is paid strikly [sic] by commission." On August 21 and 23, 1990, garnishee defendant gave Richards two checks representing commissions earned on real estate transactions that Richards performed as an independent contractor with garnishee defendant. The real estate transactions were closed after service of the writ of garnishment and filing of the disclosure statement. When plaintiff learned of the payments, it moved for entry of judgment against garnishee defendant for the amount of money paid to Richards, alleging that the payments violated the August 10, 1990, writ of garnishment and the statutes and court rules governing garnishments. Garnishee defendant answered the motion and denied any liability, claiming that because the commissions were not "obligations owed" at the time the writ was served, it did not violate the provisions of the writ or other applicable laws in paying Richards her commissions. See MCL 600.4011; MSA 27A.4011.

The trial court conducted a hearing on the motion and issued its findings of fact. The court essentially concluded that the question whether the real estate commissions represented obligations owed at the time the writ was served was irrelevant because garnishee defendant violated the so-called "injunction provision" of the writ and the court rules. See MCR 3.101(E)(1)(c). The trial

court entered a judgment against garnishee defendant in an amount equal to the commissions paid plus costs. It is from this judgment that garnishee defendant now appeals.

Pursuant to MCL 600.4011(1); MSA 27A.4011(1), the circuit court has the power to apply the following property or obligations to the satisfaction of an outstanding judgment:

> (a) Personal property belonging to the person against whom the claim is asserted but which is in the possession or control of a third person if the third person is subject to the judicial jurisdiction of the state and the personal property to be applied is within the boundaries of this state.
>
> (b) An *obligation owed* to the person against whom the claim is asserted if the obligor is subject to the judicial jurisdiction of the state. [Emphasis added.]

On several occasions, our Supreme Court has held that the garnishment statute applies only to obligations owed or payable at the time the writ is served. See *Erb-Kidder Co v Levy,* 262 Mich 62, 64; 247 NW 107 (1933); *Kiely v Bertrand,* 67 Mich 332; 34 NW 674 (1887); *Webber v Bolte,* 51 Mich 113; 16 NW 257 (1883).

In the instant case, the question is whether real estate commissions on sales not consummated before the service of the writ constitute obligations owed or debts owing at the time the writ was served. Although the trial court declined to answer this question, we believe it is paramount to any determination that the writ of garnishment was violated.

A real estate commission is a one-time payment to a broker or agent that only becomes due once the sale has been consummated. In fact, neither the seller nor the employing broker is obligated to

pay commissions until the sale is completed. See *First Central Coast Bank v Cuesta Title Guarantee Co,* 143 Cal App 3d 12, 14; 191 Cal Rptr 433 (1983) (real estate commissions in escrow not garnishable until the sale closes). In this case, the undisputed facts are that the writ was served on or about August 13, 1990, while closing of the sales at issue did not take place until August 17 and 20, 1990. Thus, when garnishee defendant completed the disclosure pursuant to service of the writ, it did not owe Richards the commissions generated from the sales at issue. In the provisions of the sales agreements that are part of this record, it is clearly stated that the seller is not obligated to pay the commissions until such time as the sale of the property is consummated. Insofar as the seller was not obligated to pay the commissions until the sale was completed, absent an agreement to the contrary, neither did garnishee defendant owe Richards those commissions until the sale was consummated.

Although garnishment actions are authorized by statute, the procedural aspects of the garnishment process are set out in the court rules under MCR 3.101 and 3.102. In fact, the statute contains a provision that the court's exercise of jurisdiction regarding garnishment actions must conform to the rules established by our Supreme Court. MCL 600.4011(2); MSA 27A.4011(2). Thus, although the statute provides the authority for the circuit court to exercise garnishment jurisdiction, the court must do so within the parameters established in the Michigan Court Rules.

Pursuant to MCR 3.101(G)(1)(d), the garnishee is liable for "all debts, whether or not due, owing by the garnishee defendant to the principal defendant when the writ is served on the garnishee defendant . . . ." This rule conforms with the statutory

provision that the court has the power to apply the garnishment to an "obligation owed." See MCL 600.4011(1)(b); MSA 27A.4011(1)(b).

In *Chayka v Brown,* 92 Mich App 360, 367; 284 NW2d 530 (1979), this Court stated:

> In its interpretation of this clause ["whether or not due"], Michigan is in accord with the majority of jurisdictions which hold that for a garnishment to be effective there must be an existing debt. Debts due in the future then refer to claims which are already fixed in amount or capable of being so fixed, and which do not depend for their validity or amount on anything to be done or earned in the future, or a continued liability which may be changed by events. [Citation omitted.]

The trial court apparently concluded that *Chayka* stands for the proposition that the court rules include an "injunction provision" that independently prohibits a garnishee defendant from transferring any property or debt to the principal defendant after a writ is served, regardless of whether that property was in the possession of the garnishee defendant or whether the debt was owing at the time the writ was served. See MCR 3.101(G)(1)(a) and (d). We believe that such an interpretation ignores the clear language of the rules requiring that the debt be owed at the time the writ was served.

The so-called "injunction provision" of MCR 3.101 states in part as follows:

> (E) Writ of Garnishment. . . . The writ shall:
> (1) direct the garnishee defendant:
>
> * * *
>
> (c) to pay no obligation to the principal defendant, *unless allowed by statute or court rule.* [Emphasis added.]

A fair reading of this provision in the context of the rule requiring a debt to be owing at the time the writ was served suggests that a prerequisite to application of the "injunction provision" is a determination that the subject property falls within the jurisdictional parameters of the garnishment statute or court rule. In fact, we are persuaded that a debt that is not owed or owing at the time the writ is served falls within the language "unless allowed by the statute or court rule" and constitutes an exception to the "injunction provision."

Thus, we hold that the "injunction provision" of MCR 3.101(E)(1)(c) only limits the garnishee defendant from paying debts that would be in violation of the substantive provisions of the rule. As such, it was error for the trial court to rely upon the "injunction provision" without first having determined whether the commissions constituted debts owing at the time the writ was served.

We note that both the statute and the court rule have been amended since the beginning of this action. See MCL 600.4012; MSA 27A.4012 as added by 1991 PA 67 (effective December 31, 1991); MCR 3.101(U) (effective December 31, 1991). The Legislature amended the statute to provide for the use of a continuing garnishment, apparently in the interest of alleviating the procedural and administrative complications that arise with the garnishment of periodic payments. See House Legislative Analysis, HB 4064, July 28, 1991. The court rule was then amended to effectuate the provisions of the statute as amended. However, even as amended, we expressly hold that the statute and the court rule do not obligate a garnishee defendant to pay real estate commissions for sales of property that have not yet become fixed or due because closing has not taken place. To conclude otherwise would result in an impermissible expansion of the power

given to the circuit court by the statute. See MCL 600.4011(1)(b); MSA 27A.4011(1)(b) (referring to the circuit court's power to garnish obligations owed).

The trial court erred in failing to determine whether real estate commissions constituted debts owed or owing at the time the writ was served. Thus, the trial court's conclusion that the "injunction provision" had been violated under the facts of this case was improper. Inasmuch as garnishee defendant did not violate the garnishment statute when it paid Richards real estate commissions earned after the writ was served, the judgment in favor of plaintiff is hereby vacated.

Reversed.

## WEEMS v CHRYSLER CORPORATION

Docket Nos. 143709, 144061. Submitted November 9, 1992, at Lansing. Decided September 7, 1993, at 9:05 A.M. Leave to appeal sought.

Virginia R. Weems was awarded workers' compensation death benefits as a result of the death of her husband from an injury suffered during the course of his employment with Chrysler Corporation. The amount of the death benefits to be paid was based in part on the magistrate's findings that the claimant was wholly dependent on her husband's income despite the fact that she received $850 a month in pension benefits herself and that the daughter and grandchildren of the claimant and her husband were not his dependents. Chrysler appealed. The claimant did not. The Workers' Compensation Appellate Commission found that the claimant was only partially dependent within the meaning of the death benefit provision and, because her calculated weekly benefit as a partially dependent claimant was less than fifty percent of the state average weekly wage, awarded her benefits in the amount of fifty percent of the state average weekly wage pursuant to the minimum death benefit provision. The claimant and Chrysler each appealed. The appeals were consolidated.

The Court of Appeals *held:*

1. The appellate commission did not err in finding that the claimant was partially dependent within the meaning of the death benefit provision, MCL 418.321; MSA 17.237(321). Her pension was a substantial and reasonably regular income source and not of a trifling amount; accordingly, it cannot be said that she relied totally and completely on her husband's income.

2. Neither the fact that claimant was considered to be fully dependent on her husband while he survived nor the fact that without his income she would have been unable to maintain the same standard of living precludes finding her to be only

REFERENCES

Am Jur 2d, Workers' Compensation §§ 188, 191, 193, 207, 414, 577, 579, 686, 701, 714.

See ALR Index under Workers' Compensation.

partially dependent for the purpose of the death benefit provision.

3. The appellate commission correctly determined that death benefits paid to partially dependent claimants are subject to the minimum weekly benefits provision of MCL 418.356(2); MSA 17.237(356)(2) and in awarding death benefits in accordance with that provision.

4. The appellate commission correctly refused to consider the claimant's arguments concerning the magistrate's conclusion that her grandchildren were not shown to be dependents of the decedent, inasmuch as she had not preserved that issue by filing either an appeal or a cross appeal of the magistrate's order.

Affirmed.

1. WORKERS' COMPENSATION — DEPENDENTS — DEATH BENEFITS.

A person is partially dependent on the earnings of a deceased employee for the purpose of workers' compensation death benefits where that person has a substantial and regular income source of more than a trifling amount and did not rely totally and completely on the decedent's income (MCL 418.321; MSA 17.237[321]).

2. WORKERS' COMPENSATION — DEPENDENTS — DEATH BENEFITS.

The provision fixing the minimum weekly benefit level of workers' compensation death benefits is applicable to benefits paid to partially dependent claimants (MCL 418.356[2]; MSA 17.237[356][2]).

3. WORKERS' COMPENSATION — APPEAL — WORKERS' COMPENSATION APPELLATE COMMISSION.

The Workers' Compensation Appellate Commission is limited to reviewing only the specific findings and conclusions the parties request to be reviewed (MCL 418.861a[11]; MSA 17.237[861a][11]).

*Thurswell, Chayet & Weiner* (by *Lenny Segel* and *Tammy J. Reiss*), for Virginia R. Weems.

*Garan, Lucow, Miller, Seward, Cooper & Becker, P.C.* (by *Dennis P. Partridge* and *Robert D. Goldstein*), for Allstate Insurance Company.

*Lacey & Jones* (by *Susan B. Cope*), for the defendant.

Before: GRIBBS, P.J., and MICHAEL J. KELLY and REILLY, JJ.

MICHAEL J. KELLY, J. These consolidated appeals concern the amount of death benefits due plaintiff, the widow of an employee who died from injuries arising out of and in the course of his employment. The Workers' Compensation Appellate Commission concluded that plaintiff was partially dependent upon her husband's earnings under MCL 418.321; MSA 17.237(321), that plaintiff was entitled to benefits at the rate of $149.60 a week except that MCL 418.356(2); MSA 17.237(356)(2) required a minimum weekly payment of $207.35, and that plaintiff had not preserved for review the issue of her grandchildren's dependency. In a concurrence, one WCAC member calculated plaintiff's benefit rate at $113.94 a week, but agreed that plaintiff was entitled to a minimum of $207.35 under § 356(2).

Plaintiff's husband was involved in an automobile accident during the course of his employment on March 10, 1986. Injuries received led to his death on March 23, 1986. Plaintiff's husband earned $822.91 a week. Plaintiff herself received a retirement pension of $850 a month from her former employer. Plaintiff and her husband pooled their incomes for their mutual support. The parties agreed that the pertinent state average weekly wage was $414.70.

Plaintiff and her husband helped support their daughter and her three minor children. The daughter and grandchildren lived with plaintiff and her husband from about 1979 to December 1985, when the daughter and the children moved to California. Plaintiff and her husband continued to provide financial support, and plaintiff continued to do so after her husband's death. Plaintiff

claimed that both she and her grandchildren were wholly dependent on her husband's earnings.

I

Under MCL 418.321; MSA 17.237(321), a person "wholly" dependent on a deceased employee's earnings is entitled to benefits of eighty percent of the employee's after-tax average weekly wage for five hundred weeks, subject to maximums and minimums provided in the act. But a person "only partially dependent" is entitled to benefits

> equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as 80% of the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of injury.

Dependency, generally a factual issue, becomes a legal conclusion where the facts are undisputed. *Garbutt v Stoll,* 287 Mich 396, 399-400, 405; 283 NW 624 (1939); *Corbett v Montgomery Ward & Co, Inc,* 194 Mich App 624, 631; 487 NW2d 825 (1992). The WCAC concluded plaintiff was partially dependent under § 321.

Our role in reviewing decisions of the WCAC, in light of the changes brought about by 1985 PA 103 that created the WCAC, was clarified in *Holden v Ford Motor Co,* 439 Mich 257, 261-263; 484 NW2d 227 (1992). The standard of judicial review of final WCAC decisions is essentially the same as the standard used to review the decisions of the Workers' Compensation Appeal Board: the WCAC's findings are conclusive if there is any competent evidence to support them. *Holden v Ford Motor Co, supra* at 263, 269; *Corbett v Montgomery Ward, supra* at 629. We review the findings of the WCAC,

not those of the magistrate. *Holden v Ford Motor Co, supra* at 262.

There was competent evidence supporting the WCAC's conclusion that plaintiff was only partially dependent upon her husband's income. Plaintiff received a pension of $850 a month, or $196.30 a week. Even though plaintiff's pension amounted to only nineteen percent of the family's pooled weekly income of $1,019.21, any reasonable view of the facts shows that plaintiff's pension was a meaningful contribution to the pooled family income and that plaintiff was supported in part by that pension. Therefore plaintiff was only partially dependent on her husband's income. Plaintiff's pension was a "substantial and reasonably regular income" source. *Rose v Paper Mills Trucking Co,* 47 Mich App 1, 7; 209 NW2d 305 (1973), quoting from 2 Larson, Workmen's Compensation Law, § 63.13, pp 134.7-134.8. Plaintiff did not rely "totally" or "completely" on her husband's income. *Ammons v Dunbar & Sullivan Construction Co,* 54 Mich App 107, 109; 220 NW2d 323 (1974).

We reject plaintiff's attempts to distinguish *Rose* and *Ammons.* The fact that those cases dealt with persons who did not necessarily have a legal obligation to support the claimants was not material to the decisions in *Rose* and *Ammons.* Plaintiff's argument that there must be a point where a dependent's personal income is so small that it should not be considered has more strength, but that point is hardly reached where the dependent has personal income of over $10,000 a year. Compare *Kalcic v Newport Mining Co,* 197 Mich 364, 370; 163 NW 962 (1917), where the Court described the wholly dependent widow's total earnings of $0.40 to $0.60 a month as "trifling."

Plaintiff's reliance on *Garbutt v Stoll,* 287 Mich 396; 283 NW 624 (1939), is misplaced. There the

claimant-mother was found totally dependent upon her deceased son, despite her receipt of monthly payments from the employer of her deceased husband. The payments received by the claimant, however, were "temporary, voluntary payments" that were paid only during the first year following the husband's death. *Id.* at 401. The instant case contrasts sharply, because plaintiff received regular and continuing pension payments that she herself earned.

Plaintiff and Allstate argue that it is inconsistent to find plaintiff partially dependent after her husband's death when, under MCL 418.353(b); MSA 17.237(353)(b), she was considered fully dependent during the two weeks her husband survived following the accident. But the legislative scheme leading to different results depending on whether an employee survives or not is reasonable. The injured employee's death is a significant event in many ways. Among other things, the Legislature could recognize that an employee does not require continuing financial support after his demise.

Plaintiff's argument that she is wholly dependent is largely based on the fact that without her husband's income she cannot maintain her previous standard of living. Regular benefits under the act are a function of employee earnings. MCL 418.351 and 418.361; MSA 17.237(351) and 17.237(361). Death benefits under § 321 are also based upon employee earnings. The WCAC correctly concluded plaintiff was only partially dependent.

II

Once the WCAC found plaintiff to be partially dependent, the majority calculated plaintiff's benefits under § 321 to be $149.60 a week, while the

concurring member calculated benefits of $113.94 a week. But all WCAC members agreed that plaintiff was entitled to benefits of $207.35 a week, one-half of the applicable state average weekly wage, pursuant to the minimum rate imposed by MCL 418.356(2); MSA 17.237(356)(2), which provides:

> The minimum weekly benefit for death under section 321 shall be 50% of the state average weekly wage as determined under section 355.

Defendant argues that § 356(2) applies only to benefits to persons wholly dependent under § 321, and not to those who are partially dependent. Defendant points out that in § 321 the language "subject to the maximum and minimum rates of compensation under the act" immediately follows the language providing for benefits for wholly dependent persons and that there is no such limiting language following the provision for benefits for those who are partially dependent. Defendant also argues that application of the minimum in § 356(2) could result in payment of more than one hundred percent of benefits in cases of multiple dependents where the fifty percent minimum is applied to each dependent.

As concluded by the WCAC, § 356(2) applies to all death benefit cases under § 321. The statute is clear. It makes no distinction between persons wholly and persons partially dependent. Where the plain language of a statute is clear, judicial construction is normally neither necessary nor permitted. *Montgomery Ward & Co, Inc v Dep't of Treasury,* 191 Mich App 674, 679; 478 NW2d 745 (1991).

Defendant's reasoning is amiss. Although the limiting language regarding maximums and minimums that follows the provision for benefits for

wholly dependent persons in § 321 is not repeated after the provision for benefits for partially dependent persons, the limitations are enforced for those who are partially dependent by virtue of the fact that benefits for a partially dependent person are calculated as a percentage of benefits for persons wholly dependent. Thus, partial benefits are a percentage of whole benefits that have already been adjusted for statutory maximums and minimums. In addition, the asserted result of excessive total benefits to multiple dependents will not occur, because § 356(2) refers to the total benefits paid, not necessarily to the total benefits received. Death benefits are apportioned to multiple dependents under MCL 418.331(b); MSA 17.237(331)(b).

Because the WCAC correctly ordered benefits pursuant to § 356(2) at a rate greater than was otherwise calculated either by the majority or the concurring member, we need not decide which method (if either) was the proper one for calculating benefits for a partially dependent person under § 321.

III

The WCAC correctly declined to consider plaintiff's arguments disputing the magistrate's conclusion that plaintiff had not shown her grandchildren to be dependents of her husband at the time of his death. Only defendant appealed to the WCAC. Plaintiff did not file a claim for review, MCL 418.859a(1); MSA 17.237(859a)(1), or a cross appeal, MCL 418.861a(6); MSA 17.237(861a)(6), after defendant filed its claim for review. The WCAC was limited to reviewing "only" the "specific" findings or conclusions the parties "requested be reviewed." MCL 418.861a(11); MSA 17.237(861a)(11).

The WCAC adhered to the statutory scheme,

which was devised to expedite appeals under the act. The fact that plaintiff had received the maximum rate of benefits from the magistrate was an insufficient reason not to appeal the adverse result concerning one of her principal claims, particularly once defendant appealed and thereby put into jeopardy the favorable result she had obtained from the magistrate. The result here is no more unfair than if she had failed to appeal to this Court. MCL 418.861a(14); MSA 17.237(861a)(14). *Wszola v Robert Carter Corp,* 187 Mich App 372; 468 NW2d 57 (1991).

Affirmed. No costs, no party having prevailed in full.

DEPARTMENT OF TREASURY v COMERICA BANK

Docket No. 144045. Submitted April 6, 1993, at Detroit. Decided September 7, 1993, at 9:10 A.M.

The Department of Treasury brought an action in the Wayne Circuit Court against Comerica Bank, seeking funds held by the bank in a joint account, one of the owners of which was allegedly a delinquent taxpayer. On April 20, 1990, the department had issued a warrant and notice of levy regarding the account, held by Intissar and Mariam Ismail. The levy stated that Youssef and Intissar Ismail, who are husband and wife, owed personal income taxes and intangibles taxes. On May 18, 1990, the bank paid the department only one-half of the balance of the joint account, contending that a joint tenant in a bank account is the presumptive owner of only fifty percent of the account. On May 22, 1990, at a hearing regarding Youssef and Intissar Ismail's tax liability, the department's representatives determined that Youssef and Intissar were not liable for the taxes with regard to which the warrant and levy had been issued. However, Youssef Ismail and the department's representatives then agreed that all money obtained pursuant to the levy would be applied on an outstanding debt for sales tax owed by a business owned by Youssef Ismail individually. There was no evidence presented regarding Intissar Ismail's role, if any, in her husband's business, her liability for the sales tax debt, or Youssef Ismail's authority to apply Intissar Ismail's property to his business' sales tax debt. Although the matter was settled on May 22, 1990, the assessments for Youssef and Intissar Ismail's personal income taxes and intangibles taxes were not formally canceled until March 4, 1991. When the bank did not remit the remaining one-half of the joint account following receipt of a formal demand letter dated August 16, 1990, the department brought this action, seeking the remaining one-half of the account and a penalty of one-half of that amount pursuant to MCL 205.25(3); MSA 7.657(25)(3). The complaint stated that Youssef and Intissar Ismail were indebted to the plaintiff for taxes and did not disclose that the plaintiff had agreed to cancel the underlying assessments against Youssef and Intissar Ismail. The assessments were formally canceled before the trial. After a bench trial, the court, John H. Hausner, J., ruled that pursuant to MCL 205.25; MSA 7.657(25), and upon presen-

tation of a warrant and levy, the plaintiff may levy upon all property and rights to property belonging to the taxpayer, including funds in a joint bank account on the basis of the taxpayer's right to withdraw all the funds. The court ordered the defendant to surrender the remaining funds in the joint account, but did not impose a penalty. The defendant appealed.

The Court of Appeals *held:*

1. The issue presented is essentially hypothetical. For that reason, the opinion is purely advisory, and is nonbinding dicta.

2. Pursuant to MCL 205.25; MSA 7.657(25), the defendant should have paid to the plaintiff the entire amount in the account held jointly by Intissar and Mariam Ismail.

Affirmed.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, and *E. David Brockman* and *Marci B. McIvor,* Assistant Attorneys General, for the plaintiff.

*Michael F. Main, Michael D. Boutell, Christian Nilson, Paul W. Creasy, Lawrence J. Sauter, Elias Muawad,* and *Kurt M. Carlson,* for the defendant.

Before: HOOD, P.J., and BRENNAN and CORRIGAN, JJ.

CORRIGAN, J. In this action to determine rights to a delinquent taxpayer's assets, defendant bank appeals the circuit court's ruling, pursuant to the levy statute, MCL 205.25; MSA 7.657(25), that it should have paid over to plaintiff Department of Treasury the entire amount in an account held jointly by taxpayer Intissar Ismail and an innocent third party, Mariam Ismail, who was not named in the levy. We affirm.

On April 20, 1990, plaintiff issued a warrant and notice of levy for a joint account at Manufacturers National Bank (now Comerica Bank). The levy stated that Youssef and Intissar Ismail, who are husband and wife, owed $55,717.43 in Michigan personal income taxes and intangibles taxes. The

warrant was served on April 23, 1990.[1] On May 18, 1990, defendant paid to plaintiff the sum of $15,714.53. That sum represented one-half of the balance in the joint account at the bank, held by Intissar and Mariam Ismail (*not* Intissar and Youssef Ismail). Defendant did not remit the remaining one-half, contending that a joint tenant in a bank account is the presumptive owner of only fifty percent of the account.

On May 22, 1990, four days after defendant had paid plaintiff one-half of the balance of the account, a hearing was held regarding Youssef and Intissar Ismail's tax liability. From the facts before us, we cannot ascertain whether Intissar Ismail attended or was represented at that hearing. At the hearing, plaintiff's representatives determined that Youssef and Intissar Ismail were *not* liable for the unpaid personal income taxes or intangibles taxes as to which the warrant and levy had been issued. Youssef Ismail and plaintiff's representatives then agreed that all money obtained pursuant to the levy would be applied on an outstanding debt of $91,000 for sales tax owed by Youssef Ismail's business, "Scoopy's Fill-Up." The record is silent regarding Intissar Ismail's role, if any, in Youssef Ismail's business and her liability for the sales tax debt. It is also silent as to Youssef Ismail's authority to apply his wife's property to his business' sales tax debt. Although plaintiff apparently settled the matter with the taxpayers on May 22, 1990, the assessments for personal income taxes and intangibles taxes were not formally canceled by plaintiff until March 4, 1991, when plaintiff approved the May 22, 1990, determination.

[1] Although the parties' stipulated facts state that the warrant was served on May 2, 1990, the warrant itself indicates that service was accomplished on April 23, 1990.

Nonetheless, plaintiff continued in June and July of 1990 to attempt to recover from defendant the balance of the Intissar-Mariam account, culminating in a formal demand letter dated August 16, 1990. Defendant did not remit the remainder of the Intissar and Mariam Ismail joint account. Plaintiff filed suit in the Wayne Circuit Court on October 10, 1990, representing to the court that both taxpayers were indebted to plaintiff for unpaid taxes. However, as the proceedings on May 22, 1990, established, this representation in the complaint was no longer accurate. In addition to seeking the $15,714.53 remaining in the account, plaintiff sought a penalty of one-half that amount ($7,857.26), pursuant to MCL 205.25(3); MSA 7.657(25)(3). Neither the August 16 demand letter nor the October 10 complaint disclosed that plaintiff had agreed to cancel the underlying assessments against Intissar and Youssef Ismail; indeed, the complaint represented that "Youssef and Intissar Ismail *are* indebted" to plaintiff for 1983 and 1984 taxes [emphasis supplied].[2]

The matter was submitted to the court on stipulated facts, both parties agreeing to the need for a judicial determination of the question. Neither party, however, explained on what basis plaintiff continued to pursue a demand against the joint account of *Intissar* and *Mariam* Ismail, when—well before August 16, 1990—plaintiff knew that the only tax liability was *Youssef* Ismail's sales tax liability for the operation of his individual business, Scoopy's Fill-Up. By the time of the trial, plaintiff had abandoned its claim for the remaining $15,714.53 in the Intissar and Mariam Ismail

[2] The court noted that "there was a personal tax liability or something which was thrown out, and then they reassessed it on the sales tax." Plaintiff's counsel replied, "I believe they were—it was not as to the ownership of the money. What they did is that they—it was on the basis, the assessment itself."

account because the assessments had been formally canceled. The discussion of damages related to the fifty percent penalty. Plaintiff conceded that it had only a weak claim because defendant's withholding of the money was not "unreasonable."

After a bench trial, the court ruled that pursuant to MCL 205.25; MSA 7.657(25), and *upon presentation* of a warrant and levy, the plaintiff may levy upon all property and rights to property belonging to the taxpayer, including "funds in a joint bank account based upon the taxpayer's rights to withdraw all of said funds."[3] The court ordered defendant to surrender the remaining funds in the Intissar and Mariam Ismail account, but did not impose any "costs or penalties . . . because a public issue is involved." Defendant appealed. Although we would be inclined to find in plaintiff's favor on the underlying legal issue, we recognize that our opinion on this question is purely advisory. In the factual posture of this case, the issue presented is essentially hypothetical. We have *no* record evidence that Youssef Ismail had any legal right to the Intissar and Mariam Ismail joint account at the time of the complaint, the trial, or the final order. Nonetheless, we will attempt to respond to the parties' arguments because we recognize the importance of the underlying question. Our opinion regarding this question is, however, nonbinding dicta.

It is a fundamental rule of statutory construction that where the language of a statute is clear and unambiguous, no judicial interpretation is warranted. *Victorson v Dep't of Treasury,* 439 Mich 131, 137; 482 NW2d 685 (1992). Judicial construction is permitted where the language of a statute is susceptible to more than one interpreta-

[3] We need not vacate this order, because it is obviously conditional, and the condition cannot come to pass.

tion. *Id.* at 138. When construing a statute, a court is obligated to ascertain and give effect to the intention of the Legislature. *Id.* Where the wording of a statute is ambiguous, we seek to discern the intent of the Legislature in light of the purpose sought to be accomplished. *Energetics, Ltd v Whitmill,* 442 Mich 38, 48; 497 NW2d 497 (1993). *Comerica Bank-Detroit v Dep't of Treasury,* 194 Mich App 77, 92; 486 NW2d 338 (1992). The scope of tax laws will not be extended by implication or forced construction. *Id.,* citing *Hart v Dep't of Revenue,* 333 Mich 248, 251; 52 NW2d 685 (1952).

Plaintiff indisputably has statutory authority to pursue assets of delinquent taxpayers in the hands of others, such as banks. MCL 205.25; MSA 7.657(25) provides in part:

> (1) . . . Except as provided in subsection (5), the commissioner or an authorized representative of the commissioner . . . may levy on all property and rights to property, real and personal, tangible and intangible, belonging to the taxpayer or on which a lien is provided by law for the amount of the deficiency, and sell the real and personal property of the taxpayer found within the state for the payment of the amount due, the cost of executing the warrant, and the additional penalties and interest. Except as provided in subsection (6) [permitting service by certified mail], the officer or agent serving the warrant shall proceed upon the warrant in all respects and in the same manner as prescribed by law in respect to executions issued against property upon judgments by a court of record.

The dispute in this case centers on the method by which such assets may be collected.

Regarding this question of first impression, no Michigan case is squarely on point. We find that *United States v Nat'l Bank of Commerce,* 472 US

713; 105 S Ct 2919; 86 L Ed 2d 565 (1985), provides guidance. In *Nat'l Bank of Commerce,* a resident of Arkansas was delinquent in paying federal income tax. The Internal Revenue Service filed a notice of levy against two accounts at the National Bank of Commerce, both held in the name of the taxpayer and two other parties, neither of whom was subject to the IRS levy. *Id.* at 715. All three individuals were authorized to make withdrawals from either account. *Id.* at 716. The bank refused to comply with the levy and the United States brought suit. *Id.*

The analogous portion of the federal tax code is essentially identical to the relevant portion of MCL 205.25; MSA 7.657(25):

> If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. [26 USC 6331(a).]

The Court explained that state law determines the taxpayer's property and rights to property, but that, once those are established, "the tax consequences . . . are dictated by federal law." 472 US 722. The IRS "steps into the taxpayer's shoes," *id.* at 725, and acquires "whatever rights the taxpayer himself possesses." *Id.* Because the taxpayer had a right under state law to make withdrawals from the accounts, *id.,* and "[c]ommon sense dictates that a right to withdraw qualifies as a right to property for purposes of §§ 6331 and 6332," *id.,* the Court held that the levy extended to the full

amount in both joint accounts. *Id.* at 726. See, also, e.g., *Comm'r of Internal Revenue v Stern,* 357 US 39, 45; 78 S Ct 1047; 2 L Ed 2d 1126 (1958) (in diversity cases, federal courts must apply state decisional law in defining state-created rights, obligations, and liabilities); *United States v General Motors Corp,* 929 F2d 249, 252 (CA 6, 1991); *William L Comer Family Equity Trust v United States,* 732 F Supp 755, 758 (ED Mich, 1990) (state law determines the nature and extent of a taxpayer's property interests in any given property).

In Michigan, the holders of a joint bank account are joint tenants with the right of survivorship. MCL 487.703; MSA 23.303 provides:

> When a deposit shall be made, in any bank by any person in the name of such depositor or any other person, and in form to be paid to either or the survivor of them, *such deposits* thereupon and any additions thereto, made by either of such persons, upon the making thereof, *shall become the property of such persons as joint tenants,* and the same together with all interests thereon, shall be held for the exclusive use of the persons so named *and may be paid to either during the lifetime of both* . . . . [Emphasis supplied.]

Decisional law makes it plain that any of the coowners of a joint account may withdraw the entire account. See *In re Wright Estate,* 430 Mich 463, 469, n 7; 424 NW2d 268 (1988); *Sasanas v Manufacturers Nat'l Bank of Detroit,* 130 Mich App 812, 819; 345 NW2d 621 (1983). See, also, e.g., *LaValley v Pere Marquette Employes' Credit Union,* 342 Mich 639, 643; 70 NW2d 798 (1955) (credit union could pay entire savings account to coholder, depositor's son); *Meigs v Thayer,* 289 Mich 680, 683; 287 NW 342 (1939) (co-owner who was not depositor would have had right to entire account during

depositor's lifetime); *Esling v City Nat'l Bank & Trust Co,* 278 Mich 571, 577; 270 NW 791 (1936) (either depositor could have withdrawn entire account).

Plaintiff, relying on the rights of a holder of a Michigan joint account and the *Nat'l Bank of Commerce* rule that the IRS "stands in the shoes" of a delinquent taxpayer, concludes that the Department of Treasury is entitled to levy upon the whole account. Defendant counters by citing the portion of MCL 205.25; MSA 7.657(25) that directs that "the officer or agent serving the warrant [of levy] shall proceed upon the warrant in all respects and in the same manner *as prescribed by law* in respect to executions issued against property upon judgments by a court of record" [emphasis supplied]. Defendant points out that "[a]s prescribed by law," creditors of one depositor cannot reach the entire account.[4] MCL 487.718; MSA 23.295(8) provides:

> Deposits in a statutory joint account shall be subject to the rights of creditors of the persons designated in the statutory joint account contract as owners of the funds *to the extent of the ownership,* except that the funds shall remain subject to laws applicable to transfers in fraud of creditors. [Emphasis supplied.]

In construing MCL 205.25; MSA 7.657(25), we must bear in mind that the state taxing authority is in a preferred position with respect to the taxpayer's other creditors. For example, tax liens

[4] Compare *American Nat'l Bank & Trust Co v Modderman,* 37 Mich App 639, 643; 195 NW2d 342 (1972) (account payable to "husband or wife" could be garnished by husband's creditor); *Muskegon Lumber & Fuel Co v Johnson,* 338 Mich 655, 659; 62 NW2d 619 (1954) (where husband mingles funds with wife's, entire fund is subject to garnishment). These decisions occurred before the enactment of MCL 487.718; MSA 23.295(8).

"shall take precedence over all other claims, encumbrances and liens" on personal property, MCL 211.40; MSA 7.81. When real property is sold for delinquent taxes, the state's lien is "a preferred or first claim upon the lands," MCL 211.60; MSA 7.104. See, e.g., *In re Rite-Way Tool & Mfg Co,* 333 Mich 551, 556; 53 NW2d 373 (1952) (tax lien superior to chattel mortgage); *In re Dissolution of Ever Krisp Food Products Co,* 307 Mich 182, 207; 11 NW2d 852 (1943) (personal tax lien takes precedence over mortgage lien); *Michigan Nat'l Bank v Auburn Hills,* 193 Mich App 109, 110; 483 NW2d 436 (1992) (tax lien superior to interests of secured party).

Our review of this matter is complicated by the parties' eagerness to obtain a judicial determination of the question presented, i.e., whether a tax levy extends to all the funds in a joint account. The realities of the actual case, however, are such that it is not an appropriate vehicle to resolve the underlying question. Youssef and Intissar Ismail owed a tax debt. Plaintiff levied on an account owned, in part, by Intissar. But plaintiff withdrew its claim to the levied funds at a hearing four days later, and well before plaintiff began its efforts to collect the remaining funds in the account. By the time plaintiff filed its complaint on this record, it actually had no legal claim to the remaining funds in the account of the taxpayer wife and the innocent third party.[5]

Although Youssef Ismail may have agreed that funds from that account were to be applied to the tax debt of his business, nothing in the record before us, or presented to the court below, indicates that he had the authority to make such an assignment. That is, a link in the chain is missing.

[5] Youssef Ismail may have owned the funds in Intissar Ismail's account. We have no such showing on this record.

Without proof that Intissar Ismail consented to having her personal property used to satisfy her husband's obligations, plaintiff had no claim at all with regard to the account in dispute. It seems to us that defendant would have had a complete defense to the complaint, had the plaintiff been fully candid. Because neither Intissar nor Mariam Ismail was indebted to plaintiff, defendant was not "[a] person who refuses or fails to surrender any property or rights to property *subject to levy*," MCL 205.25(2); MSA 7.657(25)(2) (emphasis supplied).

Absent evidence to the contrary, co-owners are presumed to have made equal contributions to a joint account. See *Sussex v Snyder,* 307 Mich 30, 38; 11 NW2d 314 (1943). Defendant apparently relied upon this rule when it remitted only one-half of the balance in the Ismails' account to plaintiff. Plaintiff, on the other hand, argues that the restriction appearing in MCL 205.25; MSA 7.657(25), but which is *not* found in 26 USC 6331(a), is merely procedural and does not affect the taxpayer's substantive "rights to property." We agree.

As plaintiff analyzes the statute, the limitations on the levy power included in the tax code were intended to circumscribe the authority of taxing entities primarily with respect to seizures of physical property. The intent of the Legislature, plaintiff suggests, was to assure that delinquent taxpayers would be afforded the same protections available to other debtors in regard to the seizure and sale of nonliquid assets. We find support for this position in cases involving the collection of property taxes. In *Fidlin v Collison,* 9 Mich App 157, 167; 156 NW2d 53 (1967), this Court reproached a city tax collector for seizing more than $10,000 worth of property to satisfy a jeopardy assessment

of $629.32 in personal property tax. Similarly, in *Joy Management Co v Detroit,* 176 Mich App 722, 732-733; 440 NW2d 654 (1989), the Court found the seizure of $13,218.81 excessive when the delinquent tax was only $2,343.

We are mindful that a tax levy is not a final determination of rights to the property involved. As the Supreme Court said in *Nat'l Bank of Commerce, supra* at 731, "§ 6331 is a *provisional* remedy, which does not determine the rights of third parties until *after* the levy is made, in postseizure administrative or judicial hearings." (Emphasis in original.) During the lives of the codepositors in a joint account, the "actual property rights of the respective parties" are "open to adjudication." *Manufacturers Nat'l Bank v Schirmer,* 303 Mich 598, 603; 6 NW2d 908 (1942); see also *Esling, supra* at 578 ("realities of ownership" determined if "a contest in the courts" occurs during the joint lives of the depositors).

A levy on a joint account does not permanently deprive an innocent co-owner of his property. Plaintiff has represented to us that an administrative remedy is available, i.e., a co-owner's contributions to the joint account will be returned if he can establish them. An aggrieved co-owner may also bring suit in the Court of Claims. MCL 205.22; MSA 7.657(22). On balance, the state's interest in collecting its revenues exceeds the co-owner's interest in avoiding expenses associated with the pursuit of remedies.

Defendant also argues that plaintiff's levy procedure violates the rights of innocent joint-account holders to notice and hearing before their property is seized. We do not reach this issue because defendant lacks standing to raise this constitutional issue on behalf of third parties. To have standing, a party must have a legally protected

interest that is in jeopardy of being adversely affected. *Bowie v Arder,* 441 Mich 23, 42; 490 NW2d 568 (1992). Defendant has no "legally protected interest" in Mariam Ismail's property. Had the entire account been paid over to plaintiff, defendant would have a complete defense to any suit by the codepositor:

> When a deposit has been made, or shall hereafter be made, in any banking institution transacting business in this state, in the names of two or more persons, payable to either or the survivor or survivors, such deposit or any part thereof or any interest or dividend thereon and any additions thereto, made by any one of the said persons, shall become the property of such persons as joint tenants, and the same shall be held for the exclusive use of the persons so named and may be paid to any one of said persons during the lifetime of said persons or to the survivor or survivors after the death of one of them, and *such payment and the receipt or acquittance of the same to whom such payment is made shall be a valid and sufficient release and discharge to said banking institution for all payments made on account of such deposits* prior to the receipt by said bank of notice in writing not to pay such deposit in accordance with the terms thereof. [MCL 487.703; MSA 23.303.]

Affirmed.

MARTIN v DEPARTMENT OF CORRECTIONS (ON REMAND)

Docket No. 140960. Submitted April 14, 1993, at Lansing. Decided September 7, 1993, at 9:15 A.M.

Kenneth F. Martin, a state prison inmate, sought review by the Ingham Circuit Court of a grievance decision by the Department of Corrections. The court, Lawrence M. Glazer, J., granted Martin a waiver of court fees and costs on the basis of indigency, but subsequently revoked that waiver without determining whether there had been a change in indigency status. Martin sought, and the Court of Appeals denied, leave to appeal. The Supreme Court, in lieu of granting leave, remanded the case to the Court of Appeals for consideration as on leave granted limited to the issue whether the circuit court erred in revoking the waiver of fees and costs without first determining whether there had been a change in indigency status. 437 Mich 1004 (1991).

On remand, the Court of Appeals *held:*

Before revoking a previously granted waiver or suspension of court fees and costs, a trial court must determine whether the litigant is indigent at the time of the revocation of the waiver or suspension.

This case must be remanded to the trial court for such a determination.

Reversed and remanded.

COURTS — WAIVER OR SUSPENSION OF FEES AND COSTS — INDIGENTS.

A waiver or suspension of court fees and costs previously granted on the basis of indigency may not be revoked by a trial court unless the court first determines that there has been a change in status with respect to indigency (MCR 2.002[G]).

Prison Legal Services of Michigan, Inc. (by *Sandra Girard*), for the plaintiff.

*Frank J. Kelley,* Attorney General, *Thomas L.*

REFERENCES

Am Jur 2d, Costs §§ 47, 48.

See ALR Index under Costs of Actions; Poor Persons.

*Casey,* Solicitor General, and *Lamont M. Walton,* Assistant Attorney General, for the defendant.

ON REMAND

Before: WHITE, P.J., and CAVANAGH and JANSEN, JJ.

JANSEN, J. Pursuant to a May 21, 1991, remand order of the Michigan Supreme Court, plaintiff appeals as on leave granted from the Ingham Circuit Court's December 8, 1989, order revoking the waiver of filing fees and costs previously granted to him. 437 Mich 1004 (1991). In accordance with the order of the Supreme Court, this Court is required to determine "whether the circuit court erred in revoking, without a determination of change in indigency status, its earlier waiver or suspension of filing fees and costs under MCR 2.002(G). . . . See *Jordan v Dep't of Corrections,* 412 Mich 939 (1982)."

MCR 2.002 provides for the waiver or suspension of fees and costs for indigent persons. MCR 2.002(D) provides as follows:

> Other Indigent Persons. If a party shows by ex parte affidavit or otherwise that he or she is unable because of indigency to pay fees and costs required by law or court rule, the court shall order those fees and costs either waived or suspended until the conclusion of the litigation.

MCR 2.002(G), which allows the trial court to reinstate the requirement for payment of fees and costs, states:

> Reinstatement of Requirement for payment of Fees and Costs. If the payment of fees or costs has

> been waived or suspended under this rule, the court may on its own initiative order the person for whom the fees or costs were waived or suspended to pay those fees or costs when the reason for the waiver or suspension no longer exists.

In the present case, after considering plaintiff's motion for waiver of filing fees (and costs), as well as his affidavit of indigency, the trial court ordered "that payment by plaintiff of filing fees be *suspended* until further order of the court." After concluding that plaintiff's petition challenging a grievance decision of the Department of Corrections was not reviewable, the court revoked the "*waiver* of filing fees (and costs)" previously granted to plaintiff. In doing so, the court noted that "a waiver of filing fees (and costs) was granted to plaintiff upon initiation of the instant case to ensure timely review of his petition." The court concluded that because "the reason for the waiver no longer exists, the court pursuant to MCR 2.002(G), revokes the waiver."

We would point out that the court's order of March 16, 1989, granted plaintiff a "suspension of fees." However, in its December 8, 1989, opinion and order, the court purportedly revoked the "waiver of filing fees (and costs)" previously granted to plaintiff. Because of the disparity in the terms used in the court's orders, we find the March 16, 1989, order controlling and will treat the payment of filing fees and costs as having been suspended.

In *Langworthy v Dep't of Corrections,* 192 Mich App 443; 481 NW2d 726 (1992), this Court addressed the propriety of a circuit court's reinstatement of the requirement of payment of fees and costs. *Id.,* pp 445-446. In *Langworthy,* the petitioner argued that the circuit court's order rein-

stating fees and costs was violative of both state law and the court rules. *Id.,* p 445. This Court disagreed, stating as follows:

> MCR 2.002(D) provides for waiver or suspension of court costs for indigents, and petitioner was granted such a suspension by the trial court. MCR 2.002(G), however, permits reinstatement of the costs when the reason for the waiver or suspension no longer exists. Such was the case here. In its order reinstating the costs, the circuit court noted that suspension was ordered to insure "timely review of [petitioner's] complaint" and that because such review had occurred, the reason for the suspension no longer existed. We affirm the order of the court. [*Langworthy,* pp 445-446.]

We are aware that *Langworthy* is binding authority pursuant to Administrative Order No. 1990-6, as extended by Administrative Order Nos. 1991-11 and 1992-8. However, we are also cognizant of the fact that this Court, in *Langworthy,* did not address the specific issue that is now before this Court pursuant to the Supreme Court's May 21, 1991, remand order.

In *Langworthy,* the Court did not address the issue whether, before revoking an earlier granted waiver or suspension of filing fees and costs under MCR 2.002(G), the circuit court must determine whether a petitioner is still indigent. We are of the opinion that such an inquiry must be made by the trial court before revoking a waiver or suspension of filing fees and costs previously granted.

The above holding is, in our estimation, in accord with the Supreme Court's order in *Jordan, supra,* which was cited in the Supreme Court's May 21, 1991, remand order. In *Jordan,* this Court denied the plaintiff's motion to waive fees and dismissed his appeal. 412 Mich 939. The Supreme Court stated:

> Under the circumstances, information which showed plaintiff may not have been indigent in May or October, 1980, was insufficient in itself to overcome plaintiff's affidavits relating to his indigency in April, 1981. GCR 1963, 120.3. On remand [to the Court of Appeals], the defendant may provide the Court with information indicating that plaintiff is not presently indigent. [*Id.*]

We believe that the order in *Jordan* suggests that a circuit court must make a determination regarding the financial status of the litigant before revoking a previously granted order waiving or suspending fees and costs because of indigency. See also *Mizell v Dep't of Corrections,* 437 Mich 1017 (1991) (in lieu of granting leave to appeal, the Supreme Court reversed the judgments of the Court of Appeals and the Ingham Circuit Court, which reinstated court costs and fees, because the "record [did] not establish that the plaintiff was not indigent at the time of the circuit court judgment").

We therefore hold that before revoking a previously granted waiver or suspension of filing fees and costs under MCR 2.002(G), a trial court must determine whether the litigant is indigent at the time of the revocation of the waiver or suspension. Because it does not appear that such a determination was made in the present case, we reverse that portion of the trial court's December 8, 1989, order revoking the waiver of filing fees and costs, and remand the case to the trial court. On remand, the trial court is to determine whether there has been a change in indigency status justifying a revocation of the previously granted waiver of filing fees and costs.

Reversed and remanded. We do not retain jurisdiction.

THOMPSON v TNT OVERLAND EXPRESS

Docket No. 136558. Submitted March 3, 1993, at Detroit. Decided September 7, 1993, at 9:20 A.M. Leave to appeal sought.

Roger Thompson brought an action in the Wayne Circuit Court against TNT Overland Express, seeking no-fault automobile insurance benefits for injuries he sustained as a tractor-trailer driver for the defendant. On the day of his injury, the plaintiff drove a loaded tractor-trailer to a yard and detached the loaded trailer from the tractor. After attaching an unloaded trailer to the tractor, the plaintiff walked around the tractor-trailer to inspect it. He discovered a leak in an air hose connection between the tractor and the trailer. In an attempt to reconnect the air hose, he climbed up on the parked tractor but fell and injured himself before he could grab the air hose. The court, Samuel A. Turner, J., granted summary disposition for the plaintiff, rejecting the defendant's contention that no-fault benefits were not available to the plaintiff because he was entitled to workers' compensation benefits and injury was sustained while loading, unloading, or doing mechanical work on a parked vehicle. MCL 500.3106(2)(a); MSA 24.13106(2)(a). The defendant appealed.

The Court of Appeals *held:*

MCL 500.3106(2)(a); MSA 24.13106(2)(a) provides that accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if benefits under the workers' compensation act are available for the injury and the injury is sustained while loading, unloading, or doing mechanical work on the parked vehicle, unless the injury arose from the use or operation of another vehicle.

In this case, in attempting to reconnect the air hose of the tractor-trailer, the plaintiff was not loading, unloading, or doing mechanical work on the parked vehicle, but merely was engaged in an activity that is routinely performed by a driver to make a tractor-trailer operational. The plaintiff's delivery of a loaded trailer and the subsequent attempt to connect an empty

REFERENCES

Am Jur 2d, Automobile Insurance §§ 281, 368.

See ALR Index under Mechanics; Workers' Compensation.

trailer to the tractor did not constitute loading or unloading because they cannot be construed as activities preparatory to the actual lifting or lowering of cargo or as acts incidental to the completion of the loading or unloading process.

Affirmed.

GRIFFIN, J., dissenting, stated that the plaintiff was doing mechanical work on the tractor-trailer, so as to be disqualified from no-fault benefits, because he was altering the operational characteristics of the vehicle or correcting a specific operational defect, either of which can be construed as doing mechanical work on the vehicle.

INSURANCE — NO-FAULT — PARKED VEHICLES — WORKERS' COMPENSATION — MECHANICAL WORK.

The phrase "doing mechanical work," as used in the provision of the no-fault act that disallows no-fault benefits for injury if workers' compensation benefits are available and if injury is sustained while doing mechanical work on a parked vehicle, means engaging in an activity that is normally done by a mechanic for the purpose of maintaining or repairing the vehicle (MCL 500.3106[2][a]; MSA 24.13106[2][a]).

*Mark Granzotto* and *William N. Bradford,* for the plaintiff.

*Bodman, Longley & Dahling* (by *James W. Walsh* and *Megan Maher Brennan*), for the defendant.

Before: CAVANAGH, P.J., and GRIFFIN and JANSEN, JJ.

JANSEN, J. Defendant appeals as of right from the Wayne Circuit Court's December 17, 1990, judgment requiring it to pay plaintiff statutory no-fault benefits and interest in the amount of $26,652.61. The judgment is the result of the trial court's previous orders denying defendant's motion for summary disposition and granting plaintiff's cross-motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Defendant contends that plaintiff is not entitled

to no-fault benefits because he has been receiving workers' compensation benefits as a result of an injury that occurred while he was loading, unloading, or doing mechanical work on a vehicle. Defendant argues that pursuant to MCL 500.3106(2)(a); MSA 24.13106(2)(a), plaintiff's injuries do not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle. We disagree with defendant.

No-fault benefits are payable for certain accidental bodily injuries arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. MCL 500.3105; MSA 24.13105. However, the parked vehicle provision, MCL 500.3106; MSA 24.13106, provides for certain exclusions from no-fault coverage. At issue in the present case is MCL 500.3106(2)(a); MSA 24.13106(2)(a), which provides as follows:

> (2) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if benefits under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.941 of the Michigan Compiled Laws, or under a similar law of another state or under a similar federal law, are available to an employee who sustains the injury in the course of his or her employment while doing either of the following:
>
> (a) Loading, unloading, or doing mechanical work on a vehicle unless the injury arose from the use or operation of another vehicle. As used in this subdivision, "another vehicle" does not include a motor vehicle being loaded on, unloaded from, or secured to, as cargo or freight, a motor vehicle.

In *Bell v F J Boutell Driveaway Co,* 141 Mich App 802; 369 NW2d 231 (1985), this Court adopted a broad meaning of the terms "loading" and "un-

loading" as used in § 3106(2). *Id.,* p 809. "Those terms encompass activities preparatory to the actual lifting onto or lowering of property. The terms include the complete operation of loading and unloading." *Id.* See also *Raymond v Commercial Carriers, Inc,* 173 Mich App 290, 292-293; 433 NW2d 342 (1988); *Crawford v Allstate Ins Co,* 160 Mich App 182, 186; 407 NW2d 618 (1987); *Gibbs v United Parcel Service,* 155 Mich App 300, 302-303; 400 NW2d 313 (1986); *Gray v Liberty Mutual Ins Co,* 149 Mich App 446, 449-450; 386 NW2d 210 (1986). Applying a broad definition of the terms "load" and "unload," the *Gibbs* Court held that, like acts of preparation, acts incidental to the completion of the loading or unloading process fall within the scope of § 3106(2). *Id.,* p 305. In *Bell,* the Court concluded that the Legislature intended to eliminate duplication of benefits for work-related injuries except where the actual driving or operation of a motor vehicle is involved. *Id.,* p 810.

We cannot conclude, as defendant asserts, that plaintiff was in the process of loading or unloading his trailer at the time he was injured. Plaintiff, a truck driver, testified at deposition that he hooked up a loaded trailer in defendant's Detroit yard and was to transport the trailer to defendant's yard in Windsor, Canada. Defendant did not personally load the trailer. Plaintiff testified that the drivers "shuttle" the trailers to defendant's yard in Canada and drop them off so that a Canadian driver can pick up the trailer and deliver it to its destination in Canada.

On the day in question, plaintiff dropped off the loaded trailer at defendant's Canadian yard; he was then required to bring an empty trailer back to Detroit. After hooking the electrical cable and air hoses from the tractor to the empty trailer, plaintiff performed a "circle check" of the tractor-

trailer unit. As plaintiff got alongside the tractor, he heard an air leak. He got up on the tractor to check the leak and, as he reached for the air hose, he slipped and fell, sustaining bodily injuries.

We are of the opinion that the facts of the present case make it distinguishable from the cases relied upon by defendant. In *Bell,* the plaintiff, who was delivering cars to a dealership, removed a chain that secured a car to the trailer during transport and, while walking around the trailer to release the chain on the other side, fell on hydraulic fluid leaking from the trailer. *Id.,* p 805. In *Gray,* the plaintiff injured his back twice, first when he picked up packages in the back of his truck to be unloaded at his next stop, and again ten days later when he bent over to pick up a package that was to be immediately unloaded from his truck. *Id.,* p 448. In *Gibbs,* the plaintiff had just finished stacking packages inside a trailer and was moving toward the back of the trailer so that she could get out when she tripped on a loose package, fell to the trailer floor, and injured her knees. *Id.,* p 301. In *Crawford,* the plaintiff, employed as the driver of a tractor-trailer hauling automobiles, was injured on his employer's premises while attempting to tighten a loose chain used to secure an automobile to the top tier of the trailer. *Id.,* pp 183-184. And similarly, in *Raymond,* the driver of a tractor-trailer hauling new cars was injured while tightening loose chains that were securing the cars to the trailer. *Id.,* p 292.

In those cases, each claimant was in the process of loading, unloading, or specifically dealing with the cargo or freight involved, while in the present case, plaintiff was not dealing with the cargo or freight. See *Cobb v Liberty Mutual Ins Co,* 164 Mich App 66, 71; 416 NW2d 328 (1987) (the plaintiff, who was not responsible for loading or unload-

ing goods from inside the trailer, was injured when he slipped and fell while dismounting from the tractor after he released the trailer from the tractor and removed the air and electrical connections between the trailer and the tractor). Plaintiff did not load the trailer that was delivered to the yard in Canada, nor was he required to unload it. Additionally, plaintiff was to return to Detroit with an empty trailer.

Even giving a broad definition to the terms "loading" and "unloading," as found appropriate in *Bell* and its progeny, we are unable to conclude that plaintiff was injured while loading or unloading the trailers. See *Marshall v Roadway Express, Inc,* 146 Mich App 753, 756; 381 NW2d 422 (1985) (the plaintiff was unhitching his trailer and, as he unhooked the brake lines, the tractor rolled forward, striking him down and running over his left hand and chest). There is no evidence that plaintiff was aiding in the loading or unloading process. *Id.* Plaintiff's mere delivery of a previously loaded trailer and his subsequent attempt to connect an empty trailer to the tractor cannot be construed as "activities preparatory to the actual lifting onto or lowering of property," *Bell,* p 809, or "acts incidental to the completion of the loading or unloading process." *Gibbs,* p 305. We are unable to find that plaintiff was loading or unloading the trailers at the time he sustained his injuries.

Defendant contends, in the alternative, that plaintiff was performing mechanical work when he attempted to reconnect the leaking air hose "glad hand" and, therefore, is precluded from receiving no-fault benefits. Again, we disagree.

This Court has determined that, like the words "loading" and "unloading," the phrase "doing mechanical work" must be liberally interpreted. *Cobb,* p 72. In *Marshall,* p 757, this Court stated:

> While a broad definition of that term may be appropriate, we do not feel that it should include activity which is not designed to maintain or repair the truck and is routinely performed in the truck's operation. While detaching the trailer requires some level of skill, as the trial court noted, we do not feel that this function was "mechanical work" as that term is used in § 3106(2). We feel that "mechanical work" means that work normally done by a mechanic which is for the purpose of maintaining or repairing the vehicle.

In the present case, while performing a circle check of the tractor-trailer unit, plaintiff heard an air leak. He climbed onto the tractor in order to check the air hoses. As he reached for the hose, he slipped and fell between the fender and the battery box, sustaining bodily injuries. Plaintiff never actually grasped the hoses.

According to the testimony of Terrence Abbott, the safety supervisor and driver trainer for defendant, the tractor-trailer unit cannot be operated if the air hoses are not connected. It is the responsibility of the driver to connect the hoses, and is part of the "[n]ormal routine in a driver's hook up." Abbott testified that it was not uncommon for an air leak to develop, and when it occurs, a driver usually does not call a mechanic to remedy the leak. According to Abbott, this is not mechanical work or repair work. Abbott stated that in his experience the drivers do not attempt to make mechanical repairs on their vehicles.

Daniel Garza, a dispatcher with defendant, testified that in order for the tractor-trailer to operate, the air hoses must be hooked up. The driver performs the hook up as part of his job; a mechanic never does. Garza testified that a hose may leak if it is not hooked up properly or if a seal is worn out and, if this occurs, the hose may be

rehooked. According to Garza, this is something that would not necessarily require the assistance of a mechanic. However, if a glad hand is broken, and the driver is not qualified to repair it, then it would be necessary to call a mechanic. In the present case, the glad hand was only leaking and was not broken.

James Armitage, a driver employed by defendant, stated that the glad hand hook up is necessary to operate the equipment because the trailer brakes will not release without air going back to them. Armitage testified that a leak could occur if the glad hand is not properly put together. If this occurs, the glad hand must be rehooked. According to Armitage, a mechanic is never called to hook up a glad hand or hose because it is not mechanical work.

In light of the above testimony, it is our opinion that plaintiff was not injured while performing mechanical work. Plaintiff's attempt at remedying the air leak by reconnecting the glad hand was not activity designed to maintain or repair the truck. *Cobb,* p 72; *Marshall,* p 757. Plaintiff did not engage in work that is normally done by a mechanic for the purpose of maintaining or repairing the vehicle; rather, it was an activity "routinely performed in the truck's operation." *Cobb,* p 72; *Marshall,* p 757. In fact, it was an activity absolutely necessary to the tractor-trailer's operation.

Plaintiff was injured while attempting to check a leaky air hose. Plaintiff was attempting to reconnect the hose, not repair or maintain the hose. Plaintiff was not "engaged in repairing a defect, performing preventive maintenance or making an adjustment to alter operating characteristics." Cf. *MacDonald v Michigan Mutual Ins Co,* 155 Mich App 650, 656; 400 NW2d 305 (1986). In fact, there was no apparent defect because, after having

fallen, plaintiff drove the tractor-trailer back to Detroit without incident. According to Armitage, he did not recall hearing a leak from plaintiff's truck after the fall, and he did not have to make any adjustments to the truck in order to make it operational.

We conclude that plaintiff was not doing mechanical work at the time he sustained his injuries. Notwithstanding a liberal interpretation of the phrase "doing mechanical work," we do not believe that plaintiff was engaged in activity designed to maintain or repair the vehicle. Additionally, reconnecting leaking air hoses is not work normally performed by a mechanic; rather, it is an activity routinely performed by the driver to make the tractor-trailer operational. We find no error requiring reversal on the record before us.

Affirmed.

CAVANAGH, P.J., concurred.

GRIFFIN, J. *(dissenting).* I respectfully dissent. I would hold that plaintiff was "doing mechanical work" on the parked vehicle at the time of his fall. Accordingly, I would hold that plaintiff is barred by operation of MCL 500.3106(2); MSA 24.13106(2) from collecting no-fault benefits for his injuries.[1]

Section 3106(2) was intended to eliminate duplicative recovery for work-related injuries except where actual driving or operation of a motor vehicle is involved. *Stanley v State Automobile Mutual Ins Co,* 160 Mich App 434, 439; 408 NW2d 467 (1987); *Bell v F J Boutell Driveaway Co,* 141 Mich App 802, 809-811; 369 NW2d 231 (1985). Therefore, the phrase "doing mechanical work" has been interpreted broadly so as to give effect to this

[1] There is no dispute that plaintiff has workers' compensation benefits available for his injuries.

legislative intent. *Dowling v Auto Club Casualty Ins Co,* 147 Mich App 482, 485-486; 383 NW2d 233 (1985).

The statutory phrase "doing mechanical work on a vehicle" includes repairing defects, performing preventive maintenance, or making adjustments to alter operating characteristics. *MacDonald v Michigan Mutual Ins Co,* 155 Mich App 650, 656; 400 NW2d 305 (1986). The focus should not be on the employee's job title or classification but rather on the type of activity engaged in at the time of the injury. See, e.g., *Stanley, supra; Cobb v Liberty Mutual Ins Co,* 164 Mich App 66; 416 NW2d 328 (1987).

In the present case, plaintiff was injured while inspecting his vehicle to determine the source of an air leak. Plaintiff slipped and fell while reaching for the air hose that was improperly connected. As noted by the majority, a properly connected hose was "absolutely necessary" for the tractor-trailer's operation. Under these circumstances, I fail to see how plaintiff was not engaged in repairing a defect—conduct that qualifies as mechanical work under § 3106(2).

In reaching a contrary result, the majority concludes that plaintiff was merely engaged in an "activity routinely performed by the driver to make the tractor-trailer operational." *Ante* at 344. In this regard, I agree with the analysis set forth in *MacDonald, supra.* There, the plaintiff was injured while attempting to adjust the position of a trailer box on a tractor-trailer rig. In holding that such action constituted "doing mechanical work," we rejected as inconsistent with legislative intent any distinction between merely altering the operational characteristics of a vehicle and correcting specific operational defects:

> It could be argued that since plaintiff was not repairing a defect but was only shifting the trailer's axle from one normal position to another to alter its operating characteristics, plaintiff was not doing mechanical work. However, *if plaintiff's purpose had been to restore the axle to a position from which it had been moved by accident or mistake, plaintiff would more clearly be deemed to have been repairing a defect and doing mechanical work. We believe that to distinguish on this basis would be both pointless and irrelevant to the language and purpose of § 3106(2).* Therefore, we conclude that a mechanic engaged in servicing a vehicle, whether he is engaged in repairing a defect, performing preventive maintenance or making an adjustment to alter operating characteristics, is performing mechanical work within the meaning of § 3106(2). [*MacDonald, supra* at 656. Emphasis added.]

In short, whatever the cause of the air leak, plaintiff was clearly "doing mechanical work" within the meaning of § 3106(2) when he attempted to correct it. Accordingly, I would remand for entry of judgment in favor of defendant on this basis.[2]

[2] I agree with the majority that plaintiff was not loading or unloading the vehicle when his injuries occurred.

PEOPLE v PERRY

Docket No. 126915. Submitted January 14, 1993, at Detroit. Decided September 7, 1993, at 9:25 A.M. Leave to appeal sought.

Juan D. Perry was convicted after a bench trial in the Wayne Circuit Court of possession of less than fifty grams of heroin with the intent to deliver and was sentenced to lifetime probation. A condition of the probation was that he not violate the laws of the state. Six months later, a search warrant was executed at his residence and he was arrested for possession of more than fifty grams of cocaine. He was also charged with probation violation. The court, Thomas E. Jackson, J., found that the search warrant was issued without adequate grounds for finding probable cause and, therefore, suppressed the evidence and dismissed the charge of cocaine possession. Following a hearing regarding the charge of probation violation, and on the basis of the testimony of one of the officers who executed the search warrant, the court found the defendant guilty of violating a condition of his probation, revoked his probation, and sentenced him to two to twenty years' imprisonment. He appealed, alleging that the court erred in basing its decision to revoke his probation solely upon the evidence obtained pursuant to an illegal search and seizure in violation of the Fourth Amendment exclusionary rule.

The Court of Appeals *held:*

1. The trial court did not err in considering the illegally seized evidence in revoking the defendant's probation. Furthermore, there were verified facts on the record from which the trial court could have found that the defendant constructively possessed cocaine.

2. The sentence imposed was within the permissible range for the underlying offense.

SHEPHERD, J., stated that the exclusionary rule does not apply where, as in this case, the police had no knowledge or reason to know that the defendant was on probation at the time the search warrant was executed.

GRIFFIN, P.J., concurring in the result, stated that the applicability of the exclusionary rule should not hinge solely on the narrow question whether the police had actual knowledge or

reason to know that the target of their illegal search and seizure was a probationer. Rather, the totality of the circumstances surrounding the Fourth Amendment violation should be examined and the exclusionary rule applied to probation revocation proceedings only in those cases where the exclusion of the evidence would substantially further the deterrent purpose of the exclusionary rule and the need for deterrence outweighs the harm to the probation system. The exclusion of the evidence in this case would not substantially further the deterrent purpose of the exclusionary rule.

Affirmed.

FITZGERALD, J., dissenting, stated that the exclusionary rule applies to probation revocation proceedings, and that this case should be reversed and remanded for a determination whether the defendant's probation should be continued or revoked without reliance on the unconstitutionally seized evidence.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Don W. Atkins,* Principal Attorney, for the people.

*John B. Payne, Jr.,* for the defendant on appeal.

Before: GRIFFIN, P.J., and SHEPHERD and FITZGERALD, JJ.

SHEPHERD, J. Defendant appeals as of right from the trial court's November 21, 1989, order revoking his November 21, 1988, sentence of lifetime probation for possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and imposing a prison sentence of two to twenty years. We affirm.

Following a bench trial on October 28, 1988, defendant was convicted of possession of heroin with an intent to deliver and sentenced to lifetime probation, as permitted by MCL 771.2; MSA 28.1132. Six months later, on April 19, 1989, a search warrant was executed at defendant's resi-

dence and he was arrested for possession of more than fifty grams of cocaine. Shortly thereafter, on April 23, 1989, defendant was charged with probation violation based upon the violation of the criminal laws of this state. Thereafter, on October 20, 1989, the trial court suppressed the evidence of cocaine possession because the search warrant was issued without adequate grounds for finding probable cause. On October 26, 1989, the court dismissed the charge of cocaine possession but refused to dismiss the probation violation warrant without a hearing regarding the facts and circumstances surrounding the warrant.

The probation violation hearing was held on November 9, 1989. On the basis of the testimony of one of the officers who executed the search warrant, the trial court found that defendant violated the condition of probation that he not violate the laws of this state.

On appeal, defendant argues that the trial court's decision to revoke his probation solely upon the evidence obtained pursuant to an illegal search and seizure violated the Fourth Amendment exclusionary rule.

The issue whether the Fourth Amendment exclusionary rule applies to probation revocation proceedings is one of first impression.[1]

Federal decisions are nearly unanimous in concluding that the exclusionary rule does not apply:

> The applicability of the exclusionary rule to

[1] Previously, in *People v Hardenbrook,* 68 Mich App 640, 645; 243 NW2d 705 (1976), this Court noted "parenthetically" that the exclusionary rule is inapplicable to probation revocation hearings. Nevertheless, *Hardenbrook* did not deal with the specific issue whether the exclusionary rule barring evidence obtained in an illegal search and seizure applies to probation revocation proceedings, but, instead, dealt with the question whether the rule of *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), applied to probation revocation hearings.

probation or parole revocation has been considered by eight circuit courts. Seven of those courts have held the rule inapplicable. Only one, the Fourth Circuit, has held to the contrary. Having reviewed the holdings of these courts, we conclude the reasoning applied by the majority of circuits is persuasive, and we aline ourselves with them.

We agree with and underscore the conclusion of the Third Circuit that application of the exclusionary rule to revocation proceedings will not achieve the deterrent effect behind the rule. That observation is particularly true where, as here, the allegedly offensive seizure is conducted by state officers as a prelude to the filing of state charges. Because the deterrence to illegal police conduct, if any, can be accomplished within the framework of the state proceeding, application of the exclusionary rule to a parallel federal revocation proceeding would be redundant. Moreover, as noted by the Third Circuit, application of the exclusionary rule at this stage would not achieve a deterrence as much as it would inhibit the interests of the public in the pursuit of its protection against "convicted criminals who have abused the liberty afforded them." [*United States v Finney,* 897 F2d 1047, 1048 (CA 10, 1990); citations omitted.]

Among the federal circuits that have not applied the Fourth Amendment exclusionary rule to revocation proceedings is the Sixth Circuit. *United States v Farmer,* 512 F2d 160 (CA 6, 1975), cert den 423 US 987 (1975).

The Ninth Circuit, however, has recognized an exception to this rule where the police knew or had reason to believe that the suspect was a probationer. *United States v Winsett,* 518 F2d 51 (CA 9, 1975). There, the court, citing *United States v Calandra,* 414 US 338, 349; 94 S Ct 613; 38 L Ed 2d 561 (1974), stated that the exclusionary rule should not be extended unless the potential harm to the probation system substantially outweighs

potential benefits. *Winsett, supra,* p 54. Accordingly, the Ninth Circuit Court of Appeals concluded that "the Fourth Amendment does not require suppression of evidence in a probation revocation proceeding where, at the time of arrest and search, the police had neither knowledge nor reason to believe that the suspect was a probationer." *Id.,* p 55.

I would adopt the rule set forth by the Ninth Circuit in *Winsett.* As this Court has recognized, the purpose of the exclusionary rule is to preserve judicial integrity and deter police misconduct. *People v Jordan,* 187 Mich App 582, 588; 468 NW2d 294 (1991). Where there is no indication that the police knew or had reason to know that they were targeting a probationer, then the exclusionary rule should not apply to probation revocation proceedings in Michigan.

Applying this rule to the present case, I conclude that the trial court did not err in revoking defendant's probation. There is no indication in the record that the police knew or had reason to know that defendant was on probation when they executed a search warrant at his residence on April 19, 1989. Thus, the exclusionary rule did not apply to bar evidence obtained pursuant to the illegal search and seizure.

I am the only member of this panel who holds that the exclusionary rule does not apply if the police had no knowledge or reason to know that defendant was on probation at the time the search warrant was executed. Judge GRIFFIN's concurring opinion applies a balancing test with respect to this issue. Judge FITZGERALD's dissent takes the position that the exclusionary rule applies in probation revocation proceedings to the same extent that it applies in any other criminal proceeding. There is a majority holding for nothing more than

the dispositive ruling that probation was properly revoked. The panel urges the Supreme Court to grant leave to appeal to resolve the question regarding when and under what circumstances the exclusionary rule applies in probation revocation proceedings. We are publishing this opinion to point out to the bench and the bar that, as of the date of this opinion, this issue has not been resolved in Michigan.

I also note, contrary to defendant's assertion, that there were verified facts on the record from which the trial court could have found that defendant constructively possessed cocaine in the house, *People v Hill,* 433 Mich 464, 470; 446 NW2d 140 (1989), in violation of the probationary condition that he not violate the laws of this state. *People v Buckner,* 103 Mich App 301; 302 NW2d 848 (1980).

Defendant also argues that his sentence violates the principle of proportionality set forth in *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). This claim is meritless.

Although the guidelines do not apply to probation revocation sentencing, *People v Leske,* 187 Mich App 153; 466 NW2d 361 (1991), this Court has held that the guidelines are a useful point of departure in determining where on the continuum the sentence should fall. *People v Peters,* 191 Mich App 159; 477 NW2d 479 (1991). Where the sentence to be imposed is for a major controlled substance offense for which the sentencing court is directed by law to impose a sentence that cannot be more or less than a specified term of years, the court is required to fix the length of both the minimum and maximum sentences within those limits. MCL 769.9(3); MSA 28.1081(3).

At the sentencing for the underlying offense, held on November 21, 1988, the trial court stated that the minimum sentence range for defendant

was twelve to thirty months. The minimum sentence of two years imposed on November 21, 1989, was within the permissible range for the underlying offense.

Affirmed.

GRIFFIN, P.J. *(concurring).* I concur in the result reached by Judge SHEPHERD. The judgment of the lower court is therefore affirmed.

I write separately, however, because I cannot agree with much of Judge SHEPHERD's analysis regarding the applicability of the exclusionary rule to probation revocation proceedings. In my view, the applicability of the exclusionary rule should not hinge solely on the narrow question whether the police had actual knowledge or reason to know that the target of their illegal search and seizure was a probationer. Rather, I would examine the totality of the circumstances surrounding the Fourth Amendment violation and apply the exclusionary rule to the probation revocation proceedings only in those cases where (1) the exclusion of the evidence would substantially further the deterrent purpose of the exclusionary rule, and (2) the need for deterrence outweighs the harm to the probation system.

I

The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v Leon,* 468 US 897, 906; 104 S Ct 3405; 82 L Ed 2d 677 (1984). The exclusionary rule has never been invoked to disallow the use of illegally seized evidence in all proceedings or against all persons. *United States v*

*Calandra,* 414 US 338; 94 S Ct 613; 38 L Ed 2d 561 (1974). Rather, any extension of the rule beyond its traditional applicability in criminal proceedings is warranted only where the use of the remedy would result in appreciable deterrence of police misconduct. *Leon, supra* at 909. Thus, in deciding to extend the exclusionary rule, the likelihood that the rule's deterrent effect will be achieved should be balanced against the cost of withholding reliable information from the truth-seeking process. *Illinois v Krull,* 480 US 340, 347; 107 S Ct 1160; 94 L Ed 2d 364 (1987). See, e.g., *United States v Janis,* 428 US 433, 454; 96 S Ct 3021; 49 L Ed 2d 1046 (1976); *Calandra, supra* at 351-352.

The competing interests involved in determining whether to extend the exclusionary rule to probation revocation proceedings involve a balancing of the potential harm to the probation system if the evidence is excluded versus the potential benefit of deterring police misconduct. See, e.g., *United States v Winsett,* 518 F2d 51, 54-55 (CA 9, 1975); *Ex parte Caffie,* 516 So 2d 831, 834 (Ala, 1987). If the potential harm substantially outweighs the potential benefits, then the rule should not be extended. See *Calandra, supra* at 351-352.

Although not directly addressed by either the parties or my colleagues, I would hold that the United States[1] and Michigan[2] constitutional guarantees against unreasonable searches and seizures are coextensive with regard to this issue. I find no compelling reason to impose a different or more restrictive construction upon the parallel provision of the Michigan Constitution than is required by the United States Constitution. *People v Collins,* 438 Mich 8, 11; 475 NW2d 684 (1991). Also see

[1] US Const, Am IV.

[2] Const 1963, art 1, § 11.

*People v Nash,* 418 Mich 196; 341 NW2d 439 (1983).

II

In Michigan, probation is a matter of grace and confers no vested rights in its continuance. MCL 771.4; MSA 28.1134. Under our court rules, the prosecution has the burden of proving by a preponderance of the evidence that a probation violation occurred. MCR 6.445(E)(1).

Judge FITZGERALD would fully extend the exclusionary rule to probation revocation proceedings. He relies upon *United States v Workman,* 585 F2d 1205 (CA 4, 1978), which is the lone federal appellate court decision that has done so. Judge FITZGERALD agrees with the *Workman* rationale in concluding that a probation revocation proceeding is a "criminal proceeding similar to a criminal trial and may result in a loss of liberty", *post* at 360, thus warranting the application of the exclusionary rule. I respectfully disagree. A revocation hearing is not a new trial, but, rather, a hearing to determine whether the defendant has abused the privilege of probation. At the time of the revocation hearing, the defendant stands convicted of a crime. His rights are restricted and his liberty is conditional.

In *United States v Bazzano,* 712 F2d 826, 833 (CA 3, 1983), the United States Third Circuit Court of Appeals, emphasized the following important distinctions between a criminal trial and a probation revocation hearing:

> In considering the effect on probation revocation proceedings of extending the exclusionary rule, it must be remembered that because the probationer has already been found guilty of a crime, and his

liberty is only "conditional," *United States v Basso,* 632 F2d 1007, 1013 (2d Cir, 1980), cert denied, 450 US 965; 101 S Ct 1480; 67 L Ed 2d 613 (1981), a revocation hearing is, in effect, more a resentencing than a taking of rights. As the Supreme Court indicated in *Morrissey v Brewer,* 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972), and *Gagnon v Scarpelli,* 411 US 778; 93 S Ct 1756; 36 L Ed 2d 656 (1973), the "full panoply of rights" due a defendant in a criminal prosecution is not available in a revocation proceeding. *Morrissey v Brewer, supra,* 408 US at 480; 92 S Ct at 2599. For example, the government has a lesser burden of proof in revocation proceedings, *United States v Manuszak,* 532 F2d 311, 317 (3d Cir, 1976), and the Federal Rules of Evidence (other than with respect to privileges) do not apply, Fed R Evid 1101(d)(3).

Further, the potential harm to our probation system from invocating the exclusionary rule is substantial. As the Ninth Circuit Court of Appeals summarized in *Winsett, supra* at 54-55:

The primary purpose of probation, which has become an integral part of our penal system, is to promote the rehabilitation of the criminal by allowing him to integrate into society as a constructive individual, without being confined for the term of the sentence imposed. *Cf. Morrissey v Brewer,* 408 US 471, 477; 92 S Ct 2593; 33 L Ed 2d 484 (1972). An important aspect of our probation system is the placing of certain restrictions on the probationer, such as the requirement that he not associate with criminals or travel outside the judicial district. These conditions serve a dual purpose in that they enhance the chance for rehabilitation while simultaneously affording society a measure of protection. Because violation of probation conditions may indicate that the probationer is not ready or is incapable of rehabilitation by integration into society, it is extremely important that all reliable evidence shedding light on the probation-

er's conduct be available during probation revocation proceedings.

Consequently, to apply the exclusionary rule to probation revocation hearings would tend to frustrate the remedial purposes of the probation system. Not only would extension of the rule impede the court's attempt to assess a probationer's progress or regression, but also it would force probation officers to spend more of their time personally gathering admissible proof concerning those probationers who cannot or will not accept rehabilitation.

Most important, the exclusionary rule should be invoked only when its deterrent purpose would be substantially furthered. I cannot agree that deterrence would be served in every probation revocation proceeding irrespective of the nature of the Fourth Amendment violation.

I agree with Judge SHEPHERD and with the great weight of authority that the exclusionary rule is not fully applicable to probation revocation proceedings. See anno: *Admissibility, in state probation revocation proceedings, of evidence obtained through illegal search and seizure,* 77 ALR3d 636. However, I disagree with Judge SHEPHERD's belief that a police officer's knowledge of the defendant's probationary status should mechanically trigger the application of the exclusionary rule.

In my view, Judge SHEPHERD's knowledge test is simply too broad. See *United States v Montez,* 952 F2d 854 (CA 5, 1992). The adoption of such a rule would lead to the exclusion of evidence in probation revocation proceedings where the facts simply do not justify exclusion given the competing interests at stake. Although a police officer's knowledge of the defendant's probationary status is certainly a relevant consideration to cause careful scrutiny of the officer's actions, such knowledge should not

serve as the sole basis for determining the applicability of the exclusionary rule. Rather, the deterrent effect of excluding the evidence should be assessed and weighed against the harm to our probation system.

III

My views regarding this issue are substantially influenced by the scholarly review and analysis contained in note, *The applicability of the exclusionary rule to probation revocation proceedings*, 17 Mem St U L R 555 (1987). Its author articulates the following rule of law that I accept and urge the Supreme Court to adopt:

> [The decision whether to apply the exclusionary rule to a probation revocation proceeding] should only be made after carefully reviewing all the facts surrounding the particular fourth amendment violation to determine whether exclusion will substantially further the rule's deterrent purpose. Since the rule is not constitutionally mandated, the courts must carefully avoid defeating its deterrent purpose by mechanically applying the rule to every revocation proceeding.
>
> . . . [T]he court's analysis must focus specifically on any deterrent benefits application of the rule might provide. Various factors the courts should consider include whether the officer knew that the victim of the fourth amendment violation was a probationer, whether the officer was acting in good faith when conducting the illegal search, and whether the evidence was secured for the primary purpose of using it in a revocation proceeding. Only after reviewing all the surrounding factors will the court be able to properly assess whether exclusion of the evidence will further the rule's deterrent purpose.
>
> The court's analysis of this issue must not stop at this point, however, for deterrence alone does

not justify invoking the exclusionary rule. As set forth in *Calandra,* the courts must remain concerned with the harm that will necessarily result through exclusion of the incriminating evidence. Probation, which allows a convicted defendant to avoid incarceration, is designed to protect society while attempting to rehabilitate the defendant. If a defendant's abuse of his probationary privilege is barred from judicial review, the dual goals of probation become severely impaired.

Therefore, the determination of whether to apply the exclusionary rule to a probation revocation proceeding requires a two-step analysis. First, the courts must ascertain whether any appreciable deterrent benefits can be achieved through exclusion. If so, the courts must then decide if the need for deterrence outweighs the injury the probation system will necessarily suffer if incriminating evidence is excluded from the proceeding. Only if the answer to the latter question is yes should the exclusionary rule be applied. [*Id.* at 580-581.]

After applying the above test, I concur with Judge SHEPHERD in affirming the decision of the lower court. I do so for the reason that in the present case the exclusion of the evidence would not substantially further the deterrent purpose of the exclusionary rule. I join in the remaining portions of Judge SHEPHERD's opinion.

FITZGERALD, J. *(dissenting).* I respectfully dissent from the majority's conclusion that the Fourth Amendment exclusionary rule does not, in the absence of an indication that the police knew or had reason to know that they were targeting a probationer, apply to probation revocation proceedings. See *United States v Workman,* 585 F2d 1205, 1209-1211 (CA 4, 1978). Noting the similarity between a probation violation proceeding and other criminal adjudicative proceedings, the Fourth Circuit Court of Appeals stated:

> [T]he Supreme Court has never exempted from the operation of the exclusionary rule any adjudicative proceeding in which the government offers unconstitutionally seized evidence in direct support of a charge that may subject the victim of a search to imprisonment. Indeed, the court has observed that standing to invoke the exclusionary rule "is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." [*Id.* at 1211; citation omitted.]

Although a probation revocation proceeding is not a stage of a criminal prosecution, it is a criminal proceeding similar to a criminal trial and may result in a loss of liberty. I would hold, therefore, that the trial court must determine whether defendant's probation should be continued or revoked without reliance on the unconstitutionally seized evidence and would reverse and remand for such a determination.

*In re* LOOSE

Docket No. 142855. Submitted April 6, 1993, at Detroit. Decided September 7, 1993, at 9:30 A.M. Leave to appeal sought.

Antoinette P. Loose filed a complaint for superintending control in the Wayne Circuit Court to compel the Wayne County Civil Service Commission to set aside its determination that, by her failure to give adequate notice of the reason for her absence from work, she was contractually deemed to have resigned from her employment with the county. The court, Paul S. Teranes, J., reversed the decision of the commission, holding that a letter sent by the office of Loose's doctor that she should remain in bed until her next scheduled doctor's appointment satisfied the notice requirement of the collective bargaining agreement covering her employment and that the commission erred as a matter of law in construing the notice provision. The defendants appealed.

The Court of Appeals *held:*

Although the construction of unambiguous and unequivocal contracts is a question of law, the commission properly found that the notice requirement in the collective bargaining agreement was ambiguous and proceeded to ascertain the intent of the contracting parties. The commission's findings that the notice requirement requires "sufficient notice" and that the letter the doctor's office sent did not satisfy that requirement in view of the fact that the county had informed Loose that a doctor's letter would not be sufficient were supported by competent evidence in the record. Because the commission did not fail to perform a clear legal duty, the trial court erred in setting aside the order of the commission.

Order of the circuit court reversed and order of the commission reinstated.

CONTRACTS — INTERPRETATION OF CONTRACTS.

Construction of unambiguous and unequivocal contracts is a question of law; however, contractual language that, standing

REFERENCES

Am Jur 2d, Contracts §§ 359, 361.
See ALR Index under Contracts.

alone, is not inherently ambiguous may become susceptible to interpretation when examined in connection with the past practices of the parties.

*Schier, Deneweth & Parfitt, P.C.* (by *Carl F. Schier*), for Antoinette P. Loose.

*Saul A. Green,* Wayne County Corporation Counsel, and *Ellen E. Mason,* Assistant Corporation Counsel, for Wayne County and Wayne County Civil Service Commission.

Before: MARILYN KELLY, P.J., and SHEPHERD and CONNOR, JJ.

MARILYN KELLY, P.J. This case concerns the conditions under which a circuit court may issue an order of superintending control. Respondents appeal from an order of the Wayne Circuit Court reversing a decision of the Wayne County Civil Service Commission. Respondents argue that the court erred in reversing the commission's decision. We agree and reverse the circuit court.

Petitioner began working for respondent Wayne County as a clerical worker in April, 1973. In January, 1982, she filed a workers' compensation claim. Petitioner began approved medical leave in June, 1982. The county instructed her to return to work on September 7, 1982, after receiving written confirmation from petitioner's two treating physicians that she was fit to return.

Petitioner did return on September 7, 1982, but failed to report two days later. She had an appointment with her physician, Dr. Warren Hardy, on September 9, 1982. The county received a letter from Dr. Hardy indicating that he had been unable to see petitioner on that date. Dr. Hardy ordered petitioner to remain at home and rest until her next scheduled appointment on Septem-

ber 15, 1982. The county sent a written response to Dr. Hardy's letter to petitioner. It advised her that the excused absence by Dr. Hardy was unacceptable and instructed petitioner to report to work. If she failed, she would be shown as absent without leave and treated accordingly.

The county next received a second letter, this one from Dr. Hardy's secretary on September 20, 1982. She explained that Dr. Hardy had been unable to see petitioner on September 15, 1982, due to his own illness. However, petitioner was to remain in bed until her next scheduled appointment. Petitioner never returned to work.

In October, 1984, petitioner's workers' compensation claim was decided adversely to her based on her failure to prove a work-related disability. The county then informed petitioner that "any and all claims of employment are terminated." Petitioner requested a hearing on her discharge before respondent Wayne County Civil Service Commission. During the hearing, the county argued that, under the terms of the collective bargaining agreement, petitioner had automatically resigned her position as of September 22, 1982. Petitioner objected, stating that this was the first time she had been informed that she had "automatically resigned."

The collective bargaining agreement provided:

> Any employee who is absent without leave for five (5) or more consecutive work days without notification to the EMPLOYER as to the reason for said absence, shall be deemed to have resigned from the employ of the EMPLOYER and shall forfeit all seniority rights.

The commission upheld petitioner's termination. She then filed a complaint for superintending control with the Wayne Circuit Court. The court

remanded to the commission for rehearing, holding petitioner had not received adequate notice of the reason for termination. On remand, the commission again upheld petitioner's termination. It indicated that it had terminated petitioner's employment, because it had not received sufficient notification satisfying the reason for petitioner's absence from work.

Petitioner filed another complaint for superintending control. She argued that, since the county had been notified of her absence, the commission had a clear legal duty to order her reinstated to her former position with back pay. The circuit court reversed the commission's order, ruling that the commission had made an error of law in interpreting the collective bargaining agreement. The court concluded that the letter received by the county on September 20, 1982, was sufficient to meet the notice requirement set forth in the collective bargaining agreement.

I

Respondents argue that the trial court erred in overruling the decision of the commission. They point out that the Legislature has provided no mechanism for direct appeals from decisions of general municipal civil service commissions. *Fort v Detroit,* 146 Mich App 499, 502-503; 381 NW2d 754 (1985). Therefore, the proper avenue of review is by way of an action for superintending control. *Id.,* 503-504; MCL 600.615; MSA 27A.615. In this case, petitioner properly filed an independent action in circuit court seeking superintending control. However, the question remains whether the trial court exceeded its authority in granting it and reversing the commission's decision.

In exercising superintending control over an inferior tribunal, a reviewing court is invoking an

extraordinary power. *In re Payne,* 193 Mich App 620, 621; 484 NW2d 759 (1992), lv gtd 442 Mich 923 (1993), citing *In re Huff,* 352 Mich 402; 91 NW2d 613 (1958). The standard for issuing superintending control is to determine whether the inferior tribunal failed to perform a clear legal duty. *Frederick v Presque Isle Judge,* 439 Mich 1, 15; 476 NW2d 142 (1991). Superintending control is also proper where the court committed an error of law. *In re LaFayette Towers,* 200 Mich App 269, 272; 503 NW2d 740 (1993), citing *Wayne Co Prosecutor v Recorder's Court Judge (On Remand),* 167 Mich App 282, 284; 421 NW2d 665 (1988).

An order of superintending control has traditionally been used only to determine: (1) if the inferior tribunal has jurisdiction; (2) whether the inferior tribunal exceeded that jurisdiction; and (3) whether the inferior court proceeded according to law. *In re People v Burton,* 429 Mich 133, 139; 413 NW2d 413 (1987) (citing *Genesee Prosecutor v Genesee Circuit Judge,* 386 Mich 672, 681; 194 NW2d 693 [1972]); *Payne,* 621.

> The process of seeking an order of superintending control is not an appeal. It is an original civil action designed to require the defendant to perform a clear legal duty. *Beer v Fraser Civil Service Comm,* 127 Mich App 239, 242; 338 NW2d 197 (1983). The review in such a case is limited only to questions of law. *In re People v Burton,* 429 Mich 133, 139; 413 NW2d 413 (1987). A reviewing court cannot substitute its judgment of the facts if there is any competent testimony in the record to support the findings made below. *Bay Trust Co v Dow Chemical Co,* 326 Mich 62, 65; 39 NW2d 244 (1949). [*Payne,* 621-622.]

II

In this case, there is no question that the com-

mission had jurisdiction to hear petitioner's grievances. The commission has jurisdiction to "fully hear and determine" employment disputes. See MCL 38.416; MSA 5.1191(16). Moreover, the commission did not exceed its jurisdiction by interpreting the collective bargaining agreement. The only relevant question is whether the commission proceeded according to law.

The collective bargaining agreement provides that automatic resignation occurs when an employee is absent for five or more consecutive days without notifying the county of the reason for the absence. The commission found that the county never received sufficient notice of the reason for petitioner's absence. The trial court found that the commission made a clear error of law when it interpreted the collective bargaining agreement. The court believed it had a clear legal duty to correct the error.

We disagree with the trial court that the commission made a clear error of law. We recognize that construction of unambiguous and unequivocal contracts is a question of law. See *Mt Carmel Mercy Hosp v Allstate Ins Co,* 194 Mich App 580; 487 NW2d 849 (1992); *Chrysler Corp v Brencal Contractors, Inc,* 146 Mich App 766, 775; 381 NW2d 814 (1985). However, contractual language which, standing alone, is not inherently ambiguous may become susceptible to interpretation when examined in connection with the parties' past practices. *Mid-Michigan Education Ass'n v St Charles Community Schools,* 150 Mich App 763, 770; 389 NW2d 482 (1986). The collective bargaining agreement here, to the extent it required notice of the reason for absence from work, is susceptible to interpretation, given the parties' past practices.

The commission in this case refused to find that

the agreement was clear and unambiguous. Instead, it found ambiguity and looked outside the express language of the contract to ascertain the parties' intent. The primary rule in construing a contract is to ascertain the intent of the parties. *Kassin v Arc-Mation, Inc,* 94 Mich App 520, 524-525; 288 NW2d 413 (1979). The commission concluded that the notice the county was entitled to receive was "sufficient notice" of the reasons for petitioner's absence.

Dr. Hardy had declared petitioner fit to return to work following an August 24, 1982, examination. Petitioner did return on September 7, 1982, but failed to report after September 9, 1982. The county advised petitioner that it would not accept her doctor's excuse for her failure to report to work. Therefore, petitioner was aware that other notice was required in order for her notice to be "sufficient."

We agree with the commission that the notice language of the collective bargaining agreement needs interpretation. Under the agreement's terms, the notice that must be given to justify an absence from work must be "sufficient notice." The commission's interpretation of the collective bargaining agreement is reasonable. The trial court's interpretation is unreasonable. It would mean that even an excuse the employee knows to be unacceptable could prevent enforcement of the agreement's automatic resignation provision. We strive to avoid unnatural or unreasonable contract construction, if the language would also bear a fair and reasonable construction. *Ypsilanti v Appalachian Ins Co,* 547 F Supp 823, 826 (ED Mich, 1982), aff'd 725 F2d 682 (CA 6, 1983), citing *B Siegel Co v Wayne Circuit Judge,* 183 Mich 145, 153; 149 NW 1015 (1914).

In ruling that petitioner was absent without leave, the commission found:

> [T]he Appointing Authority supported its position. The Commission determined that the September 14, 1982 note from Dr. Hardy's office (received September 20, 1982) is insufficient evidence for not reporting to work from September 20, 1982, until her admission to the hospital on October 28, 1982. The collective bargaining agreement provides that automatic resignation shall occur when an employee is absent for five or more consecutive work days without notification to the Employer as to the reason for said absence. The August 24, 1982 examination by her doctor established that she was fit to work. The Employer never received sufficient notification after that satisfying the reason for her absence. Since there was no communication from Ms. Loose, the Commission determined that the Appointing Authority proceeded correctly in determining that Ms. Loose was absent without leave. The commission does not find that the determination of the Appointing authority was arbitrary or unreasonable, nor based upon political, religious or racial prejudice.

We conclude that the trial court erred in issuing an order of superintending control reversing the commission's interpretation of the collective bargaining agreement and its findings of fact. There was competent testimony in the record supporting the commission's findings. See *Payne,* 621-622. The commission did not fail to perform a clear legal duty. *Id.* Moreover, the commission did not exceed its jurisdiction; it proceeded according to law.

Reversed. The commission's order affirming the action of the appointing authority is reinstated.

SMITH v MICHIGAN BELL TELEPHONE COMPANY (ON REMAND)

Docket No. 165909. Submitted July 7, 1993, at Lansing. Decided September 7, 1993, at 9:35 A.M.

Paul L. Smith was awarded workers' compensation benefits from his employer, Michigan Bell Telephone Company, for a work-related injury that occurred before March 31, 1982. The hearing referee allowed the defendant to reduce its liability for workers' compensation benefits by amounts received by the plaintiff in the form of unemployment compensation and wage continuation benefits. The Workers' Compensation Appeal Board reversed the grant of those setoffs, determining that there was no evidence that such benefits had been paid. The Court of Appeals, GILLIS, P.J., and WEAVER and DOCTOROFF, JJ., reversed the appeal board's decision with respect to the setoffs, holding that an employer is entitled to credit against its workers' compensation liability any unemployment compensation benefits paid to an injured employee without first seeking an evidentiary hearing to establish the amount of unemployment compensation paid, that there was sufficient evidence on the record to indicate that the plaintiff received wage continuation benefits, and that an employer is entitled to a setoff against workers' compensation liability for any wage continuation benefits paid to an injured employee. 189 Mich App 125 (1991). The Supreme Court granted leave to appeal, 440 Mich 893 (1992), and remanded the case to the Court of Appeals for reconsideration in light of *Maner v Ford Motor Co,* 442 Mich 620 (1993). 442 Mich 934 (1993).

On remand, the Court of Appeals *held:*

1. Benefits other than those paid or caused to be paid by an employer as provided in the workers' compensation act cannot be used to reduce amounts payable under the act to an injured employee unless such a reduction is specifically provided for in the act. For injuries incurred before March 31, 1982, the workers' compensation act does not allow setoffs for wage continuation benefits.

2. An evidentiary hearing is not necessary before an employer may take a setoff for unemployment compensation bene-

fits. In case of a dispute over the proper amount of such a setoff, a hearing pursuant to 1984 AACS, R 408.35 is available.

Remanded.

*Sachs, Nunn, Kates, Kadushin, O'Hare, Helveston & Waldman, P.C.* (by *Granner S. Ries*), for the plaintiff.

*Lacey & Jones* (by *Gerald M. Marcinkoski*), for the defendant.

ON REMAND

Before: DOCTOROFF, C.J., and WEAVER and MARILYN KELLY, JJ.

DOCTOROFF, C.J. This case is before us on remand from our Supreme Court pursuant to a June 30, 1993, order returning the matter for reconsideration in light of *Maner v Ford Motor Co,* 442 Mich 620; 502 NW2d 197 (1993). 442 Mich 934 (1993). We affirm all those portions of our prior opinion except the analysis regarding the wage continuation offset issue, which we now vacate.

We initially released an opinion in this matter affirming the decision of the Workers' Compensation Appeal Board insofar as it upheld plaintiff's benefits for a work-related injury, but reversing that portion of the WCAB decision that precluded defendant from taking an offset for that amount of compensation that plaintiff received as unemployment compensation and wage continuation benefits. *Smith v Michigan Bell Telephone Co,* 189 Mich App 125; 472 NW2d 32 (1991). Thereafter, this Court convened a special panel pursuant to the conflict resolution provisions of Administrative Order No. 1990-6, as extended by Administrative

Order No. 1993-4, and overruled our prior decision regarding the wage continuation offset issue. *Maner v Ford Motor Co,* 196 Mich App 470, 473, 478; 493 NW2d 909 (1992). In its recent decision, our Supreme Court agreed with the result and reasoning of the conflict resolution panel in *Maner.* See 442 Mich 622.

Accordingly, we now expressly abandon our prior position on the wage continuation offset issue in favor of that expressed by this Court in *Maner,* as adopted by our Supreme Court. With respect to the offset for unemployment compensation payments, we continue to adhere to the view expressed in our original opinion—that no evidentiary hearing is necessary to verify that figure. See *Smith, supra* at 133-134. However, being cognizant of our Supreme Court's recent statement regarding the verification of setoffs in *Maner,* should the parties be unable to agree upon the proper amount of unemployment compensation setoff, a Rule V (1984 AACS, R 408.35) hearing would be available to resolve the dispute. 442 Mich 623, n 4; *Franks v White Pine Copper Div,* 422 Mich 636, 660-664; 375 NW2d 715 (1985).

Our prior opinion in *Smith* is affirmed in part and vacated in part. This matter is remanded for a determination of the proper setoff available for unemployment compensation benefits and further proceedings, should they become necessary. We do not retain jurisdiction.

Remanded.

MARILYN KELLY, J., concurred in the result only.

PEOPLE v OXENDINE

Docket No. 136658. Submitted June 2, 1993, at Detroit. Decided September 7, 1993, at 9:40 A.M.

Charles Oxendine was convicted by a jury in the Detroit Recorder's Court, Clarice Jobes, J., of ninety-nine counts of altering a motor vehicle identification number without intent to mislead, two counts of operating a chop shop, ten counts of receiving and concealing stolen property exceeding $100 in value, and of being an habitual offender. He appealed.

The Court of Appeals *held:*

1. Convictions of receiving and concealing stolen property and of operating a chop shop violate the double jeopardy protection against multiple conviction for the same offense where, as in this case, the convictions arise from the same criminal transaction. The convictions and sentences for receiving and concealing stolen property must be vacated.

2. Convictions of altering a vehicle identification number and of operating a chop shop violate the double jeopardy protection against multiple punishment for the same offense where, as in this case, the convictions arise from the same criminal transaction. The convictions and sentences for altering vehicle identification numbers must be vacated.

3. The statutory presumption that a person in possession of a motor vehicle or motor vehicle parts with altered vehicle identification numbers did the alteration is not unconstitutional.

4. The convictions of operating a chop shop were supported by sufficient evidence of stolen motor vehicle parts in the possession of the defendant.

5. There was no abuse of discretion by the prosecutor in charging the defendant.

Affirmed in part and reversed in part.

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REFERENCES

Am Jur 2d, Criminal Law §§ 266, 277.

Supreme Court's views as to application, in state criminal prosecutions, of double jeopardy clause of Federal Constitution's Fifth Amendment. 95 L Ed 2d 924.

1. CRIMINAL LAW — DOUBLE JEOPARDY — RECEIVING AND CONCEALING STOLEN PROPERTY — CHOP SHOPS.

   Convictions of receiving and concealing stolen property and of owning or operating a chop shop violate a defendant's protection against double jeopardy where they arise from the same criminal transaction (MCL 750.535, 750.535a[2]; MSA 28.803, 28.803[1][2]).

2. CRIMINAL LAW — DOUBLE JEOPARDY — ALTERING VEHICLE IDENTIFICATION NUMBERS — CHOP SHOPS.

   Convictions of altering a motor vehicle identification number and of owning or operating a chop shop violate a defendant's protection against double jeopardy where they arise from the same criminal transaction (MCL 750.535a[2], 750.415[1]; MSA 28.803[1][2], 28.647[1]).

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Rita H. Lewis,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Fred E. Bell*), for the defendant on appeal.

Before: FITZGERALD, P.J., and MICHAEL J. KELLY and W. J. CAPRATHE,* JJ.

FITZGERALD, P.J. Following a jury trial, defendant was convicted of ninety-nine counts of altering a vehicle identification number (VIN) without intent to mislead, MCL 750.415(1); MSA 28.647(1), two counts of owning or operating a chop shop, MCL 750.535a(2); MSA 28.803(1)(2), ten counts of receiving and concealing stolen property over $100, MCL 750.535; MSA 28.803, and of being an habitual offender, MCL 769.12; MSA 28.1084. Defendant was sentenced to a prison term of eight to

* Circuit judge, sitting on the Court of Appeals by assignment.

twenty years. He appeals as of right. We affirm in part and reverse in part.

Defendant first claims that his convictions of receiving and concealing stolen property and of operating a chop shop violated his protection against multiple convictions under the Double Jeopardy Clauses, US Const, Am V; Const 1963, art 1, § 15.[1] For the reasons enunciated in *People v Allay,* 171 Mich App 602; 430 NW2d 794 (1988), we agree. Accordingly, we vacate the convictions and sentences for receiving and concealing stolen property.

Defendant also maintains that his convictions of altering VINS and operating a chop shop violated the double jeopardy protection against multiple punishment. We agree.

Again, we are confronted with the double jeopardy protection against multiple punishment for the same offense. This form of double jeopardy addresses the defendant's interest in not having more punishment imposed than that intended by the Legislature. *People v Robideau,* 419 Mich 458, 485; 355 NW2d 592 (1984). The issue whether two convictions involve the same offense for purposes of the protection against multiple punishment is solely one of legislative intent. *People v Sturgis,* 427 Mich 392, 400; 397 NW2d 783 (1986).

This Court must use traditional means to determine whether the Legislature intended to permit multiple punishment and examine the subject, language, and history of the statutes involved. *Robideau, supra* at 486. Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishment. *Id.* at 487. A further source of legislative intent can be found in

[1] The prosecutor concedes error with respect to this issue.

the amount of punishment expressly authorized by the Legislature. Where the Legislature has taken conduct from a base statute and increased the penalty for aggravated conduct, it in all likelihood did not intend punishment under both statutes. *Id.* at 487-488.

The statutes involved are part of a statutory scheme dealing with automobiles and stolen goods in general. *People v Noble,* 152 Mich App 319, 323-324; 393 NW2d 619 (1986). The Penal Code prohibits the removing and defacing of VINS on automobile parts and also prohibits the switching of parts that have VINS on them. MCL 750.415; MSA 28.647; *People v Boscaglia,* 419 Mich 556, 564; 357 NW2d 648 (1984). Violation of § 415(1) is a misdemeanor.[2] The code also prohibits receiving, possessing, and concealing stolen property, MCL 750.535; MSA 28.803.

The statutes involved have common social purposes. The prohibition against concealing or misrepresenting the identity of a motor vehicle by altering the VIN was enacted to provide for ready ascertainment of a VIN in order to deter theft. The thrust of the statute is the prevention of the taking apart and reassembling of stolen vehicles by chop shops. Through this statute, the Legislature intended to curtail motor vehicle thefts as well as chop shop operations. The statute inhibits both the profit of the illegal stolen car market and the ease with which stolen automobiles and their parts are sold. Likewise, the chop shop statute was specifically intended to prevent profiteering and larcenous activity. *Allay, supra* at 609. Although one statute prohibits conduct that may facilitate theft and the other prohibits profiteering through the sale of stolen property, each statute discour-

[2] Violation of § 415(2), which contains the same elements as § 415(1) plus the element of intent to mislead, is a felony.

ages the theft of property, albeit in a different manner.

Addressing the relationship of the criminal penalties provided for each offense, we note that altering a VIN without intent to mislead is a misdemeanor punishable by imprisonment in the county jail for not more than ninety days, or by a fine of no more than $100, or both. MCL 750.504; MSA 28.772.[3] A first offense under the chop shop statute carries a maximum penalty of five years' imprisonment or $5,000, or both. The primary concern of the chop shop statute was to increase the penalty on a chop shop operator, thereby reducing the economic benefit derived from chop shop ventures. The criminal penalties indicate that the chop shop statute bears a hierarchical relationship to the statute prohibiting alteration of VINS. "In light of the problems posed by chop shops, the Legislature devised enhanced penalties and procedures in an attempt to tailor a specific solution." *Allay, supra* at 611. The multiple convictions for altering VINS and operating a chop shop are inconsistent with the Legislature's intent and, therefore, constitute double jeopardy. Consequently, we vacate the convictions and sentences for altering VINS.

Defendant next contends that the statutory presumption contained in MCL 750.415(3); MSA 28.647(3), that a person in possession of a vehicle or motor vehicle parts with an altered VIN did the alteration, is unconstitutional. The argument raised by defendant was addressed and rejected by this Court in *People v Battle,* 161 Mich App 99, 101; 409 NW2d 739 (1987).[4]

[3] Altering a VIN with intent to mislead is punishable by imprisonment for not more than four years or by a fine of no more than $2,000, or both. MCL 750.503; MSA 28.771.

[4] In *Battle,* the defendant was convicted under subsection 2, whereas the defendant herein was convicted under subsection 1.

Defendant also complains that the evidence was insufficient to support seven of his ten convictions of receiving and concealing stolen property because the evidence failed to establish that the property was stolen. Although we disagree, this issue is moot in light of our conclusion that defendant's convictions of receiving and concealing must be vacated.

Defendant also asserts that there was insufficient evidence to support his conviction of operating a chop shop because the evidence failed to establish the presence of three or more stolen parts. We disagree. Evidence was presented that four items were seized from defendant's storage unit and that four other stolen items were seized from defendant's residence.

Lastly, we reject defendant's argument that prosecutorial overcharging coerced the jury into reaching verdicts without deliberating on each count. The prosecutor had wide discretion over what charges to file, and that discretion will not be disturbed absent a showing of clear and intentional discrimination based on an unjustifiable standard such as race, religion, or some other arbitrary classification. *People v Allan,* 158 Mich App 472, 474; 404 NW2d 266 (1987). No such showing was made in this case.

Affirmed in part and reversed in part.

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Nonetheless, the presumption contained in subsection 3 applies to the entire section.

PEOPLE v MONTROSE (AFTER REMAND)

Docket No. 137523. Submitted June 3, 1993, at Detroit. Decided September 7, 1993, at 9:45 A.M.

Thomas Montrose pleaded guilty in the Detroit Recorder's Court, John R. Kirwan, J., of breaking and entering an occupied dwelling with the intent to commit criminal sexual conduct and was sentenced to six to fifteen years' imprisonment. He appealed, and the Court of Appeals, BRENNAN, P.J., and HOOD and SULLIVAN, JJ., remanded the action to the trial court to allow him to make a motion to withdraw his plea. On remand, Judge Kathleen Macdonald, who had assumed Judge Kirwan's position as a visiting judge from the Wayne Circuit Court to the Detroit Recorder's Court, denied the motion. The defendant appealed.

After remand, the Court of Appeals *held:*

1. There is nothing that requires that the defendant's motion to withdraw his guilty plea be heard by the judge who accepted his plea of guilty.

2. The trial court did not abuse its discretion in denying the defendant's motion to withdraw his guilty plea. The plea-taking requirements of MCR 6.302 were fully complied with by Judge Kirwan. The defendant's assertion to a probation officer after his plea that he could not have committed the crime does not rebut the factual basis upon which his plea was accepted.

Affirmed.

1. CRIMINAL LAW — GUILTY PLEAS — POSTCONVICTION MOTIONS.

There is no requirement that the same judge who accepts a defendant's plea of guilty must preside and hear postconviction motions by the defendant.

2. CRIMINAL LAW — GUILTY PLEAS — POSTSENTENCING MOTIONS.

There is no absolute right to withdraw a guilty plea once it has been accepted by the trial court; where a motion to withdraw a guilty plea is brought after sentencing, a trial court's decision

REFERENCES

Am Jur 2d, Criminal Law §§ 500, 501, 505, 535.

Withdrawal of plea of guilty or nolo contendere, after sentence, under Rule 32(d) of Federal Rules of Criminal Procedure. 9 ALR Fed 309.

will not be reversed absent a clear abuse of discretion resulting in a miscarriage of justice.

3. CRIMINAL LAW — PLEAS — POSTSENTENCING MOTIONS.
Error in the plea-taking proceeding must be shown in order to set aside a plea after sentencing (MCR 6.311).

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Jeffrey Caminsky,* Assistant Prosecuting Attorney, for the people.

*Michael J. Brady,* for the defendant on appeal.

AFTER REMAND

Before: FITZGERALD, P.J., and MICHAEL J. KELLY and W. J. CAPRATHE,* JJ.

FITZGERALD, P.J. Pursuant to a plea and sentencing agreement, defendant pleaded guilty of breaking and entering an occupied dwelling with intent to commit criminal sexual conduct, MCL 750.110; MSA 28.305. Defendant was sentenced to a prison term of six to fifteen years' imprisonment. He appeals as of right. We affirm.

After a claim of appeal was filed in this Court, the case was remanded to the trial court to allow the defendant to make a motion to withdraw his guilty plea. Defendant originally pleaded guilty before Judge John Kirwan, who also imposed his sentence. The hearing regarding the motion to withdraw his plea was held before Judge Kathleen Macdonald, who had assumed Judge Kirwan's position as a visiting judge from the Wayne Circuit Court to Detroit Recorder's Court.

Defendant first argues that he was entitled to have his motion to withdraw his guilty plea heard

* Circuit judge, sitting on the Court of Appeals by assignment.

by the judge who accepted the plea of guilty.[1] However, defendant failed to object to Judge Macdonald's conducting the proceeding. Defendant did not mention Judge Kirwan's alleged superior ability to hear the motion until after Judge Macdonald stated that she was going to deny the motion. Certainly, defendant would not have complained had Judge Macdonald granted the motion. Because our research has unveiled no court rule, statute, or case law requiring postconviction motions to be heard by the convicting judge,[2] and because of defendant's failure to timely and formally object to Judge Macdonald's conducting the hearing, we reject defendant's argument.

Next, defendant argues that Judge Macdonald erred in denying his postsentence motion to withdraw his guilty plea.

There is no absolute right to withdraw a guilty plea once it has been accepted by the trial court. When a motion to withdraw a guilty plea is brought after sentencing, a trial court's decision will not be reversed absent a clear abuse of discretion resulting in a miscarriage of justice. *People v Hall,* 195 Mich App 460, 461; 491 NW2d 854 (1992).

To set aside a plea after sentencing, MCR 6.311 requires error in the plea proceeding. Defendant does not dispute that the trial court fully complied

[1] MCR 8.111(C), on which defendant relies, is inapplicable in this case. The rule was intended to prevent judge shopping, to avoid the appearance of impropriety, and to equally distribute the workload of a court among the judge's elected to that court. The rule basically provides for the random assignment of cases to a judge by lot, generally at the time the case is filed.

[2] Although judicial assignments cover all postjudgment matters in cases heard during the assignment, thus giving the assigned judge authority to hear postjudgment matters, *State Court Administrative Office Judicial Assignment Guidelines,* pp 24-25 (July 1993), there is no requirement that the assigned judge *must* preside over all postjudgment motions.

with the plea-taking requirements of MCR 6.302.[3] MCR 6.302 is the successor of GCR 1963, 785.3(2), which is the successor of Court Rule No 35A (1945), in reference to which the Supreme Court held in *People v Barrows,* 358 Mich 267, 272; 99 NW2d 347 (1959):

> The direct questioning of a defendant by the trial judge on [a] plea of guilty is required by the rule for the purpose of establishing the crime and the participation therein of the person pleading guilty. This is a precaution against involuntary or induced false pleas of guilty *and against subsequent false claims of innocence.* [Emphasis added.]

Likewise, the rationale underlying GCR 1963, 785.3 was the prevention of involuntary or false pleas. *People v Berry (On Remand),* 198 Mich App 123, 128; 497 NW2d 202 (1993).

At the plea hearing, defendant offered the following version of events to establish the factual basis for the plea:

> I entered that house without permission, went in the room, pulled a knife to the lady, told the lady to suck my penis, then I left out the door.

Defendant asserts that the description of the offense that he related to a probation officer after the plea and that was contained within the presentence report is an assertion of innocence that negates the factual basis for his plea and entitles him to withdraw his plea.[4] We disagree. Defendant's bare assertion to the probation department

[3] In addition, defendant gave an adequate factual recitation to support the plea, and denied the existence of any undue influence on his decision to plead guilty.

[4] Defendant's description of the offense as contained in the presentence report is as follows:

that he could not have committed the crime does not rebut the factual basis upon which his previous plea was accepted, particularly in light of defendant's admission that "I am pleading guilty because I am guilty."[5]

Additionally, defendant failed to raise the issue regarding his alleged innocence at the time of sentencing and did not move to withdraw his plea before sentencing. Rather, defendant indicated that he had nothing to say and permitted the sentencing court to sentence him pursuant to the sentencing agreement. Under these circumstances, we conclude that the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea.

Affirmed.

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They say I broke into [the] house, tried to rape her. There is no way I could have been there, the time does not match up. I was at a friend's house, when they say this happened, now I was there at 11:00 that night. I told her that she has to start paying me for the coke she owes me money for. That [is] how I got this B&E put on me. There was no reason for me to do it. I had a job and girlfriend.

[5] Defendant also indicated at the time of the plea that he had not been influenced to plead guilty and that his plea was a voluntary act.

PEOPLE v MERRIWEATHER

Docket No. 131742. Submitted February 3, 1993, at Detroit. Decided September 7, 1993, at 9:50 A.M. Leave to appeal sought.

Bashara Merriweather was convicted by a jury in the Recorder's Court of Detroit, Michael J. Talbot, J., of assault with intent to rob while armed, assault with intent to murder, breaking and entering an occupied dwelling, and two counts of first-degree criminal sexual conduct. The defendant was sentenced to imprisonment for life for each of the assault convictions, ten to fifteen years for the breaking and entering conviction, and 60 to 120 years for each of the criminal sexual conduct convictions. The defendant appealed.

The Court of Appeals *held:*

1. The defendant's claim that his convictions must be reversed because the trial court failed to conduct a hearing concerning the voluntariness of his confession before admitting it into evidence is without merit. The record clearly shows that such a hearing was held.

2. The sixty-year minimum sentences for the criminal sexual conduct convictions, being triple the twenty-year upper limit of the minimum sentence recommended in the sentencing guidelines, violates the proportionality requirement of *People v Milbourn,* 435 Mich 630 (1990), and must be set aside. Although reluctant to do so, the Court is constrained by Administrative Order No. 1990-6 to hold that these sentences do not violate the life expectancy rule of *People v Moore,* 432 Mich 311 (1989).

Convictions affirmed, but remanded for resentencing for the criminal sexual conduct convictions.

CONNOR, J., concurring in the affirmance of the convictions but dissenting from the setting aside of the sentences for the criminal sexual conduct convictions, stated that the sentences should be affirmed because they do not violate the life expectancy rule and are proportional to the defendant's background and the brutal nature of the crimes.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of

Research, Training, and Appeals, and *Nancy A. Neff,* Assistant Prosecuting Attorney, for the people.

*Arthur L. Morman,* for the defendant.

Before: WAHLS, P.J., and MICHAEL J. KELLY and CONNOR, JJ.

MICHAEL J. KELLY, J. Defendant was convicted by a jury of assault with intent to rob while armed, MCL 750.89; MSA 28.284, assault with intent to murder, MCL 750.83; MSA 28.278, breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305, and first-degree criminal sexual conduct (two counts), MCL 750.520b; MSA 28.788(2). He thereafter was sentenced to life imprisonment for each of the assault convictions, ten to fifteen years' imprisonment for the breaking and entering conviction, and 60 to 120 years' imprisonment for each of the two criminal sexual conduct convictions. He now appeals as of right. We affirm all convictions, but remand for resentencing for the criminal sexual conduct convictions.

Defendant's claim that his convictions must be reversed because the trial court decided his challenge to the voluntariness of his confession without conducting an evidentiary hearing pursuant to *People v Walker,* 374 Mich 331; 132 NW2d 87 (1965), lacks record support. Our review of the record reveals that such a hearing was held.

Defendant also challenges his sentences as being violative of the dictates of *People v Moore,* 432 Mich 311; 439 NW2d 684 (1989), and *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). Defendant's sentences for the assault convictions and the breaking and entering conviction do not vio-

late either the life expectancy rule announced in *Moore* or the principle of proportionality announced in *Milbourn*. The sentences for the criminal sexual conduct conviction are both disproportionate and arguably hard life. The two sixty-year minimum sentences exceed the guidelines' recommended minimum range by forty years, and are three times the guidelines' recommendation. There is no doubt this defendant deserves a severe sentence. We think, however, such lengthy sentences, which are effectively hard life sentences, are unsupportable socially, logically, legally, and economically. Those who contend otherwise ignore real and statistical averages. Keeping ancient, feeble, doddering prisoners in durance is uncivilized, and evidences poor judgment and bad economics.

We do not believe that defendant, who was born in 1971, has a reasonable prospect of actually serving his 60- to 120-year sentences. However, we are constrained under Administrative Order No. 1990-6 to follow this Court's decision in *People v Weaver (After Remand)*, 192 Mich App 231; 480 NW2d 607 (1991). The *Weaver* Court affirmed a 75-year minimum sentence imposed on a defendant who was approximately thirty years old. The *Weaver* Court concluded that a defendant reasonably could be expected to serve a sentence that would place him in his early nineties before being first eligible for parole. We disagree with and abhor this result, and follow *Weaver* only because we are required to do so.

However, we find that the 60- to 120-year sentences violate the proportionality requirement of *Milbourn*. Clearly, considering defendant's background and the nature of his crimes, a severe sentence is warranted in this case. However, the sentences imposed exceeded the guidelines' recommended range by forty years, and are three times

the guidelines' recommendation. Under the circumstances, we conclude that this substantial departure violates the proportionality requirement of *Milbourn.* The 60- to 120-year sentences are set aside, and this matter is remanded for resentencing for the criminal sexual conduct convictions. All the convictions are affirmed, and the sentences for assault and breaking and entering are likewise affirmed.

Affirmed in part and remanded for resentencing for the first-degree criminal sexual conduct convictions.

WAHLS, P.J., concurred.

CONNOR, J. *(concurring in part and dissenting in part).* I concur in the majority's affirmance of defendant's convictions. I would affirm defendant's sentences as well. I do not find the 60- to 120-year sentences to violate *People v Moore,* 432 Mich 311; 439 NW2d 684 (1989). See *People v Weaver (After Remand),* 192 Mich App 231, 234-235; 480 NW2d 607 (1991). Considering defendant's background and the brutal nature of his crimes, I do not find the sentences to violate *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990).

*In re* CONSERVATORSHIP OF HALBECK

(OTTO v DETERS)

Docket No. 136453. Submitted February 18, 1993, at Lansing. Decided September 7, 1993, at 9:55 A.M.

Edna LeBlanc, as conservator of the estate of Opal Halbeck, a protected person and a Kansas resident temporarily living in Michigan, engaged Lawrence J. Otto to provide certain services for the estate. After the services were provided, a dispute arose and LeBlanc terminated Otto's services and declined to pay for the services rendered. Otto wrote to the Cheboygan County Probate Court, enclosing a copy of his bill, informing the court that LeBlanc had stated that payment for the services rendered would not be made. The deputy register of the probate court replied to Otto, enclosing a Statement and Proof of Claim form and informing him that there was a hearing set for May 14, 1990, regarding the conservator's first annual accounting. The deputy register indicated that Otto might want to attend the hearing relative to the claim or process the claim before that date. Otto was not told to file a petition, but, instead, was told to file the claim form. The claim form stated that claims must be presented either personally or by mail to the fiduciary on or before the last day for the presentment of claims and that the claim could also be filed with the probate court. Otto signed the proof of service portion of the form and mailed the form with his claim to the deputy register on May 9, 1990, noting that a copy was being sent to LeBlanc. The form was stamped "filed" by the probate court on May 11, 1990. On May 23, 1990, the probate court scheduled a hearing regarding Otto's claim for July 2, 1990. Margaret Deters, who replaced LeBlanc as conservator on June 1, 1990, filed objections to Otto's claim on June 12, 1990, and also served on Otto interrogatories, requests to produce, and requests to admit. At the July 2, 1990, hearing, the court, Joanna Neale, J., gave Otto sixty-three days from June 12, 1990, to file a petition for allowance of his claim. Halbeck died on July 27, 1990, and her estate was probated in

REFERENCES

Am Jur 2d, Creditors' Bills §§ 41, 46, 73.

See ALR Index under Creditors' Bills.

Kansas. Otto, unaware of Halbeck's death, filed a petition on August 15, 1990, containing information virtually identical to that contained in his earlier claim. Deters moved for dismissal, contending that, after Halbeck's death, only the conservator could file a claim in the probate court, and that Otto's only recourse was to file his claim in Kansas. The probate court agreed that it lacked jurisdiction with regard to Halbeck's estate and dismissed the claim. Otto appealed.

The Court of Appeals *held:*

1. Halbeck's death did not deprive the probate court of jurisdiction to resolve the matter. Pursuant to MCL 700.488(3); MSA 27.5488(3), a claimant whose claim is not paid may petition the probate court for determination of the claim at any time before it is barred by the applicable statute of limitation. The form that Otto mailed on May 9, 1990, fulfilled the requirements of a petition set forth in MCR 5.113. The only items missing were the file number of the case and the name of the court, and the omission of these items is not fatal.

2. The Revised Probate Code does not require that a "claim," as defined in MCL 700.3(4); MSA 27.5003(4), be made only in the form of a "petition" as defined by MCR 5.113.

3. The claim was properly presented under MCL 700.488(1) or (2); MSA 27.5488(1) or (2).

4. Under the unusual circumstances of this case, Otto's filing of the detailed statement and proof of claim amounted to the filing of a petition. The probate court erred in finding that MCL 700.488(6); MSA 27.5488(6) divested it of jurisdiction.

Reversed.

MCDONALD, J., dissenting, stated that because Otto served a written claim on the conservator two days before filing a statement and proof of claim with the probate court, the claim served on the conservator is the presented claim. After receiving the claim, the conservator filed a written disallowance of the claim within the sixty-three-day period provided in MCL 700.488(2); MSA 27.5488(2). Halbeck died before Otto filed his petition for determination of the claim with the court. Otto therefore failed to file properly a claim with the court before Halbeck's death, and had no standing to file a claim in the conservatorship after the death. MCL 700.488(6); MSA 27.5488(6) grants the power to petition the probate court after the death of the protected person only to the conservator. Furthermore, the claim submitted by Otto was not a petition.

1. EXECUTORS AND ADMINISTRATORS — GUARDIAN AND WARD — LIMITATION OF ACTIONS — PROTECTED PERSONS.

A claimant whose claim against the estate of a protected person

is not paid may petition the probate court for a determination of the claim at any time before it is barred by the applicable statute of limitation (MCL 700.488[3]; MSA 27.5488[3]).

2. PLEADING — PROBATE COURT — CLAIMS — PETITIONS.

The Revised Probate Code does not require that a claim, as defined in MCL 700.3(4); MSA 27.5003(4), be made only in the form of a "petition" as defined by MCR 5.113.

*Mary M. Otto,* for Lawrence Otto.

*Lindsay & Lindsay* (by *Stephen E. Lindsay*), for Margaret Deters.

Before: CORRIGAN, P.J., and SHEPHERD and MCDONALD, JJ.

CORRIGAN, P.J. In this action for payment for services rendered to respondent's ward, Opal Halbeck, a Kansas resident who died while temporarily living in Michigan, petitioner appeals the probate court's determination that it lacked jurisdiction. We reverse.

Respondent's predecessor as conservator of Opal Halbeck's estate, Edna LeBlanc, contracted with petitioner Lawrence Otto to prepare tax forms and inventory the estate on December 12, 1989. Petitioner provided those services, but a dispute arose in March 1990. On March 26, 1990, LeBlanc terminated petitioner's services and declined to pay him for the services rendered. Seeking payment, petitioner first wrote to LeBlanc on April 25, 1990. On May 3, 1990, petitioner wrote to the probate court, enclosing a copy of his bill and stating:

> To date no payment has been received and I was informed on or about March 26th that payment for services rendered will not be made. I have waited a week since sending my bill and have had no communication with Mrs. LeBlanc. A copy of this letter is being sent to Mrs. LeBlanc.

On May 8, 1990, the deputy register of the probate court replied to petitioner:

> Enclosed is a statement and proof of claim which you may want to complete, attaching a statement of services. There is an upcoming hearing on 5/14/90 on the first account [conservator's first annual accounting] which you may want to attend relative to your claim or you may want to process your claim prior to that date.

Although petitioner had explicitly informed the probate court that the conservator had already disallowed payment, he was not told to file a petition, but, instead, was told to file the claim form approved by the State Court Administrative Office. The form included a statement that "[c]laims must be presented either personally or by mail to the fiduciary on or before the last day for presentment of claims. This claim may also be filed with the probate court (see reverse side for proof of service)." Petitioner signed the "proof of service" portion of the form and dated it May 9, 1990. He then mailed the completed form with a claim for $1,075 to the deputy register, with a note saying, "A copy is being sent to Edna LeBlanc." The probate court stamped petitioner's completed form "filed" on May 11, 1990. On May 23, 1990, the probate court scheduled a hearing regarding the petitioner's claim for July 2, 1990.

Respondent Deters, who replaced LeBlanc as conservator on June 1, filed objections to petitioner's statement and proof of claim on June 12. At the same time, Deters also served interrogatories, requests to produce, and requests to admit on the petitioner. After June 12, discovery apparently proceeded on the petitioner's claim. The claim was thus the functional equivalent of a petition.

At the hearing on July 2, the court, acting on

Deters' objection, gave petitioner sixty-three days from the date of the conservator's objections to file a petition for allowance of his claim.

Opal Halbeck died on July 27. Her estate was probated in Rush County, Kansas, the state of her legal residence.

Petitioner, apparently unaware of Halbeck's death, complied with the court's July 2 directive and filed the petition on August 15. The petition contained information virtually identical to that contained in the earlier claim. Respondent then moved to dismiss the petition because Halbeck had died before it was filed. She contended that after Halbeck's death, only the conservator could file a claim in the probate court and that the petitioner's only recourse was to file his claim in Kansas. Agreeing that it lacked jurisdiction with regard to Halbeck's estate, the probate court dismissed the claim.

The definition of a "claim" applicable to estates commenced before January 1, 1989,[1] appears at MCL 700.3(4); MSA 27.5003(4):

> "*Claim" in respect to estates of* decedents, disappeared persons, minors, and *legally incapacitated persons includes liabilities of the* decedent, disappeared person, or *ward,* whether *arising in contract,* in tort, or otherwise, *and liabilities of the estate which arise* at or *before the death of the decedent,* and funeral and burial expenses. Claim does not include estate and inheritance taxes, demands, or disputes regarding title of a decedent, disappeared person, or ward to specific assets alleged to be included in the estate. [Emphasis supplied.]

[1] MCL 700.3(4); MSA 27.5003(4) was rewritten by 1988 PA 222, but is applicable only to estates commenced on or after January 1, 1989. Because the Halbeck estate was commenced in 1988, when LeBlanc was appointed conservator, the earlier version of the statute controls.

Claims against the estate of a protected person are governed by MCL 700.488; MSA 27.5488, which provides in part:

> (1) A conservator may pay or secure from the estate claims against the estate or against the protected person arising before or after the conservatorship upon their presentation and allowance . . . . A claim may be presented by either of the following methods:
>
> (a) The claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and mailing address of the claimant, and the amount claimed.
>
> (b) The claimant may file a written statement of the claim, in the form prescribed by supreme court rule, with the court and deliver or mail a copy of the statement to the conservator.
>
> (2) A claim shall be considered presented on receipt of the written statement of claim by the conservator or on the filing of the claim with the court, whichever occurs first. A presented claim shall be allowed if it is not disallowed by written statement mailed by the conservator to the claimant within 63 days after its presentation. The presentation of a claim tolls any statute of limitation relating to the claim until 28 days after its disallowance.
>
> (3) A claimant whose claim is not paid may petition the court for determination of the claim at any time before it is barred by the applicable statute of limitation and, upon due proof, procure an order for its allowance, payment, or security from the estate.
>
> * * *
>
> (6) If a protected person dies while under conservatorship, *the court may, upon petition of the conservator and with or without notice, hear a claim for burial expense or any other claim as the court considers advisable.* Upon hearing the claim, the court may enter an order allowing or disallowing the claim or any part of it and provide in the

> order of allowance that the claim or any part of it shall be paid immediately if payment can be made without injury or serious inconvenience to the protected person's estate. [Emphasis supplied.]

Respondent relies on MCL 700.488(6); MSA 27.5488(6) for the rule that, after the death of a protected person, only the conservator may petition the court for payment of a claim. In support of this proposition, she also cites MCL 700.485(5); MSA 27.5485(5), which directs:

> If a protected person dies, the conservator shall . . . .
>
> * * *
>
> (c) Retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto.

Respondent asserts that her only duty after Halbeck's death was to transfer all the assets of the estate to the ward's personal representative. If, she argues, she did anything other than what is directed by § 485(5)(c), i.e., paying petitioner for services rendered before the ward's death, she would violate § 485 and breach her fiduciary duties. We disagree.[2]

In *In re Quinney's Estate,* 287 Mich 329, 334; 283 NW 599 (1939), our Supreme Court concluded that if a guardian had contracted with someone to render services to the deceased ward and that party had performed,

[2] At least one other court, in a state with a statutory scheme quite similar to Michigan's, has found that individuals with a claim against the estate of a protected person are "other persons entitled" to assets of the conservatorship. See *In re Britten,* 430 NW2d 408, 410-411 (Iowa, 1988). "For purposes of carrying out this statutory directive, the court may find in the proper circumstances that the persons entitled to these assets are someone other than the ward's personal representative." *Id.* at 411, construing Iowa Code § 633.678.

> such person could not present a claim against [the ward's] estate and recover upon the same after her death. . . . The right to recover by such person would be against the guardian upon the guardian's contract, and, upon payment or settlement thereof, the guardian might include the claim paid in his account as guardian, and *its allowance would in the first instance be by the probate court.* [Emphasis supplied.]

Although Article 4 of the Revised Probate Code is largely adapted from the Uniform Guardianship and Protective Proceedings Act (hereafter the "uniform act"), 8 ULA (Master ed), pp 478-510, § 488(6) appears to be a unique provision.[3] We thus turn to other states' case authority in search of guidance. See, e.g., anno: *Power of guardian, committee, or trustee of mental incompetent, after latter's death, to pay debts and obligations,* 60 ALR2d 963. Many jurisdictions maintain a strict dichotomy between the powers of a conservator or guardian and the powers of a personal representative or executor of a ward's estate. See, e.g., *In re Poynot,* 389 So 2d 106, 107 (La App, 1980) (remaining debts must be paid by the executor, the administrator, or the heirs only; state has not adopted the uniform act); *In re Bohnstedt,* 36 Del Ch 97, 100; 125 A2d 580 (1956) (without statutory authority, trustee has no power to pay existing obligations; state has not adopted the uniform act subsequently); *Estate of Mouckerezi,* 468 A2d 993, 995, n 1 (Me, 1983) (conservator's duties terminate at

[3] Our research discloses no jurisdiction that, having adopted the uniform act, has added a provision analogous to MCL 700.488(6); MSA 27.5488(6). Of all the uniform act states (Alabama, Arizona, Colorado, District of Columbia, Hawaii, Idaho, Maine, Michigan, Montana, Nebraska, New Mexico, North Dakota, South Carolina, and Utah), only Michigan and New Mexico have a statutory procedure for "presentation" of claims against a protected person. New Mexico's statute does not include any provision for payment in the event of the protected person's death; see NM Stat Ann 45-5-428.

death; personal representative of estate must defend claims; jurisdiction adopted section of uniform act corresponding to § 485); *In re Guardianship of Mayou,* 6 Wash App 345, 347; 492 P2d 1047 (1972) (creditors with outstanding claims must submit their claims to decedent's personal representative; not a uniform act jurisdiction); *Noyes v First Nat'l Bank of Rawlins,* 589 P2d 384, 385 (Wy, 1979) (guardian has no legal authority after death of ward; not a uniform act jurisdiction).

Conversely, some jurisdictions have held that claims against a ward's estate may be brought against the conservator even after the ward's death. See, e.g., *In re Hill,* 166 Ariz App 230, 232; 801 P2d 465 (1990) (conservator has power to settle ward's account; jurisdiction has adopted uniform act); *State v Greenhaw,* 50 Ariz 436, 440; 72 P2d 950 (1937) (all debts legally incurred by the estate of an incompetent during the guardianship are liens upon the estate as formal mortgages and administrator of estate takes it subject to them; before adoption of uniform act); *In re McCann,* 444 NW2d 500, 502 (Iowa, 1989) (trial court's closing of conservatorship does not constitute a discharge of liability against conservator; not a uniform act jurisdiction); *In re Pappas,* 174 NW2d 422, 425 (Iowa, 1970) ("manifest" that claimant does not forfeit his right to recover a valid debt because the debtor dies; claimant is entitled to a hearing in the guardianship proceedings); *In re Matthews,* 54 AD2d 999, 1001; 388 NYS2d 933 (1976) (conservator retains authority to satisfy obligations payable during ward's life, applying statutory language not based on uniform act); *In re Kohler,* 200 Misc 506, 508-509; 107 NYS2d 964 (1951) (divesting authority of conservator as a result of the ward's death does not relieve him of performance of obligations already incurred); *In re Guigues,* 64 NYS2d 573, 574

(Supreme Ct, 1946) (ward's death did not deprive court of power to order payment of all valid and legal obligations undertaken by the conservator during ward's lifetime).

Following a protected person's death, the conservator or guardian must "settle his account." See, e.g., *In re Estate of Livingston,* 627 SW2d 673, 679 (Mo App, 1982) (guardian has power to settle ward's account; not a uniform act jurisdiction); *Gutierrez v Estate of Gutierrez,* 786 SW2d 112, 112-113 (Tex App, 1990) (although trial court had no authority after ward's death, guardian was responsible for final accounting of ward's estate; not a uniform act jurisdiction).

We believe that Opal Halbeck's death did not deprive the probate court of jurisdiction to resolve this matter. MCL 700.488(3); MSA 27.5488(3) provides that "[a] claimant whose claim is not paid may petition the court for determination of the claim at any time before it is barred by the applicable statute of limitation." Petitioner's failure to file a document styled "petition" before the ward's death resulted from incomplete advice from the deputy register, scheduling delays, and unnecessary procedural hurdles. Having analyzed the claim submitted, we conclude that it amounted to a petition.

MCR 5.113, governing papers filed in probate court, provided in 1990:[4]

> (A) Form of Papers Generally.
>
> (1) A petition, motion, inventory, report, account, or other paper in a proceeding must

[4] The current version of MCR 5.113 is substantively identical, but now includes subsection A(1)(c) providing that the petition must "be substantially in the form approved by the State Court Administrator, if a form has been approved for the use." The Supreme Court now also requires that "[t]he court must endorse the date of receipt on all papers filed." MCR 5.113(C).

(a) be legibly written in ink, typewritten, or printed, and

(b) include the

(i) title of the proceeding in which it is filed;

(ii) file number, if any, including the case-type code (see MCR 8.117) according to the principal subject matter of the proceeding;

(iii) character of the paper; and

(iv) name, address, and telephone number of the attorney, if any, appearing for the person filing the paper.

(B) Contents of Petitions.

(1) A petition must include allegations and representations sufficient to justify the relief sought and must:

(a) state the name of the court and title of the proceeding;

(b) identify the petitioner, and his or her interest in proceedings, and qualification to petition;

(c) include allegations as to residence, domicile, or property situs essential to establishing court jurisdiction;

(d) identify and incorporate, directly or by reference, any documents to be admitted, construed, or interpreted;

(e) include any additional allegations required by law or court rule;

(f) except where ex parte relief is sought, include a current list of interested parties, indicate the existence and form of incapacity of any of them, the mailing addresses of the parties or their representatives, the nature of representation and the need, if any, for special representation.

(2) The petition may incorporate by reference papers and lists of interested parties previously filed with the court if changes in the papers or lists are set forth in the incorporating petition.

(3) The requirements of this subrule do not apply to additional pleadings related to the petition filed or to objections of interested parties under MCR 5.119.

The "Statement and Proof of Claim" form that petitioner mailed on May 9, 1990, fulfilled the requirements of a petition as set forth in MCR 5.113. It was legibly written and gave the title of the proceeding and the character of the paper. Respondent was not represented by an attorney at that point. The form included "allegations and representations sufficient to justify the relief sought," MCR 5.113(B)(1), by indicating that petitioner had rendered specified services to the Halbeck estate in a specific amount and had received only partial compensation. It stated the title of the proceeding, MCR 5.113(B)(1)(a), and identified petitioner, his interest in the proceeding, and his qualification to petition. It also gave addresses for all parties in Cheboygan County (MCR 5.113[B][1][c]), and included copies of the documents petitioner offered in support of his claim (MCR 5.113[B][1][d]). No additional allegations were required, MCR 5.113(B)(1)(e), and petitioner and respondent, whose address appeared on the form, were the only interested parties.

The only missing elements were the file number of the case, MCR 5.113(A)(1)(b)(ii), and the name of the court, MCR 5.113(B)(1)(a). The omission of these items should not be fatal. The court already had indicated to petitioner that it had jurisdiction ("There is an upcoming hearing . . . which you may want to attend relative to your claim"), and the court register herself did not use the file number when she corresponded with petitioner. Nothing in the Revised Probate Code requires that a "claim," as defined in MCL 700.3(4); MSA 27.5003(4), be made *only* in the form of a "petition" as defined by MCR 5.113.

Further, respondent actually treated the claim form as a petition. Respondent's counsel forwarded interrogatories and a request for production of

documents in June 1990, before petitioner even had been instructed to file a formal petition. Under the unusual circumstances of this case, petitioner's filing of the detailed statement and proof of claim amounted to the filing of a petition.

Indeed, the parties do not appear to dispute that the claim was properly presented under MCL 700.488(1) or (2); MSA 27.5488(1) or (2).[5]

In these circumstances, the probate court erred in finding that § 488(6) divested it of jurisdiction.

Reversed.

SHEPHERD, J., concurred.

MCDONALD, J. *(dissenting).* I would affirm the order of the probate court. It is undisputed a "protected" person's death does not invalidate claims for debts incurred before the death and that the court supervising the conservatorship has jurisdiction to decide all claims properly filed before the death. What must be decided in this case, however, is whether the instant claim was properly filed with the court before the protected per-

[5] We disagree with the dissent's analysis of "presentation" under this statute. MCL 700.488(2); MSA 27.5488(2) says, "A claim shall be considered presented on receipt of the written statement of claim by the conservator or on the filing of the claim with the court, whichever occurs first." The purpose of this language is to identify the date on which the disallowance period starts running, rather than to disqualify a duplicate filing of the same claim. We have found no authority for the latter position. The record indicates that petitioner simultaneously mailed his "Statement and Proof of Claim" on May 9, 1990, to respondent and the court. The statute provides that "[a] claim shall be considered presented on *receipt* of the written statement of claim by the conservator or on the *filing* of the claim with the court, whichever occurs first." MCL 700.488(2); MSA 27.5488(2) (emphasis supplied). The court stamped the claim "filed" on May 11. The record does not indicate the date on which respondent received it. Petitioner's claim should not be defeated merely by the unpredictability of the mails. Note, too, that the court treated petitioner's claim as "presented" (by scheduling a hearing regarding the matter for May 22) even though petitioner's cover letter indicated that "[a] copy [of the claim form] is being sent to Edna LeBlanc [respondent]."

son's death, and, if not, whether the claimant has standing to file a petition for payment after the protected person's death.

MCL 700.488; MSA 27.5488 governs the presentation of claims against the estate of a protected person. A claim must be written and delivered either directly to the conservator, subsection 1(a), or to the court, with a copy provided to the conservator, subsection 1(b). A claim is considered presented upon receipt of the written claim by the conservator or on the filing of the claim with the court, whichever occurs first. Subsection 2. In this case, because petitioner served a written claim on the conservator pursuant to subsection 1(a) on May 9, 1990, two days before filing a statement and proof of claim with the probate court pursuant to subsection 1(b), the claim served on the conservator is the presented claim. Subsection 2.

After receiving the claim, the conservator filed a written disallowance of the claim within the sixty-three-day period provided in the statute. Section 488(2). Petitioner was instructed to file a petition for determination of the claim with the court. Section 488(3). However, before petitioner filed his claim, the protected person died. Petitioner therefore failed to file properly a claim with the court before the death of the protected person. I would hold because petitioner failed to file a proper claim with the court before the protected person's death, he has no standing to file a claim in the conservatorship after the death.

Although the death of a protected person while under a conservatorship does not preclude the filing of a claim incurred during the conservatorship, § 488(6) provides that such a claim is supposed to be filed upon petition of the conservator. Specifically § 488(6) states:

> If a protected person dies while under conservatorship, the court may, *upon petition of the conservator* and with or without notice, hear a claim for burial expense or any other claim as the court considers advisable. Upon hearing the claim, the court may enter an order allowing or disallowing the claim or any part of it and provide in the order of allowance that the claim or any part of it shall be paid immediately if payment can be made without injury or serious inconvenience to the protected person's estate. [MCL 700.488(6); MSA 27.5488(6). Emphasis added.]

The language utilized by the Legislature in drafting subsection 6 is explicit and evidences a clear intent to grant only a conservator the power to petition the probate court after the death of the protected person. When a statute designates the persons who may bring a claim, only the persons so designated have the right to bring such an action. *In re Swope,* 190 Mich App 478; 476 NW2d 459 (1991). The Legislature is presumed to have intended the meaning it plainly expresses. *Frasier v Model Coverall Service, Inc,* 182 Mich App 741; 453 NW2d 301 (1990).

Lastly, I disagree with the majority's holding appellant's claim amounted to a petition. It is clear from the record that no one, including the appellant, intended his claim to be a petition under the statute. If appellant does not argue his claim was, in effect, a petition, then I can find no reason for this Court to do so.

I would affirm the order of the probate court dismissing the appellant's petition.

PEOPLE v SIEBERT

PEOPLE v OATMAN

Docket Nos. 146736, 146737. Submitted January 12, 1993, at Detroit. Decided September 7, 1993, at 10:00 A.M. Leave to appeal sought.

Douglas Siebert and Raymond Oatman pleaded guilty in the Recorder's Court of Detroit, George W. Crockett III, J., of delivery of between 225 and 650 grams of cocaine pursuant to plea agreements under which the prosecution would drop several other charges in exchange for the defendants' agreements to prison terms of from twenty to thirty years and to cooperate with authorities in other criminal investigations. After the defendants had cooperated extensively with authorities, the court indicated that it did not feel bound by the sentence agreements and that it remained free to exercise its discretion to sentence as it saw fit. The prosecution agreed that the court retained complete sentencing discretion, but argued that the prosecution was entitled to withdraw from the plea agreements if the court intended to impose sentence other than those agreed upon by the parties. The court sentenced Siebert to five to thirty years and Oatman to three to thirty years and denied the prosecution's motion to withdraw from the plea agreements. The prosecution appealed with respect to each of the defendants. The appeals were consolidated.

The Court of Appeals *held:*

1. A sentencing court is not bound to impose a sentence that has been agreed upon as part of a plea agreement and retains complete sentencing discretion; however, if the court, in the exercise of its sentencing discretion, feels that it must impose a sentence other than the sentence agreed upon in the plea agreement, it must afford the prosecution an opportunity to withdraw from the agreement.

2. Because the defendants were never placed in jeopardy with

REFERENCES

Am Jur 2d, Criminal Law § 485.

Comment Note.—Right to withdraw guilty plea in state criminal proceeding where court refuses to grant concession contemplated by plea bargain. 66 ALR3d 902.

respect to the original charges, the prosecution may reinstate those charges.

3. The trial court erred in denying the prosecution's motion to withdraw from the plea agreements after the court accepted the pleas without honoring the sentencing agreements. Each defendant, because he performed as his plea agreement required, has the right to insist on specific performance of the agreement. On remand, each defendant must be permitted to elect to reaffirm his plea of guilty to the reduced charge and to be sentenced to the terms of years set forth in his agreement. If either defendant chooses not to do so, the prosecution must be permitted to reinstate the original charges against that defendant.

Reversed and remanded.

CRIMINAL LAW — SENTENCING — GUILTY PLEAS — SENTENCING AGREEMENTS.

The prosecution is entitled to withdraw from a guilty plea agreement and reimpose the original charges where the plea agreement includes a sentencing agreement and the sentencing court, in the exercise of its sentencing discretion, declines to impose the sentence agreed upon by the parties.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Thomas M. Chambers,* Assistant Prosecuting Attorney, for the people.

*Robert F. Mitchell,* for Douglas Siebert.

*Mark Kriger,* for Raymond Oatman.

Before: DOCTOROFF, C.J., and WEAVER and WHITE, JJ.

WHITE, J. The people appeal the trial court's denial of the prosecutor's motion to withdraw from plea and sentence agreements after the court sentenced defendants to terms of years less than those set forth in the agreements. Defendants respond that their guilty pleas were validly accepted, they

fully complied with the terms of the agreements to their prejudice, there is no authority for the prosecutor to withdraw from an agreement under such circumstances, and reinstatement of the original charges would be contrary to the Due Process and Double Jeopardy Clauses. We reverse.

I

Defendants were charged with delivery of over 650 grams of cocaine and conspiracy to deliver over 650 grams of cocaine. MCL 333.7401(1), 333.7401(2)(a)(i); MSA 14.15(7401)(1), 14.15(7401)(2)(a)(i). In a separate information, they were also charged with conspiracy to possess with intent to deliver marijuana. MCL 750.157a; MSA 28.354(1), MCL 333.7401(1), 333.7401(2)(c); MSA 14.15(7401)(1), 14.15(7401)(2)(c). Defendant Siebert additionally was charged with gambling, taking bets, and conspiracy to gamble. MCL 750.301; MSA 28.533, MCL 750.157a; MSA 28.354(1). The penalty for delivery of over 650 grams of cocaine is life imprisonment without parole.[1]

Defendants and the prosecutor entered into plea and sentence agreements that provided that the defendants would be permitted to plead guilty to the lesser offenses of conspiracy to deliver, and delivery of, between 225 and 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii); MCL 750.157a; MSA 28.354(1), would cooperate with state and federal drug investigations by providing information, testimony, and other assistance, and would be sentenced to twenty to thirty years as contemplated by statute and that the

[1] The sentence agreement that is the subject of this case was entered into before *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992), and *People v Fluker*, 197 Mich App 225; 494 NW2d 830 (1992), rev'd 442 Mich 890 (1993), were decided.

charges concerning marijuana, gambling, and conspiracy to gamble would be dismissed.

Defendants pleaded guilty as agreed in October and November 1990. The terms of the agreements were discussed on the record by the judge and counsel. The judge accepted the pleas. Sentencing was deferred to obtain presentence reports and so that defendants could perform in accordance with their agreement to cooperate with drug enforcement authorities. In the months that followed, both defendants cooperated extensively.

Defendants were sentenced approximately one year later, in October 1991. In a presentence proceeding shortly before sentencing, the judge said he jealously guarded his sentencing prerogatives and had uniformly told parties that he would not be bound by any sentence bargain or agreement. The judge stated that he considered himself free to exercise his discretion to depart from the statutorily prescribed minimum sentence for substantial and compelling reasons, as provided by MCL 333.7401(4); MSA 14.15(7401)(4). The judge did not indicate what sentence he thought would be appropriate. The prosecutor agreed that the court retained complete sentencing discretion, but argued that under *People v Killebrew,* 416 Mich 189; 330 NW2d 834 (1982), a prosecutor may withdraw from a plea and sentence agreement if the court decides not to sentence in accordance with the agreed-upon terms.

After the court sentenced Siebert to five to thirty years, and Oatman to three to thirty years, the prosecutor moved to withdraw from the plea agreements. The court denied the motion. The prosecutor dismissed the charges concerning marijuana, gambling, and conspiracy to gamble. The people now appeal, contending that the prosecutor was entitled to withdraw from the plea and sen-

tence agreements when the court declined to sentence in accordance with the agreements.

II

Defendants argue that the only authority for a prosecutor's motion to vacate a defendant's plea is found in MCR 6.310(C), which states:

> Vacation of Plea before Sentence. On the prosecutor's motion, the court may vacate a plea before sentence is imposed if the defendant has failed to comply with the terms of a plea agreement.

Defendants assert that the prosecutor failed to establish a right to withdraw under this court rule because the motion was made after the sentences were imposed and because defendants have more than fully complied with the terms of the plea agreements.

While MCR 6.310(C) does not authorize a prosecutor to withdraw under these circumstances, the prosecutor does not rely on this court rule and does not assert a right to withdraw on the basis of defendants' failure to cooperate. Rather, the prosecutor seeks to withdraw on the basis of the court's failure to honor the agreements. We do not read MCR 6.310(C) as stating the only basis on which the prosecutor may withdraw or as precluding withdrawal under these circumstances.

A

Defendants rely on *People v Pool,* 183 Mich App 191; 454 NW2d 121 (1989), where a panel of this Court held that the trial court erred in resentencing the defendant in response to the prosecutor's motion to vacate sentence and resentence on the ground that the original sentence did not comply

with the sentence agreement. In *Pool,* the prosecutor did not mention the agreement at the time of sentencing, did not object to the sentence when imposed, and did not state an intention to rely on the agreement until one month after sentencing. Additionally, the prosecutor, in effect, sought specific performance of the agreement rather than to be allowed to withdraw from the agreement. Thus, *Pool* is distinguishable and, in all events, is not binding because it precedes Administrative Order Nos. 1990-6 and 1992-8.

B

Defendants also rely on *People v Lowe,* 172 Mich App 347; 431 NW2d 257 (1988). In *Lowe,* the defendant asserted that the trial court erred in permitting a plea agreement that allowed the prosecutor to withdraw from the agreement if the sentence recommendation was not accepted by the court.[2] A panel of this Court observed that prosecutors are aware that sentence *recommendations* are only that and that sentencing judges retain exclusive authority with regard to sentences, concluded that the trial court understood that it was not bound by the recommendation, and found no error in the court's following the recommendation. The Court added:

> We do not decide here what the consequences would have been if the trial court had, in the exercise of its sentencing authority, given defendant a more lenient sentence. Defendant's plea

[2] The agreement provided that the defendant would plead guilty of armed robbery, a charge of possession of a firearm during the commission of a felony would be dismissed, a sentence recommendation of 7½ to 15 years would be presented to the court, and if the court sentenced more leniently, the prosecutor could withdraw from the agreement. The defendant pleaded guilty, and the court imposed a sentence of 7½ to 15 years.

> had already been accepted. Would the prosecution then be forced to appeal defendant's conviction and argue that the defendant's plea should be set aside? That defendant should face a full trial and possibly a greater sentence? We leave that question for another panel when properly posited. [*Id.* at 353.]

We read *Lowe* as recognizing that the issue presented in the instant case had yet to be decided.[3]

III

Defendants stress that while *Killebrew* and MCR 6.302(C)(3) expressly provide a defendant with the right to withdraw from a plea agreement where a judge declines to follow its terms, neither provides such a right to prosecutors. We conclude, however, that while *Killebrew* and MCR 6.302(C)(3) do not expressly provide prosecutors with a right to withdraw, neither is inconsistent with such a right. Indeed, *Killebrew* implies such a right in the case of a sentence agreement.

A

In *Killebrew,* the Supreme Court held that

[3] The New Jersey Supreme Court in *State v Warren,* 115 NJ 433; 558 A2d 1312 (1989), held invalid the practice of entering into a negotiated plea providing for a certain sentence, with the prosecutor retaining the right to withdraw in the event the trial court imposed a more lenient sentence. The court held that the New Jersey court rule authorizes a defendant to withdraw from a guilty plea under certain circumstances, but not a prosecutor. The Court further concluded that there are no policy reasons for recognizing such a right, because a prosecutor's interests, unlike a defendant's, are not of constitutional magnitude.

The Arizona Supreme Court in *Dominguez v Meehan,* 140 Ariz 328; 681 P2d 911 (1984), adopting the opinion of the Arizona Court of Appeals, 140 Ariz App 329; 681 P2d 912 (1983), recognized the validity of the practice rejected by the New Jersey court. The court held that a provision in a plea agreement preserving the prosecutor's right to withdraw should the court reject the terms of the agreement and providing that the defendant waives any double jeopardy claims in such circumstances was valid and enforceable.

where a prosecutor and a defendant agree to a specific sentence disposition in exchange for a guilty plea, the trial court, after considering the presentence report, can either accept the agreement or reject it. *Id.* at 206-207. If the court accepts the agreement, it is obliged to sentence the defendant according to the agreed-upon terms. If the court concludes that the sentence is inappropriate to the circumstances or the offender, it is obliged to reject the plea and inform the defendant that it will not accept the plea or be bound by the agreement. *Id.* at 207. In the case of a sentence recommendation, which, in contrast to a sentence agreement, merely suggests a particular sentence as a nonbinding term of the agreement, the trial court can accept the guilty plea but refuse to be bound by the recommended sentence. The court, after indicating the sentence it intends to impose, is obliged to offer the defendant the opportunity to withdraw the guilty plea. *Id.* at 209-210.[4]

B

MCR 6.302(C)(3), incorporates and clarifies the holding in *Killebrew.* Staff Comment, MCR 6.302. This subrule expands the judicial options set forth in *Killebrew* to four:

[4] The *Killebrew* Court emphasized that the procedures that it set forth, while curbing judicial participation in plea negotiations, left a court's sentencing discretion unhampered. Faced with a sentence agreement it considers inappropriate, a court can reject the agreement in its entirety. *Id.* at 207. Faced with an unacceptable recommendation, a court can accept the plea but exercise its usual sentencing discretion if, after allowing the defendant an opportunity to withdraw the plea, the defendant chooses instead to affirm it. *Id.* at 210-212. *Killebrew* did not discuss the option of accepting a negotiated plea before accepting or rejecting the agreement. *Id.* at 206-210. Thus, under a strict application of *Killebrew,* there would normally be no need for a defendant or prosecutor to affirm or withdraw from a sentence agreement as with a rejected recommendation, because the plea would not be accepted until the court was satisfied that it could follow the agreement.

> If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may
>
> (a) reject the agreement; or
>
> (b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to or recommended by the prosecutor; or
>
> (c) accept the agreement without having considered the presentence report; or
>
> (d) take the plea agreement under advisement.
>
> If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement.

Under MCR 6.302(C)(3), the procedures established for both kinds of plea agreements—sentence agreements and sentence recommendations—are identical.

Notwithstanding the court rule's singular treatment of the procedural aspects of the court's acceptance or rejection of sentence agreements and sentence recommendations, we believe that *Killebrew*'s substantive distinctions between the two types of plea agreements continue to be important. A sentence recommendation is but a recommendation, without agreement by the court. *Killebrew* at 208. There is no promise of a specific sentence, and the court's sentencing discretion is completely unfettered. The court may accept the guilty plea, yet refuse to be bound by the sentence recommendation. The only restriction, set forth both in *Killebrew* and in the court rule, is that if the court does

not follow the sentence recommendation, the defendant must be given an opportunity to withdraw the guilty plea. A sentence agreement is, however, an agreement for a specific sentence. Under *Killebrew,* the court has the option of accepting the plea and imposing the agreed-upon sentence, or rejecting the plea. *Killebrew* at 207. *Killebrew* took great care to distinguish sentence agreements from sentence recommendations and did not state an option of accepting a plea involving a sentence agreement and imposing a different sentence subject to the defendant's affirmance of the plea, as is the case with a sentence recommendation.

IV

Defendants argue that *Killebrew* only addressed a defendant's right to withdraw from a sentence agreement and not a prosecutor's, because the prosecutor, unlike the defendant, waives no constitutional rights[5] when offering a sentence bargain. Defendants assert that given this rationale for

[5] In the past, this Court has held that a trial court is not bound by a sentence agreement, but once it accepts the plea induced by that agreement, it is bound by its terms. *People v Nixten,* 183 Mich App 95, 97; 454 NW2d 160 (1990); *People v Jennings,* 178 Mich App 334, 336; 443 NW2d 793 (1989). In so holding, the Court adopted the principle set forth in *Santobello v New York,* 404 US 257, 262; 92 S Ct 495; 30 L Ed 2d 427 (1971), that

> when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

The recurrent concern in *Santobello* and its progeny, reflected in *Killebrew* as well, is the false position in which a defendant is placed, being induced to plead guilty on terms that are then not honored. Justice Douglas' concurring opinion in *Santobello* emphasized the prejudice to a defendant's fundamental rights to a jury trial, to confront accusers, to present defense witnesses, to remain silent, and to be convicted by proof beyond a reasonable doubt. 404 US 264, 268. Some panels of this Court have adopted that emphasis as well. *People v Eck,* 39 Mich App 176, 179; 197 NW2d 289 (1972); *People v Baker,* 46 Mich App 495, 497; 208 NW2d 220 (1973).

*Killebrew,* the prosecution has no right to withdraw and the trial court was not obliged to extend such an opportunity.

We disagree and conclude that *Killebrew* must be considered in the context of broader public policy concerns and must be read in conjunction with *Genesee Prosecutor v Genesee Circuit Judge,* 386 Mich 672, 683; 194 NW2d 693 (1972) (hereafter *Genesee Prosecutor I*), and *Genesee Prosecutor v Genesee Circuit Judge,* 391 Mich 115; 215 NW2d 145 (1974) (hereafter *Genesee Prosecutor II*).

A

*Killebrew* was not based solely on the ground that a defendant waives constitutional rights in entering into a plea agreement. *Killebrew* sought to define the proper roles of judge and prosecutor in the plea bargaining process, while protecting the rights of the defendant as well as the authority of the judge and the prosecutor. These broader concerns require that other factors be considered.

The Supreme Court of Arizona considered the same question in *State v Superior Court,* 125 Ariz 575, 578; 611 P2d 928 (1980), where the Arizona court rule, like the Michigan court rule, does not specifically provide that the prosecutor, as well as the defendant, may withdraw from a plea agreement if the court rejects the terms of the agreement. The court said:

> The rule does not specifically provide that the State may also withdraw from the plea agreement previously entered into if the court rejects the terms of the plea agreement. We believe, however, it is implicit in the rule that the State, if it is to bargain freely and on equal terms with the defendant, must also be allowed to timely withdraw from a plea agreement when it is apparent that

the court does not wish to abide by its terms. In the words of Justice Cardozo:

"[J]ustice, though due to the accused, is due to the accuser also. . . . We are to keep the balance true." *Snyder v Massachusetts,* 291 US 97, 122; 54 S Ct 330, 338; 78 L Ed 674, 687 (1933).[6]

B

A more straightforwardly contractual ground for finding that the prosecutor has an equal right to withdraw from a plea agreement is that the people, no less than the defendant, should be able to receive the benefit of the agreed-upon bargain: a specific sentence and no less. This is the view found in 1A Gillespie, Michigan Criminal Law & Procedure (2d ed), § 327.50 (1993 Cum Supp, p 43):

> Although it may sound unusual, there is a circumstance under which the prosecution should be able to demand the setting aside of a guilty plea. That circumstance is when the prosecutor has made a charge concession, either to a lesser plea, to the dismissal of other counts or to the dismissal of other cases, in exchange for a sentence agreement. This situation must be carefully distinguished from that of a sentence recommendation. . . .
>
> However, if the agreement is a sentence agreement, for a specific sentence in exchange for the lowering of charges, or the dismissal of related or unrelated charges, rights should arise in the prosecutor as well as in the defendant. Under Killebrew, the trial judge clearly is not bound by the agreement reached by the parties, and if the trial

[6] The Arizona Supreme Court later confined this principle to cases where a court has not yet accepted a plea or a plea agreement contains an express provision acknowledging the prosecutor's right to withdraw should the court find the agreement unacceptable. *Dominguez,* n 2 *supra*; *State v Tellez,* 165 Ariz App 381, 384; 799 P2d 1 (1989).

> judge decides that the sentence agreement reached by the parties is too low, he or she must offer the defendant the right to withdraw the plea. But if the trial judge concludes that the sentence agreement is too high because the prosecutor made charge concessions contingent on an agreement to a specific sentence, which would not have been given absent that sentence, then the prosecutor should insist that the plea be withdrawn and the bargain set aside, as the prosecutor has not received the benefit of the bargain, which was a *specific* sentence and not less. If the plea was to a lesser charge, it should be set aside, and the case returned to its original posture. (Emphasis in original.)

C

Another basis for recognizing a prosecutor's right to withdraw is the need to maintain a balance between the executive branch of government and the judiciary, and the appropriate exercise of the discretion of each. The prosecutor, in the executive capacity as the chief law enforcement officer of the county, has broad discretion in determining the statutory provisions under which a defendant will be charged. *People v Rogers,* 438 Mich 602, 608; 475 NW2d 717 (1991); *Genesee Prosecutor I.* The judiciary may not usurp that charging authority; a trial court may not, over a prosecutor's objection, accept a plea of guilty to an offense not charged in the information. *Id.* at 684-685. This is true whether that offense is or is not a lesser included offense. *Genesee Prosecutor II.* Similarly, where a prosecutor refuses to relinquish discretion in a charging decision, a trial court may not, on its own motion, dismiss the charge in dispute. *People v Williams,* 186 Mich App 606, 608-609; 465 NW2d 376 (1990).

Where, as here, a prosecutor, in the exercise of the discretion of that office, agrees to a charge reduction if certain conditions are met, that agreement remains conditional until the terms of the agreement are fulfilled. A court that accepts a plea of guilty of a lesser offense while declining to honor a sentence condition, though exercising its own sentencing discretion, trespasses on the prosecutor's discretion to charge. The court, in accepting a plea to a lesser offense, effectively dismisses the greater offense—a charge respecting which the prosecutor has not relinquished discretion.

As the New York Court of Appeals explained in *People v Farrar,* 52 NY2d 302, 306-307; 437 NYS2d 961; 419 NE2d 864 (1981), just as a trial court must be free to exercise its discretion in sentencing matters, a prosecutor must be free to determine which charges *and sentences* best facilitate performance of the duties of the office:

> In considering whether to permit a defendant to plead to a lesser offense, the prosecutor legitimately may consider and negotiate a penalty that he or she deems necessary to serve the interests of the People. Postindictment investigation may well convince the prosecutor that, notwithstanding a defendant's criminal liability for the crime charged, the harsh minimum penalty on the greater offense is unwarranted in light of the then known background of the defendant or his or her role in the crime. The prosecutor, however, may consider the lower levels of the sentence range for the lesser offense similarly unacceptable as permitting the imposition of a too lenient penalty. A negotiated sentence permits a compromise that may well satisfy the law enforcement demands of the offices and the ends of justice.

The New York court in *Farrar* held that the trial judge erred in not exercising his sentencing

discretion even in the face of a sentence agreement. However, the court also held, *id.* at 307-308, that the prosecutor has a right to withdraw consent to the plea in the event the sentence imposed is less than the sentence negotiated:

> The Appellate Division, however, failed to recognize the prosecutor's right to withdraw consent to the plea in the event that the sentence to be imposed is less than originally negotiated by the parties. The legislative policy of this State is to require the consent of the court and prosecutor to a plea to a lesser included offense or to less than the entire indictment (see CPC 220.10, subds. 3, 4).[7] Such a joint consent procedure prevents abuse (see *People v Selikoff,* 35 NY2d 227, 241; 360 NYS2d 623; 318 NE2d 784 [1974]) and recognizes the prosecutor's independent role and interest concerning the course the prosecution will take. Where the record shows that the prosecutor's consent to a plea is premised on a negotiated sentence and a lesser sentence is later deemed more appropriate, the People should be given the opportunity to withdraw their consent.* However justified the court's unwillingness to impose the negotiated sentence, fairness dictates that this avenue be left open. Of course, this is not to say that the People's application must be granted in all cases, for, among other things, prejudice to a defendant following a plea may prevent restoration to *status quo ante* and render vacatur of the plea inappropriate (see *People v McConnell,* 49 NY2d 340; 425 NYS2d 794 [402 NE2d 133 (1980)]). Absent defendant's showing of such prejudice or other circumstances militating against vacatur, however, relief to the People would be proper.

* This would merely be the counterpart of defendant's right to withdraw the plea in the event the court, in the exercise of its discretion, determines that the sentence agreed upon is inappropriate and indicates an intention to increase the severity of the punishment.

[7] A requirement recognized in Michigan in *Genesee Prosecutor I* and *Genesee Prosecutor II.*

We recognize that the final portion of the New York opinion can be read to support the view that in some cases a prosecutor's request to withdraw should be denied. Indeed, defendants so argue. This argument is addressed in Part VI, *infra*.

Reaching a conclusion similar to that of the New York court, the Colorado Supreme Court in *People ex rel District Attorney v District Court Judge,* 195 Colo 34, 38; 575 P2d 4 (1978), held that under a Colorado rule of criminal procedure the sentencing court retained discretion to change a sentence within 120 days, even though the sentence was the result of a plea agreement. The court also held, however, that if the sentence were changed, the prosecutor must be permitted to withdraw from the agreement, reinstate the dismissed charges, and proceed to trial as though no agreement had been made.

We conclude that the trial court exceeded the bounds of its discretion in accepting defendants' pleas to delivery of between 225 and 650 grams of cocaine and sentencing defendants to less than the agreed-upon term of years without permitting the prosecutor an opportunity to withdraw from the agreements. We now turn to defendants' double jeopardy argument.

V

Defendants argue that permitting the prosecutor to withdraw from the plea agreements after sentencing and proceed on the original charges would violate the bar against double jeopardy. Defendants further assert that the appeals should be dismissed because the people's right to appeal is circumscribed by statute and the statute permits an appeal only where the protection against double jeopardy would not prevent further proceed-

ings. MCL 770.12; MSA 28.1109.[8] We disagree and conclude that the double jeopardy question has been answered, in effect, in *Genesee Prosecutor I* and *Genesee Prosecutor II.*

A

Under both the United States and the Michigan Constitutions, multiple prosecutions for the same crime are prohibited. US Const, Am V; Const 1963, art 1, § 15. Defendants argue that under Michigan law, jeopardy attaches to a guilty plea conviction when sentence is imposed, *People v Johnson,* 396 Mich 424, 431, n 3; 420 NW2d 729 (1976); *People v Grier,* 152 Mich App 129, 132; 393 NW2d 551 (1986); *People v Leonard,* 144 Mich App 492; 375 NW2d 745 (1985); *People v Rose,* 117 Mich App 530, 535; 324 NW2d 25 (1982); *People v Burt,* 29 Mich App 275, 277; 185 NW2d 207 (1970), and that the trial court's acceptance of defendants' pleas to

[8] A panel of this Court held, in *People v McKinnon,* 139 Mich App 362, 368; 362 NW2d 809 (1984), that an appeal was proper under similar circumstances. In *People v Grier,* 152 Mich App 129, 132; 393 NW2d 551 (1986), another panel of this Court concluded that an appeal was not proper, but that the Court would exercise its discretionary authority under GCR 1963, 820.1(7) (now MCR 7.216[A][7]) and consider the claim of appeal as a complaint for an order of superintending control under GCR 1963, 711.4(a) (now MCR 3.302[D]). Were we to conclude that an appeal is not proper under MCL 770.12 MSA 28.1109, we would similarly treat this appeal as a complaint for an order of superintending control.

*Grier* and *McKinnon* discussed a prosecutor's rights to appeal under the former version of MCL 770.12; MSA 28.1109, which allowed appeals "[f]rom a decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy . . . ." This statute was amended to permit a prosecutor's appeal of right from a final judgment or final order of the recorder's court "if the protection against double jeopardy . . . would not bar further proceedings against the defendant . . . ." Thus, the present statute affords a prosecutor the right to appeal even where jeopardy has attached, provided that further proceedings would not be barred by the protection against double jeopardy. Therefore, in the instant case, the inquiry regarding the prosecutor's statutory right to appeal is coextensive with the constitutional double jeopardy inquiry.

a lesser charge and imposition of sentences on that charge bars subsequent prosecution on the greater charge, *Grady v Corbin,* 495 US 508; 110 S Ct 2084; 109 L Ed 2d 548 (1990); *Brown v Ohio,* 432 US 161; 97 S Ct 2221; 53 L Ed 2d 187 (1977); *People v Cook,* 236 Mich 333, 335-336; 210 NW 296 (1926); *People v Bower,* 3 Mich App 585; 143 NW2d 142 (1966); MCL 768.33; MSA 28.1056.

The cases cited are all distinguishable. While each deals with double jeopardy principles in the context of a guilty plea, none addresses the situation presented in the instant case. *Brown* and *Corbin* concern prosecutors' efforts to prosecute for more serious offenses after the defendants had pleaded guilty and been sentenced for lesser offenses. Similarly, *Cook* involves a subsequent prosecution after a plea conviction of an included offense. In each case, the Court focused on whether the subsequent prosecution was for the "same offense" for double jeopardy purposes.[9] The propriety of the plea conviction for the lesser offense was not in question.[10]

In *Bower,* the defendant was charged with larceny. He pleaded guilty of, and was sentenced for, a misdemeanor larceny. The municipal court, concluding that it had made a mistake regarding the charge, vacated the sentence, and rearraigned the defendant on the warrant, construing it as charging a felony. The defendant pleaded guilty of the felony and was sentenced. On appeal, this Court held that the bar against double jeopardy had

[9] Each Court held that prosecutions for the greater offenses were barred if those offenses involved proof of the offenses for which the defendants had already been convicted by plea.

[10] In *Corbin,* 495 US 512, n 4, 514, n 6, the United States Supreme Court noted that it accepted the New York Court of Appeals' refusal to characterize the defendant's attorney's statements at the plea proceedings as misconduct or misrepresentation. The Court thus proceeded on the assumption that the initial plea and sentence were valid.

been violated because the defendant had been validly convicted of simple larceny, which barred prosecution on the greater degree of the same offense. The Court concluded that the warrant charged the crime of simple larceny, regardless of whether the prosecutor had so intended. We note that *Bower* was decided before *Genesee Prosecutor I* and *II,* and that the Court's conclusion that the warrant charged simple larceny distinguishes the case from *Genesee Prosecutor I* and *II.*

The remaining Michigan cases are all cited in support of the proposition that in the case of a guilty plea, jeopardy attaches upon sentence. Each of these cases simply states the proposition without discussion and relies on the authority of earlier cases. The original case, *Burt,* states the principle in the context of rejecting the defendant's assertion that jeopardy attached when he offered his plea.[11] None of the cases holds that the bar against double jeopardy is violated when a plea-based conviction is vacated and the original charge is reinstated. *Johnson* concerns a mistrial.[12] *Grier*[13]

[11] In *Burt,* the source of the principle cited in all subsequent cases, the issue was whether the trial court violated the ban against double jeopardy when it accepted a plea of guilty to a reduced charge of unarmed robbery, examined the defendant and his codefendants concerning the charge, was dissatisfied with the answers, and ordered the defendant tried on the original charge of armed robbery. The defendant appealed on double jeopardy grounds. The Court said:

> The unanimous conclusion of the courts which have considered this question is that jeopardy does not attach in the case of guilty pleas, at least not until defendant is sentenced. [*Id.* at 277.]

[12] *Johnson* presented the questions whether the protection against double jeopardy barred reprosecution after the trial court granted a mistrial in the absence of manifest necessity and whether the defendant's subsequent guilty plea constituted a waiver of the double jeopardy issue. The proposition for which defendants cite the case was addressed in a footnote, which simply states: "In the case of a guilty plea, jeopardy attaches when the sentence is imposed. *People v Burt,* 29 Mich App 275, 277; 185 NW2d 207 (1970)." *Id.* at 431, n 3.

and *Leonard*[14] simply restate the principle that jeopardy attaches when a defendant is sentenced, although the *Grier* Court did recognize that arguably jeopardy "vanished" when the trial court vacated the original sentence. *Rose*[15] recognizes

[13] *Grier* addressed the question whether the prosecutor could properly appeal the trial court's decision to resentence the defendant. See n 8, *supra.* The Court stated:

> Because defendant pled guilty in this case, jeopardy attached when the sentence was imposed. *People v Leonard,* 144 Mich App 492; 375 NW2d 745 (1985); *People v Alvin Johnson,* 396 Mich 424, 431 n 3; 240 NW2d 729 (1976); *People v Rose,* 117 Mich App 530, 535; 324 NW2d 25 (1982); *People v Burt,* 29 Mich App 275, 277; 185 NW2d 207 (1970). While arguably jeopardy vanished when the trial court vacated defendant's original sentence, it attached again at resentencing. [*Grier* at 132.]

[14] In *Leonard,* the prosecutor sought to appeal the trial court's dismissal of charges, over the prosecutor's objection, after the court had delayed sentencing for a year pursuant to MCL 771.1; MSA 28.1131. The *Leonard* Court first discussed its jurisdiction to entertain the prosecutor's appeal, focusing on the question whether the defendant had been placed in jeopardy. The Court said:

> Defendant contends that jeopardy attaches when the plea is accepted by the court, but cites no cases to support this position. Some jurisdictions have taken this position. See, e.g., *United States v Bullock,* 579 F2d 1116 (CA 8, 1978), cert den 439 US 967; 99 S Ct 456; 58 L Ed 2d 349 (1978); *State v Sailor,* — Minn —; 257 NW2d 349 (1977); *Jeffrey v District Court,* — Colo —; 626 P2d 631 (1981). However, the rule in Michigan appears to be that, in the case of a guilty plea, jeopardy does not attach until the sentence is imposed. *People v Alvin Johnson,* 396 Mich 424, 431, fn 2; 240 NW2d 729 (1976); *People v Rose,* 117 Mich App 530, 535; 324 NW2d 25 (1982); *People v Burt,* 29 Mich App 279, 277; 185 NW2d 207 (1970). [*Leonard* at 494-95.]

The Court concluded that the defendant had not been sentenced and so jeopardy never attached.

[15] In *Rose,* the defendant pleaded guilty of attempted entry without breaking while he was still on probation for a drug offense. A judge, acting as executive floor judge, in Recorder's Court imposed sentence for the entry without breaking conviction and terminated the defendant's probation for the drug charge "without improvement." Later, the successor judge in the drug case held a probation violation hearing and sentenced the defendant to three years' probation, with

that jeopardy does not attach where the sentencing court acts without authority.

B

These cases must be read in conjunction with *Genesee Prosecutor I* and *II* and other cases concerning a prosecutor's authority to charge. As discussed in Part IV C, *supra,* the Michigan Supreme Court and other courts have sought to maintain a balance between the charging authority of the prosecutor and the powers of the judge. A judge may not accept a plea to a lesser offense over a prosecutor's objection. *Genesee Prosecutor II.* It is also a violation of the principles of *Genesee Prosecutor I* and *II* for a judge to accept a plea to a lesser offense where the charge concession is conditioned on a sentence agreement and to proceed to sentence other than in accordance with the agreement.

In *Genesee Prosecutor II,* the Court reversed and remanded for trial on the original charge. Relying on *People v McMiller,* 389 Mich 425, 430-432; 208 NW2d 451 (1973), the Court held that double jeopardy did not bar proceedings on the greater charge because the defendant had not been tried for that charge. Similarly, in this case, defendants have not been tried for the greater charge of delivery of more than 650 grams of cocaine, and thus, under *Genesee Prosecutor II,* trial on this charge is not barred by the Double Jeopardy Clause. Were it otherwise, trial courts could, by

the first six months to be spent in jail. The defendant appealed, asserting that resentencing him for probation violation violated the Double Jeopardy Clause. The Court said: "Jeopardy only attaches when the court is vested with competent jurisdiction. *People v Merillo,* 90 Mich App 655, 659; 282 NW2d 434 (1979)." *Id.* at 535. The Court concluded that the judge acting as executive floor judge did not have jurisdiction over the probation file and therefore jeopardy had not attached.

accepting pleas to lesser offenses and imposing sentences other than in accordance with sentence agreements, ignore the principles of *Genesee Prosecutor I* and *II.*

The Supreme Court's discussion in *People v Anderson,* 409 Mich 474; 295 NW2d 482 (1980), is instructive. In *Anderson,* after the prosecution presented some, but not all, witnesses in a first-degree murder trial, the court, over the prosecutor's objection, accepted the defendant's plea of guilty of manslaughter, dismissed the murder charge, and discharged the jury. The Supreme Court discussed *Genesee Prosecutor I* and *II* and addressed the question whether retrial on the murder charge was barred by the Double Jeopardy Clause. The Court said:

> In *Genesee Prosecutor I* this Court held that a judge is not authorized, over the prosecutor's objection, to accept a plea of guilty of an offense not charged or included in the information or indictment. *Genesee Prosecutor II* enlarged this holding and declared that a judge cannot, over the prosecutor's objection, accept a plea of guilty of a lesser included offense and dismiss the charge of the greater offense; we set aside a plea of guilty of manslaughter and remanded for trial on the charged offense of murder. In those cases, however, the plea was offered and the charge dismissed before trial and impaneling of a jury. We noted that there was no double jeopardy issue in *Genesee Prosecutor II* because the defendant "has not been tried for murder."
>
> The judge's actions in accepting a plea of guilty of the lesser offense of manslaughter and dismissing the murder charge appear to have been violative of *Genesee Prosecutor II.* It is, however, a separate question, one controlled by the decisions of the United States Supreme Court, whether the Double Jeopardy Clause would be violated by a retrial of Anderson for murder after jeopardy had

> attached in respect to that charge. We conclude (Part III, *infra*) that the Double Jeopardy Clause would be violated by trial because the judge made a factual determination upon the prosecutor's proofs that one or more elements of murder could not be established. This is true notwithstanding that the judge's acceptance of a plea to a lesser offense over the prosecutor's objection appears to have violated the specific dictates of *Genesee Prosecutor II.* [*Anderson* at 481-482.]

In the instant case, the court's action in accepting the pleas of guilty of delivery of between 225 and 650 grams of cocaine, without honoring the conditions placed on the charge reduction by the prosecutor, was violative of *Genesee Prosecutor II.* As in *Genesee Prosecutor II,* defendants in this case have not been tried for the greater offense, and a plea conviction on a lesser charge before trial on the merits and impaneling of a jury is not considered an acquittal of the greater charge. *Genesee Prosecutor II* at 123; *McMiller* at 430-432. And, unlike the defendant in *Anderson,* the trial court made no factual determination that one or more elements of the greater offense could not be established.[16] Therefore, the Double Jeopardy Clause does not bar proceedings on the greater charge upon this Court's vacating the convictions and sentences for the lesser charge.

Further support for this position is found in *People v Vasquez,* 129 Mich App 691; 341 NW2d 873 (1983). In *Vasquez,* the defendant was charged with and bound over to stand trial for second-degree murder. The defendant's motion to quash

[16] For the same reason, defendants' reliance on *Green v United States,* 355 US 184, 187-188; 78 S Ct 221; 2 L Ed 2d 199 (1957), is misplaced. In *Green,* the defendant was tried for first- and second-degree murder in the alternative, and was found guilty of second-degree murder. Thus, he was actually tried for and acquitted of the greater charge.

the information on the ground that there was insufficient evidence of malice was granted by the trial court, and the charge was reduced to manslaughter. The court then accepted a nolo contendere plea to manslaughter over the prosecutor's objection. On appeal, this Court concluded that there was sufficient evidence of malice. The Court vacated the plea-based conviction of and sentence for manslaughter and remanded for trial on the murder charge. The Court further stated that trial on the murder charge was not barred by double jeopardy concerns, citing *Genesee Prosecutor II.*

MCL 768.33; MSA 28.1056, which provides that a defendant who is convicted of an offense consisting of different degrees "shall not thereafter be tried or convicted for a different degree of the same offense," simply codifies the rule expressed in the cases. That statute does not address the double jeopardy issue in the context of the vacation of a conviction on appeal. In contrast, MCR 6.312 states:

> If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered.[17]

We reject defendants' argument that because the plea agreements do not expressly state that the prosecutor has a right to withdraw from the

[17] This court rule is a departure from the rule announced in *McMiller, supra,* and *People v Thornton,* 403 Mich 389; 269 NW2d 192 (1978), that, for policy reasons, when a plea-based conviction is set aside by the trial court or reversed on appeal, prosecution on a greater charge is not permitted. The rule clarifies that, if not prohibited by the bar against double jeopardy, the prosecution may proceed upon the greater charges once a plea conviction is vacated by an appellate court.

agreements and reinstate the original charges in the event the agreement is not honored, the prosecutor has no such right and the Double Jeopardy Clause would be violated by reinstatement of the original charges. In *Ricketts v Adamson,* 483 US 1; 107 S Ct 2860; 97 L Ed 2d 1 (1987), relied on by defendants, the defendant pleaded guilty of second-degree murder and agreed to testify against other defendants in return for dismissal of first-degree murder charges. The agreement stated that if the defendant breached the agreement, the original charge would be reinstated. The defendant was found to have breached the agreement, and his conviction, after trial, of the original charge was affirmed. While the Supreme Court concluded that the defendant, according to the terms of the agreement, waived any double jeopardy rights, it did not hold that the Double Jeopardy Clause would have been violated had the agreement not provided for reinstatement of the charges. Moreover, *Adamson* did not involve a prosecutor's right to withdraw from an agreement where the court declines to accept its terms.

VI

Defendants next argue that it would deny them due process and fundamental fairness to permit the prosecutor to withdraw from the agreements and reinstate the original charges after defendants have so extensively cooperated with drug enforcement authorities, to the prosecutor's benefit, and have thereby exposed themselves to considerable danger. Defendants assert that this case is different from the usual case involving a charge reduction in exchange for a sentence agreement because here the charge reduction was not based solely on the sentence agreement, but was also based on

defendants' cooperation. Defendants assert that because they have performed valuable services for the prosecutor, the plea agreements cannot be vacated.

A

We agree that it would be fundamentally unfair, in some circumstances, to permit reinstatement of the original charges after a prosecutor has obtained the benefit of a defendant's compliance with the plea agreement. In such a case, specific performance of the agreement is available, at the defendant's option. The rule set forth in *Santobello v New York,* 404 US 257; 92 S Ct 495; 30 L Ed 2d 427 (1971) (see n 5, *supra*), and adopted by this Court, is that once a trial court accepts a plea induced by an agreement with a prosecutor, the terms of that agreement must be fulfilled. *People v Nixten,* 183 Mich App 95, 97; 454 NW2d 160 (1990). Depending on the circumstances of the case, the remedy for failure to fulfill the agreement may be plea withdrawal, or it may be specific performance. *Santobello,* 404 US 263. Normally, the choice of remedy is within the court's discretion, though a defendant's preference is to be accorded considerable weight. *Nixten* at 97. Here, defendants' pleas and cooperation clearly rested in "significant degree on a promise or agreement of the prosecutor" that was "part of the inducement or consideration," and defendants are entitled to fulfillment of the agreement, if they so choose. *Santobello,* 404 US 262.

B

Defendants argue that offering them specific performance is not adequate, and indeed they do

not want specific performance, because the prosecutor does not have a right to a specific sentence and knew when the pleas were offered that the trial judge did not regard itself as being bound by the agreements.

When the pleas were placed on the record, there was no discussion of the possibility of departing from the sentence agreements. At Oatman's plea proceeding, the prosecutor drew the judge's attention to the twenty-to-thirty-year sentence agreement and recognized that "the court does not enter into plea agreements with the parties." The judge acknowledged the twenty-to-thirty-year sentence agreement and observed that it was redundant because "that's the required sentence." At Siebert's plea proceeding, the written agreement was referred to and there was some discussion whether twenty to thirty years was the mandatory sentence then in effect. The judge accepted both pleas. It was not until one year later, when the scheduling of the sentence hearings was discussed, that the judge stated that he did not feel bound by the sentence agreements and might impose sentences lower than the agreed-upon twenty-to-thirty-year terms. At that juncture, the prosecutor acknowledged the court's right to reject the sentence agreements, but asserted that the people would have a right to withdraw should it do so. While the prosecutor certainly knew that the court retained sentencing discretion under *Killebrew,* he cannot be faulted for waiting until after the sentences were imposed to seek to withdraw the pleas, because it was not until the sentences were imposed that the prosecutor knew that the agreements had been rejected by the court.

C

Defendants conclude that because the court re-

tains complete sentencing discretion under *Killebrew,* the people do not have a right to a specific sentence, and the defendants have a right to the benefit of the court's sentencing discretion.

We agree that a sentencing court has the exclusive authority to determine the appropriate sentence, in that neither a prosecutor nor a defendant can dictate the sentence, either separately or by agreement. Thus, a sentencing court has the right to reject a sentence agreement presented by a prosecutor and a defendant. In this sense, neither a prosecutor nor a defendant has a right to a specific sentence. It does not follow, however, that a defendant has a right to the benefit of a court's discretion to sentence leniently where the charge sentenced upon is a reduced charge offered by a prosecutor in exchange for a particular sentence. In that circumstance, the judicial right to exercise sentencing discretion must be balanced with the charging rights of a prosecutor and the rights of a defendant. A defendant's right to have a court exercise sentencing discretion can be bargained away in exchange for a reduced charge and a specific sentence. Having entered into such bargains, defendants in the present case cannot assert that they had a right to have the court exercise sentencing discretion regarding the reduced charge.

D

Lastly, defendants argue that because it would be fundamentally unfair to permit the prosecutor to reinstate the original charges after defendants have so fully cooperated with drug enforcement authorities, and because a judge cannot be compelled to impose a particular sentence and thus

specific performance is not proper, the only permissible alternative is to let the sentences stand. We reject this argument, because its second premise is flawed.

There are circumstances where specific performance is required, notwithstanding a court's sentencing discretion, because a defendant's performance and reliance renders it fundamentally unfair to permit reinstatement of the original charges. We have recognized in Part VI (A), *supra,* that this is such a case and defendants are entitled to specific performance of the sentence agreements, notwithstanding the court's disapproval of the sentence, should defendants so choose. This accommodation adequately protects the defendants' rights. To go further and conclude that a court's right to sentence as it sees fit requires that the plea convictions and sentences in the instant case be affirmed, notwithstanding the prosecutor's motion to withdraw from the agreements, goes beyond what is necessary to protect defendants and infringes on the rights of the prosecutor and the people.

VII

We conclude that the trial court erred in denying the prosecutor's motion to withdraw from the plea agreements after the court accepted the pleas without honoring the sentence agreements. When the court sentenced defendants to terms of years less than those set forth in the sentence agreements, the prosecutor then had a right to withdraw from the agreements, subject to defendants' right—arising from their performance of the provisions of the agreements requiring that they cooperate with state and federal drug investigations by providing information, testimony, and other assis-

tance—to specific performance of the agreements, at their option.[18]

The judgments entered by the trial court are vacated, and the cases are remanded to the trial court. The prosecutor shall be permitted to withdraw from the plea agreements unless the defendants elect to reaffirm their pleas of guilty to the reduced charge and to be sentenced to the term of years set forth in the agreement. Each defendant is entitled to his own election. If a defendant so elects, he shall be so sentenced. If he does not so elect, the prosecutor shall be permitted to reinstate the original charges against him.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

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[18] We recognize that defendants did not ask the trial court for specific performance and do not seek such relief on appeal. Nevertheless, they are entitled to that option on remand if they so choose. Because the trial court denied the prosecutor's motion to withdraw, there was no reason to seek specific performance from the trial court, and the trial court did not provide defendants an opportunity to elect whether to stand trial on the original charges or to reaffirm their pleas to the reduced charges and consent to be sentenced in accordance with the agreements. Similarly, on appeal defendants seek to have their plea convictions and sentences affirmed. They have not, under the circumstances, waived their right to elect specific performance should they so choose.

GLAZER v LAMKIN

Docket No. 140624. Submitted May 5, 1993, at Lansing. Decided September 7, 1993, at 10:05 A.M.

Richard M. Glazer and Charles J. Plante brought an action in the Livingston Circuit Court against Mary A. Lamkin, alleging defamation with respect to statements by the defendant that the plaintiffs had paid off certain members of the Hamburg Township Board for favorable treatment of a rezoning request and that the plaintiffs had exerted undue influence and control over the same officials. The court, Stanley J. Latreille, J., granted summary disposition for the defendant, ruling that the plaintiffs, as private individuals, were limited by statute to recovery for economic damages and that the plaintiffs had failed to demonstrate that they had suffered economic damages. The plaintiffs appealed.

The Court of Appeals *held:*

MCL 600.2911(2)(a); MSA 27A.2911(2)(a) provides that in actions based on libel or slander the plaintiff is entitled to recover only the actual damages suffered in respect to the plaintiff's property, business, trade, profession, occupation, or feelings. MCL 600.2911(7); MSA 27A.2911(7) provides that an action for libel or slander shall not be based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under subsection 7 is limited to economic damages, including attorney fees.

In this case, the trial court misconstrued MCL 600.2911; MSA 27A.2911 to the extent that it concluded that only public figures are entitled to actual damages. Under subsection 7, a private figure who establishes negligent publication of a defamatory falsehood is limited to recovery of economic damages, including attorney fees. However, under subsection 2(a), a

REFERENCES

Am Jur 2d, Libel and Slander §§ 302.5, 349-361.

Proof of injury to reputation as prerequisite to recovery of damages in defamation action—post-Gertz cases. 36 ALR4th 807.

Excessiveness or inadequacy of compensatory damages for defamation. 49 ALR4th 1158.

private figure, upon proof of actual malice in the publication of a defamatory falsehood may recover actual damages. Although the trial court misconstrued the statute, it did not err in granting summary disposition for the defendant, given the plaintiffs' failure to establish a genuine issue of fact concerning actual malice.

Affirmed.

LIBEL AND SLANDER — PRIVATE FIGURES — DAMAGES.

In an action for libel or slander brought by a private figure, proof that publication of the defamatory falsehood was a result of negligence entitles the plaintiff to recovery of economic damages, including attorney fees, while proof of actual malice in publication entitles the plaintiff to actual damages suffered in property, business, trade, profession, occupation, or feelings (MCL 600.2911[2][a],[7]; MSA 27A.2911[2][a],[7]).

*Michael F. Merritt,* for the plaintiffs.

*Jay R. Drick,* for the defendant.

Before: WAHLS, P.J., and SHEPHERD and CAVANAGH, JJ.

SHEPHERD, J. In this defamation action, the trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs now appeal, and we affirm.

Plaintiffs' complaint sets forth the following allegations:

> 3. That on or about December 19, 1989, at a meeting called by the Hamburg Township Board Defendant did accuse the Plaintiffs of paying off certain elected Board officials in order to obtain political favors in the form of a favorable vote on a zoning request that had been made by the plaintiffs.
>
> 4. That at the same meeting the Defendant did accuse the Plaintiffs of having undue influence and control over these elected officials and implied that a vote recently taken by the Board in favor of the Plaintiffs was a political pay-off, clearly implying

that the Plaintiffs were involved in some kind of *illegal political conspiracy.*

5. That the utterances made by the Defendant expressly and impliedly state that the plaintiffs are guilty of violating certain criminal laws and statutes of the State of Michigan which is libelous per se.

6. That the Plaintiffs believe the Defendant either directly or through her agents or cohorts have launched a letter-writing campaign to the Brighton Argus and Livingston County Press which directly and impliedly state that the Plaintiffs have wrongfully influenced elected Board members, have been violating environmental laws, and are generally creating a health and safety hazard, all of which is libelous per se.

7. That again on December 29, 1989, through a petition to recall the elected Board officials filed with the Livingston County Clerk and through an article the Defendant cause[d] to be published in the *Livingston County Press* and the *Brighton Argus* on January 3, 1990, the Defendant did impliedly accuse the Plaintiffs of "paying off political favors" and otherwise of directing or controlling the votes of these public officials, that these accusations are criminal nature [sic] and are also libelous per se.

In ruling in favor of defendant's, the trial court found that plaintiffs failed to demonstrate a genuine issue of material fact because they did not show that they suffered economic damages as required under MCL 600.2911(7); MSA 27A.2911(7).

Michigan's defamation statute, MCL 600.2911; MSA 27A.2911, amended by 1988 PA 396, § 1, applying to causes of action arising on or after January 1, 1989, provides in pertinent part as follows:

(1) Words imputing a lack of chastity to any female or male are actionable in themselves and

> subject the person who uttered or published them to a civil action for the slander in the same manner as the uttering or publishing of words imputing the commission of a criminal offense.
>
> (2)(a) Except as provided in subdivision (b), in actions based on libel or slander the plaintiff is entitled to recover only the actual damages he or she has suffered in respect to his or her property, business, trade, profession, occupation, or feelings.
>
> * * *
>
> (7) An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.

With regard to the amended statute in question, the trial court noted that subsection 1 preserves common-law slander per se, while subsection 2(a) allows recovery not only for actual economic damages but also for injuries to reputation or feelings. However, the trial court noted that subsection 7, which was added shortly after the Supreme Court's decision in *Rouch v Enquirer & News of Battle Creek,* 427 Mich 157; 398 NW2d 245 (1986), limits recovery in an action involving a private individual to economic damages, and that "damages other than economic damages are available only in public-figure defamation suits and not to private plaintiffs."

Contrary to the trial court's construal, we do not believe that the Legislature, in amending MCL 600.2911; MSA 27A.2911, intended that subsection 2(a) should apply only to actions for libel or slander actions involving public plaintiffs.

Where a statute is clear and unambiguous, judicial construction or interpretation is precluded.

*Lorencz v Ford Motor Co,* 439 Mich 370, 376; 483 NW2d 844 (1992). If judicial construction or interpretation is necessary, the court must ascertain and give effect to the intent of the Legislature, assigning words their ordinary, normally accepted meanings. *Id.; People v Hawkins,* 181 Mich App 393, 396; 448 NW2d 858 (1989). In determining legislative intent, courts should give statutory language a reasonable construction that best accomplishes the statute's purpose. *In re Forfeiture of $5,264,* 432 Mich 242, 248; 439 NW2d 246 (1989). The Legislature will be presumed to have intended that its amendments of a statute be construed harmoniously with other provisions of the statute. *Michigan Millers Mutual Ins Co v West Detroit Building Co, Inc,* 196 Mich App 367, 373; 494 NW2d 1 (1992).

In this case, the clear language of subsection 2(a) of the statute states that "in actions based on libel or slander *the plaintiff* is entitled to recover only the actual damages he or she has suffered . . . ." (Emphasis provided.) Nowhere in the statute does it say that only *public* individuals are entitled to actual damages in an action for actual malice.

On the other hand, subsection 7 states that an action involving a private individual may not be brought unless the falsehood concerns the private individual and was published negligently. Under this provision, only economic damages, including attorney fees, can be recovered.

Although the trial court construed subsection 7 as limiting recovery by private plaintiffs in actions for libel and slander to economic damages, we do not believe that the Legislature intended to permit only public plaintiffs to seek actual damages for injuries to reputation and feelings under subsection 2(a). We believe that the trial court's construal is incorrect, inasmuch as these two subsec-

tions can be read harmoniously. Under subsection 7, if the publication of the defamatory falsehood is negligent, a private plaintiff must prove economic damages but cannot recover for injuries to feelings. Under subsection 2(a), however, if a private plaintiff proves actual malice, the plaintiff is entitled to, among other things, actual damages to reputation or feelings.

In the instant case, the trial court thus erred in granting defendant summary disposition on the ground that plaintiffs failed to show that there was a genuine issue with respect to whether they suffered economic damage as a result of defendant's alleged slander. Although plaintiffs failed to establish that they suffered economic damage, summary disposition was improper because plaintiffs would be entitled to actual damages for hurt feelings under subsection 2(a) if they could show actual malice. Although the trial court erred in basing its decision on the ground that plaintiffs had produced no evidence of economic damage, we will not reverse where the right result is reached for the wrong reason. *State Mutual Ins Co v Russell,* 185 Mich App 521, 528; 462 NW2d 785 (1990).

A motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) tests whether there is factual support for a claim. In deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it, and give the nonmoving party the benefit of every reasonable doubt. *Pete v Iron Co,* 192 Mich App 687, 688; 481 NW2d 731 (1992).

Here, summary disposition is proper under MCR 2.116(C)(10) because plaintiffs have failed to present any evidence setting forth specific facts show-

ing a genuine issue of material fact that defendant made statements slandering or libeling plaintiffs.

A communication is defamatory if it tends to harm the reputation of another so as to lower that person in the estimation of the community or deter third persons from associating or dealing with that person. *Swenson-Davis v Martel,* 135 Mich App 632, 635; 354 NW2d 288 (1984). Slander (libel) per se exists where the words spoken (written) are false and malicious and are injurious to a person in that person's profession or employment. *Id.,* p 636.

To show actual malice, plaintiffs must prove that the defendant made the statement with knowledge that it was false or with reckless disregard of the truth. *Hodgins v Times Herald Co,* 169 Mich App 245, 255; 425 NW2d 522 (1988). A general allegation of malice is insufficient to establish a genuine issue of material fact. *Swenson-Davis, supra,* p 637.

After a thorough review of the record, we have found nothing to establish a genuine issue of material fact that defendant slandered or libeled plaintiffs by accusing them of paying off Hamburg Township officials or of using undue influence and control over these officials in order to obtain a favorable vote on a rezoning request for plaintiffs' bar. The documentary record, consisting of deposition testimony and the minutes of the meeting, reveals that at the board meeting on December 19,1989, defendant accused Hamburg Township Supervisor Henry Bater of having a "conflict of interest" by voting on the rezoning measure to allow plaintiffs to expand the seating capacity of their bar. The record indicates that plaintiffs supported Bater during the election campaign for township supervisor in which Bater defeated defendant and placed a campaign sign on a barn on

property owned by plaintiff Charles Plante behind the bar. Defendant further stated that Bater was "pro development," and that he tended to act in behalf of his friends. Defendant also threatened to conduct a recall campaign of Hamburg Township board members who voted for rezoning.

In short, the record contains no admissible documentary evidence setting forth specific facts showing a genuine issue of material fact that defendant accused *plaintiffs* of paying off certain board officials or of having undue influence and control over them, as plaintiffs allege in their complaint. Furthermore, we have found nothing to support plaintiffs' contention that defendant engaged in a letter-writing campaign to area newspapers accusing plaintiffs of paying off officials for political favors or wrongfully influencing elected board members. Summary disposition is therefore proper under MCR 2.116(C)(10).

Affirmed.

KLEANTHOUS v FIRST OF CHELSEA CORPORATION

Docket No. 125240. Submitted August 3, 1993, at Grand Rapids. Decided September 7, 1993, at 10:10 A.M.

Costas Kleanthous brought an action in the Washtenaw Circuit Court against First of Chelsea Corporation, seeking payment of interest and principal of two demand notes made by the defendant. The parties had originally agreed in 1980 to a rate of interest of eighteen percent a year. In 1983, they agreed to reduce the interest rate to fifteen percent a year. The defendant raised usury as a defense and moved for summary disposition. The court, William F. Ager, Jr., J., granted the motion, ruling that the plaintiff was entitled to no further payments because the total of the interest already paid exceeded the principal. The plaintiff appealed.

The Court of Appeals *held:*

MCL 450.1275; MSA 21.200(275) provides that a corporation may agree in writing to pay a rate of interest in excess of the legal rate and that usury is unavailable as a defense to a corporation that so agrees. MCL 438.61; MSA 19.15(71), effective March 31, 1983, made it lawful to charge business entities, including corporations, interest at rates not exceeding fifteen percent a year. The two statutes are not in conflict. The latter statute does not diminish the authority of corporations under the former statute to agree to pay interest in excess of the legal limit, and it does not affect the prohibition under the former statute against raising usury as a defense by corporations that agree to pay interest at rates exceeding the legal rate.

Reversed and remanded.

INTEREST — CORPORATIONS — USURY.

A corporation may agree in writing to pay on a debt a rate of interest that exceeds the legal rate; a corporation that so agrees may not raise usury as a defense to an action for collection (MCL 438.61, 450.1275; MSA 19.15[71], 21.200[275]).

REFERENCES

Am Jur 2d, Interest and Usury §§ 256-270.
See ALR Index under Interest on Money; Usury.

*Keusch & Flintoft, P.C.* (by *Peter C. Flintoft*), for the plaintiff.

*Laird, Chin & Schwartz* (by *John R. Laird*), for the defendant.

Before: FITZGERALD, P.J., and CONNOR and TAYLOR, JJ.

CONNOR, J. Plaintiff appeals as of right from the trial court's judgment entered after a series of rulings on motions for summary disposition. We reverse and remand for further proceedings.

At issue on appeal are the interest rates in two demand notes defendant made in 1980. In the notes, defendant promised to pay eighteen percent interest a year on a total of $95,000 in principal. There is no dispute that plaintiff is the holder of the notes to whom any principal and interest owed would be payable.

Plaintiff filed this action in 1988. He alleges that in 1985 the parties agreed to reduce the interest rate on the 1980 notes to fifteen percent. His complaint sought payment of interest owed on the notes and return of the principal lent.

Defendant raised a defense of usury. In a series of rulings on motions for summary disposition, the trial court decided that the notes were usurious, and, therefore, defendant owed no interest on the notes. Because the amount of interest paid on the notes had already exceeded the principal, the trial court held that plaintiff was not entitled to return of the principal.

MCL 450.1275; MSA 21.200(275) provides that a corporation may agree in writing to pay a rate of interest in excess of the legal rate and that the defense of usury is prohibited. MCL 438.61; MSA 19.15(71), effective March 31, 1983, made it lawful

to charge business entities, including corporations, interest at rates not exceeding fifteen percent a year.

These statutes are not in conflict. One sets the legal interest rate at fifteen percent for a wide class of business entities. The other states that a particular class of business entities, corporations, can agree to pay interest at rates higher than the legal rate and they will be barred from raising usury as a defense. Changing the legal interest rate applicable to business entities from seven percent to fifteen percent did nothing to diminish the authority corporations have to agree to pay interest in excess of the legal limit and did nothing to diminish the prohibition on corporations from raising the defense of usury if they have agreed to pay interest in excess of the legal limit.

We find that defendant is bound to pay the interest rate promised in writing and cannot raise the defense of usury. The judgment of the trial court on the two notes made in 1980 is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

CREGO v COLEMAN

Docket No. 139068. Submitted February 10, 1993, at Detroit. Decided September 7, 1993, at 10:15 A.M.

Phyllis R. Crego brought a paternity action in the Wayne Circuit Court against Kermit Coleman. By stipulation of the parties and after determining that adequate support had been provided for the child, the court, Marianne O. Battani, J., entered an order dismissing the complaint and directing the defendant to pay child support of $20 a week until the friend of the court made a formal recommendation and then to pay the lesser of the recommended amount or $50 a week until the child reaches eighteen years of age. Upon stipulation of the parties, the court entered a second order, increasing the amount of initial child support. The stipulation that prompted the second order included an agreement by the parties that the support order would not be subject to modification. After the friend of the court made its recommendation, the court entered a third order that directed the defendant to pay $50 a week until the child turns eighteen or until further order of the court. Neither party nor their attorneys signed the third order to approve its form or substance. The plaintiff thereafter moved for an increase in child support. The court denied the motion on the basis of res judicata. The plaintiff appealed.

The Court of Appeals *held:*

Section 3 of the Paternity Act, MCL 722.713; MSA 25.493, specifically provides that the performance of an agreement approved by a court for the provision of support to an illegitimate child by its father bars other remedies of the mother or child for the support and education of the child. The statutory bar prevents modification of a support order unless the parties' settlement agreement provides otherwise or unless the order directs payment of support until further order of the court.

In this case, the second order of the trial court was entered pursuant to a stipulation by the parties that the support

REFERENCES

Am Jur 2d, Bastards §§ 126, 127.

See ALR Index under Custody and Support of Children; Legitimacy of Children.

obligation would not be subject to modification. Although the third order provides that the defendant must pay support until further order of the court, there is no indication in the record that the parties agreed to that provision. The trial court lacks authority to modify support and it correctly denied the plaintiff's motion for modification, albeit for the wrong reason.

Affirmed.

GRIFFIN, J., dissenting, stated that in the absence of an objection or an appeal by the defendant with respect to the third order of the trial court, support was ordered paid until further order of the court, thereby allowing modification of the support obligation.

PARENT AND CHILD — PATERNITY ACTIONS — CHILD SUPPORT AGREEMENTS — MODIFICATION OF CHILD SUPPORT.

In a paternity action, an agreement approved by a court for the provision of support to an illegitimate child by its father is not subject to subsequent modification unless the parties provide for such modification in their settlement agreement or the order of support directs payment until further order of the court (MCL 722.713; MSA 25.493).

*Robes, Woodford & Kobliska* (by *J. Stephen Robes*), for the plaintiff.

*Steven M. Jentzen,* for the defendant.

Before: HOLBROOK, JR., P.J., and GRIFFIN and REILLY, JJ.

REILLY, J. Plaintiff appeals as of right from a March 22, 1991, order dismissing, on the basis of res judicata, her motion for modification of a child support order.

Pursuant to a stipulation between the parties, the trial court by order dated July 10, 1980, dismissed plaintiff's paternity complaint after determining that adequate provision for support had been made. The trial court adopted the parties' agreement and ordered defendant to pay $20 a week until the friend of the court made its formal recommendation, and thereafter the recommended

sum or $50 a week, whichever was less, until the child reached eighteen years of age.

On September 26, 1980, the trial court again determined that adequate provision for support had been made and, pursuant to the agreement of the parties, dismissed the cause "as to the question of paternity only,"[1] and ordered defendant to pay $20 a week from July 10, 1980, to September 26, 1980, $35 a week thereafter until the friend of the court recommendation was received, and thereafter the amount of the recommendation or $50 a week, whichever was less, until the child reached eighteen years of age. The stipulation upon which the order was based stated "that it is the intent of the parties that the attached order is not modifiable," and "this matter shall stand settled, discontinued and dismissed against Kermit L. Coleman, defendant herein."

On January 30, 1981, after the friend of the court recommendation was submitted, the trial court entered a "permanent" order requiring defendant to pay $50 a week in support "commencing January 30, 1981, and continuing until said child attains the age of eighteen years or until further order of the court." Neither party nor their attorneys signed the order to approve its form or substance.

Although defendant could have consented to further modification of the settlement agreement to include the language "or until further order of the court," the record does not show that he did so.

Settlements are contracts and are governed by

[1] The phrase "as to the question of paternity only" was handwritten after the printed language "is hereby dismissed as to Kermit L. Coleman, defendant herein." There is nothing in the order that indicates who added the language, when or whether it was approved by the court.

the legal principles applicable to contracts. *Hisaw v Hayes,* 133 Mich App 639, 642; 350 NW2d 302 (1984). In *Hisaw,* this Court rejected the equal protection argument raised on behalf of an illegitimate child and recognized the binding effect of a settlement in a paternity matter. Declining to follow *Boyles v Brown,* 69 Mich App 480; 245 NW2d 100 (1976), and relying on MCL 722.713; MSA 25.493, this Court held:

> The right of an illegitimate child to equal protection of law does not justify depriving the alleged father of the right to a trial of a disputed question of paternity. We decline to follow *Boyles, supra,* to the extent that in a paternity settlement like that at issue here, it would permit a court to increase an alleged father's support obligation, albeit leaving him bound by his agreement to surrender his right to a judicial determination of paternity. Such a settlement cannot be modified, the only judicial remedy being rescission. [*Hisaw, supra* at 644-645.]

We believe *Hisaw* to be the better-reasoned opinion, and we choose to follow it. Likewise, we believe that *Morrison v Richerson,* 198 Mich App 202; 497 NW2d 506 (1993), is distinguishable. In this case, defendant never acknowledged paternity. The trial court determined, in its order dismissing the case pursuant to the stipulation of the parties, that adequate provisions for support had been made. The second order, again pursuant to stipulation, authorized payment in accordance with the friend of the court recommendation. The stipulation stated that "the attached order is not modifiable" and "this matter shall stand settled, discontinued and dismissed" against defendant. The third order, entered after dismissal, was without consent of the parties and, we believe, was without

effect beyond stating the amount recommended by the friend of the court, which change had been agreed to by the parties in their stipulation.

MCL 722.713; MSA 25.493 specifically provides that the performance of the agreement after approval by the court bars "other remedies of the mother or child for the support and education of the child." That statutory bar prevents modification of the support order unless the parties provide for modification in the language of their settlement agreement.

Permission to modify has been found where the parties agreed that support should be paid "until the child reaches eighteen years of age or until further order of the court." *Van Laar v Rozema,* 94 Mich App 619; 288 NW2d 667 (1980). Although the language "until further order of the Court" was inserted in the order signed on January 30, 1981, nothing in the record suggests that phrase was agreed to by defendant, and plaintiff does not make that claim. The trial court had no authority to modify the parties' agreement by entering a support order that was inconsistent with the parties' settlement of the paternity action that had previously been approved by the court. MCL 722.713; MSA 25.493; *Hisaw, supra.* We conclude, therefore, that the phrase "or until further order of the court" in this case could not change the agreement made by the parties, and does not authorize later modification by the court.

The order of the trial court dismissing plaintiff's motion for modification is affirmed, although for reasons other than those stated by the trial court. *Griffey v Prestige Stamping, Inc,* 189 Mich App 665, 669; 473 NW2d 790 (1991).

Affirmed.

HOLBROOK, JR., P.J. concurred.

GRIFFIN, J. *(dissenting).* I respectfully dissent. I would reverse on narrow grounds. At issue in this appeal is a 1981 circuit court order that specifically provides for modification by using the language "until further order of the court." Although defendant now contends that he never agreed to the language allowing for modification, there was no objection to the order when it was entered in 1981 and defendant never appealed.

An agreement to provide support for a child born out of wedlock requires approval by the court, MCL 722.713(a); MSA 25.493(a), and it is well settled that a court speaks only through its written orders. *Tiedman v Tiedman,* 400 Mich 571, 576-577; 255 NW2d 632 (1977). Moreover, a judgment entered by consent is not a contract; rather, it has the same force and effect as a litigated judgment. *Trendell v Solomon,* 178 Mich App 365, 369; 443 NW2d 509 (1989). Because the order in this case allows for modification, the court was not barred from entertaining plaintiff's request for an increase in support. Compare *Morrison v Richerson,* 198 Mich App 202, 209-211; 497 NW2d 506 (1993).

PEOPLE v SEAN JONES (ON REHEARING)

Docket No. 143692. Submitted February 10, 1993, at Detroit. Decided June 16, 1993. Submitted on rehearing August 10, 1993. Decided on rehearing September 7, 1993, at 10:20 A.M.

Sean Jones was convicted by a jury in the Detroit Recorder's Court, Isidore B. Torres, J., of assault with intent to commit murder and of possession of a firearm during the commission of a felony and was sentenced. The Court of Appeals, JANSEN, P.J., and CAVANAGH, J. (P. D. SCHAEFER, J., dissenting in part), in an unpublished opinion per curiam, decided June 16, 1993 (Docket No. 143692), affirmed the convictions but remanded for resentencing, holding that the trial court violated the defendant's right to allocution and privilege against compelled self-incrimination by placing him under oath before he was afforded an opportunity for allocution. On its own motion, the Court of Appeals granted rehearing.

On rehearing, the Court of Appeals *held:*

1. There was sufficient evidence for conviction of assault with intent to commit murder. A rational trier of fact reasonably could conclude as proven beyond a reasonable doubt that the defendant aided and abetted the commission of that crime.

2. The trial court's decision to place the defendant under oath before allocution did not adversely affect his right to allocution or privilege against self-incrimination. MCR 6.425(D)(2)(c), which governs allocution at sentencing, does not prohibit a court from placing a defendant under oath before allocution. The defendant waived the privilege against self-incrimination by failing to raise it at the sentencing hearing and by making statements at that hearing.

3. The defendant failed to preserve for appellate review his claim of sentence disproportionality by failing to identify the specific information that he claims was considered improperly by the trial court. In any event, the sentence imposed for the assault conviction is presumptively proportionate because it falls within the range of the sentencing guidelines.

4. The defendant failed to preserve for appellate review his

REFERENCES

Am Jur 2d, Criminal Law §§ 531, 532, 703, 937, 938.
See ALR Index under Allocution; Self-Incrimination.

claim of improper scoring under the sentencing guidelines by failing to identify specifically the prior-record or offense variables that he claims were miscalculated. In any event, the trial court's scoring is supported by the record and therefore should not be disturbed.

Affirmed.

JANSEN, P.J., concurring in part and dissenting in part, stated that the trial court erred in placing the defendant under oath before affording him an opportunity for allocution because such an oath is not required by MCR 6.425(D)(2)(c) and because it forced the defendant, who did not testify at trial, to choose between invoking the right to allocution or the privilege against compelled self-incrimination under possible penalty for perjury and that the defendant did not waive the privilege against self-incrimination.

SENTENCES — RIGHT TO ALLOCUTION — PRIVILEGE AGAINST SELF-INCRIMINATION.

A sentencing court may place a defendant under oath before allocution without violating the defendant's right to allocution or privilege against self-incrimination if at the sentencing hearing the defendant does not assert the privilege or otherwise apprise the court that allocution would jeopardize the privilege (US Const, Am V; Const 1963, art 1, § 17; MCR 6.425[D][2][c]).

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Carolyn Schmidt,* Assistant Prosecuting Attorney, for the people.

*Robert M. Morgan,* for the defendant on appeal.

ON REHEARING

Before: JANSEN, P.J., and CAVANAGH and P. D. SCHAEFER,* JJ.

P. D. SCHAEFER, J. Defendant appeals as of right his jury conviction of assault with intent to com-

* Circuit judge, sitting on the Court of Appeals by assignment.

mit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to nine to twenty years' imprisonment for the assault conviction and to the mandatory two-year term for the felony-firearm conviction. On appeal, defendant argues that there was insufficient evidence to sustain the conviction, that the court violated his right to allocution, and that his sentence violates the proportionality standard established in *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). We disagree with all of the allegations of error and affirm defendant's convictions and sentences.

Defendant first argues that there was insufficient evidence to sustain his conviction of assault with intent to commit murder. We disagree. In reviewing a claim that there was insufficient evidence, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could reasonably conclude that all of the elements of the offense have been proven beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Hampton,* 407 Mich 354, 366; 285 NW2d 284 (1979), cert den 449 US 885 (1980). In order to convict a defendant as an aider and abettor, the prosecution must show that the crime was committed by the defendant or another, that the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, and that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave the aid or assistance. *People v Buck,* 197 Mich App 404, 410; 496 NW2d 321 (1992); *People v Beard,* 171 Mich App 538, 541; 431 NW2d 232 (1988).

In this case, defendant was present when the shooting took place. Moreover, the testimony indicated that defendant pointed the weapon at the victim, but was unable to fire the gun. The victim testified that when the gun would not fire, he saw defendant reload the weapon and that defendant then made a second attempt to shoot him. The evidence also showed that while defendant pointed the gun at the victim, he asked why the victim continued to call his mother's home. Testimony by the victim and his companion revealed that defendant and his two codefendants chased them a number of blocks before the victim was actually shot. The victim testified that he was shot seven times while all three codefendants watched and that he spent several weeks in the hospital. Viewing this evidence in a light most favorable to the prosecution, we are persuaded that a rational trier of fact could conclude that defendant was guilty of aiding and abetting assault with intent to commit murder.

Defendant next argues that the trial court interfered with his right to remain silent and his right to allocution when the court placed him under oath before affording him an opportunity to allocute. As a threshold matter, we note that defendant did not object to the court's act of placing him under oath at the time of sentencing. Ordinarily, we would conclude that this issue is not properly preserved because defendant failed to object. However, inasmuch as defendant presents the issue as one involving a significant constitutional question, appellate review is appropriate. *People v Passeno,* 195 Mich App 91, 95; 489 NW2d 152 (1992).

Defendant argues that the trial court impermissibly interfered with his Fifth Amendment right to remain silent when it placed him under oath at

sentencing. More specifically, defendant asserts that the court forced him to choose between his right to remain silent and his right to allocution at sentencing. This, defendant argues, constitutes an impermissible interference with his right to allocution. We disagree.

MCR 6.425(D)(2)(c) provides that before imposing sentence, a court must give the defendant, the defendant's attorney, the prosecutor, and the victim a reasonable opportunity to advise the court of any circumstances they believe the court should consider when imposing sentence. Our Supreme Court has stated that strict compliance with the rule is required and that the court must ask the defendant separately whether the defendant wishes to address the court before sentencing. *People v Berry,* 409 Mich 774, 781; 298 NW2d 434 (1980). Where the court fails to strictly comply with the provisions of the rule, resentencing is mandated. *People v Lowe,* 172 Mich App 347, 351; 431 NW2d 257 (1988). Nothing in the rule specifically prohibits the court from placing a defendant under oath at the sentencing proceeding.

Although we do not specifically sanction the court's decision to place defendant under oath before allocution, we cannot say that its decision to do so placed defendant's right to allocution in conflict with his privilege against self-incrimination. US Const, Am V and Const 1963, art 1, § 17 provide that no person shall be *compelled* to be a witness against himself in a criminal trial. The protection has been extended beyond criminal trials to protect a person from compelled, self-incrimination in all settings where freedom of action is curtailed in any significant way. *People v Schollaert,* 194 Mich App 158, 164; 486 NW2d 312 (1992) (quoting *Miranda v Arizona,* 384 US 436, 467; 86 S Ct 1602; 16 L Ed 2d 694 [1966]).

The United States Supreme Court explained the privilege against self-incrimination as follows:

> The Fifth Amendment privilege against compelled self-incrimination is not self-executing. At least where the Government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion.
>
> In this case, . . . petitioner "did not assert his privilege or in any manner suggest that he withheld his testimony because there was any ground for fear of self-incrimination. His assertion of it here is evidently an afterthought." . . . [T]he privilege "must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it." [*Roberts v United States,* 445 US 552, 559-560; 100 S Ct 1358; 63 L Ed 2d 622 (1980) (citations omitted).]

In his concurring opinion in *Jenkins v Anderson,* 447 US 231, 243-244; 100 S Ct 2124; 65 L Ed 2d 86 (1980), Justice Stevens stated that the inquiry was not whether the petitioner was silent, but whether the petitioner was in a position to have the testimony compelled and then asserted the privilege.

In this case, as in *Roberts, supra,* defendant's assertion of the privilege appears to be nothing more than an afterthought. Defendant not only failed to assert the privilege against self-incrimination, but arguably waived the privilege by making limited statements in the context of allocution. At sentencing, the following colloquy took place:

> *The Court:* Do you want to say anything to me, sir, that pertains to my sentencing you?
>
> *Defendant Jones:* No.
>
> *The Court:* What do you think I should do?
>
> *Defendant Jones:* Should give me whatever you think's best.

*The Court:* What do you think?
*Defendant Jones:* Like I didn't do the shooting.

Notwithstanding defendant's argument on appeal regarding his struggle with the right to remain silent in the context of allocution, defendant never asserted the privilege or apprised the court of the fact that he would not allocute because he felt compelled to give incriminating testimony. In fact, it appears from the record that defendant was not only afforded his right to allocution in this case, but also that he exercised that right when he made the comments referred to above.

Our research has not revealed any Michigan authority addressing the merits of this issue. However, at least one federal decision has addressed a similar issue. In *United States v Fleming,* 849 F2d 568, 569 (CA 11, 1988), the Eleventh Circuit Court of Appeals concluded that a defendant who fails to raise the privilege against self-incrimination at the time allocution takes place effectively waives the right to assert the privilege on appeal. *Id.* at 570. In so holding, the court quoted the following excerpt from another federal court decision:

> Marshall is apparently suggesting that the [F]ifth [A]mendment privilege against self-incrimination prohibits a sentencing court from considering the Government's evidence when the defendant presents no evidence—by his own testimony or otherwise—to rebut the Government's presentation. Marshall was not compelled to testify against himself, nor was he punished for not testifying on his own behalf. Marshall, like any defendant who chooses not to testify, took the chance that the uncontradicted Government testimony would be deemed credible. If we were to adopt Marshall's argument, the privilege against self-incrimination would be a way to completely rebut the Government's evidence without the defendant presenting

> any evidence of his own. The privilege against self-incrimination has never been so construed. [*Id.* at 569-570, quoting *United States v Marshall,* 719 F2d 887 (CA 7, 1983).]

In view of *Fleming* and *Marshall,* we believe that where a defendant fails to assert the privilege at allocution or to demonstrate some unconstitutional level of coercion that forced him to make statements at allocution, no violation of his rights can be found.

For the reasons stated above, we are not persuaded that the court's decision to place defendant under oath at sentencing had an adverse effect on his right to allocution. Absent some express prohibition of the practice by our Supreme Court or the Legislature, we cannot say that a court may not place a defendant under oath at sentencing. Inasmuch as the tribunals below have a strong interest in preventing perjury, we believe that a prohibition against placing a defendant under oath at sentencing will have the effect of encouraging defendants to deliberately mislead the court in order to avert harsh sentences, thereby demeaning the purposes of allocution. While we do not mean to say that it is mandatory to place a defendant under oath at sentencing (nor do we encourage such practice), we will not prohibit it where the court, in its discretion, chooses to do so. We decline to grant defendant's request for resentencing on this ground.

Defendant's next argument is that his sentence is in violation of the *Milbourn* proportionality standard. We disagree. In the context of this argument, defendant contends that the court considered improper information at sentencing. However, defendant has failed to articulate what improper information was considered. Because defen-

dant has failed to argue the merits of this allegation of error, this issue is not properly presented for review. *People v Kent,* 194 Mich App 206, 210; 486 NW2d 110 (1992).

Defendant also claims that the court erred in scoring the guidelines. Once again, defendant does not specify which of the prior-record or offense variables the court miscalculated. Without specific references to the alleged errors, we will not review the issue. In any case, our review of the guidelines calculations is limited; as long as there is record evidence to support the assessment under a particular variable, we will not disturb the score. *Buck, supra* at 430. We can find no obvious errors in the scoring process, nor does defendant assist us in finding any such errors.

The sentence imposed is within the guidelines and, as such, is presumptively proportionate. *Kent, supra* at 208. Considering the seriousness of the offense and the background of this offender, we are not persuaded that the court abused its discretion in imposing sentence in this case.

Affirmed.

CAVANAGH, J., concurred.

JANSEN, P.J. *(concurring in part and dissenting in part).* I respectfully dissent with regard to the majority's holding that it was "not persuaded that the court's decision to place defendant under oath at sentencing had an adverse effect on his right to allocution." *Ante* at 456. I would hold that the trial court erred in placing defendant under oath before affording him his opportunity to allocute.

The applicable court rule, MCR 6.425(D)(2)(c), does not require that the trial court place a defendant under oath before affording the defendant an opportunity to allocute; rather, the court rule

provides that the sentencing court must "give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence."

The majority states that defendant arguably waived the privilege against compelled self-incrimination by making limited statements in the context of allocution. In reviewing the record, it is apparent that the statements were made in response to questioning by the court. The trial court asked defendant if he wanted to say anything pertaining to sentencing. The defendant replied "No." The trial court then proceeded to question defendant further.

The trial court, by placing a defendant under oath, forces the defendant to choose between the privilege against compelled self-incrimination and the right to allocute at sentencing. If sworn, a defendant may choose not to allocute out of fear of prosecution and penalty for perjury. This is particularly true in a case such as this where defendant exercised his right to remain silent at trial. A defendant who has chosen not to testify at trial must, if placed under oath at sentencing, give sworn testimony if the defendant desires to allocute. Such a procedure severely undermines a defendant's right of allocution.

I would hold that it is inappropriate for a trial court to place a defendant under oath before affording the defendant the right to allocution. In all other respects, I concur with the majority's opinion.

PEOPLE v CADE (AFTER REMAND)

Docket No. 148946. Submitted June 17, 1993, at Detroit. Decided September 8, 1993, at 9:00 A.M. Leave to appeal sought.

Stephen T. Cade pleaded guilty in the Genesee Circuit Court, Robert M. Ransom, J., of second-degree criminal sexual conduct and was sentenced to ten to fifteen years' imprisonment, a significant departure from the sentencing guidelines' recommended range of three to five years. He appealed, and the Court of Appeals, BRENNAN, P.J., and MURPHY and CAVANAGH, JJ., affirmed in an unpublished memorandum opinion, decided December 28, 1989 (Docket No. 114687). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for reconsideration in light of *People v Milbourn,* 435 Mich 630 (1990). 437 Mich 861 (1990). On remand, the Court of Appeals, DANHOF, C.J., and HOLBROOK, JR., and WAHLS, JJ., in an unpublished memorandum opinion, decided January 18, 1991 (Docket No. 135021), vacated the defendant's sentence and remanded the case to the trial court for resentencing, because the sentence represented a substantial departure from the guidelines' recommendation and was imposed without the benefit of *Milbourn.* On remand, the trial court imposed the same sentence. The defendant appealed.

After remand, the Court of Appeals *held:*

1. A court's authority to resentence a defendant depends on whether the previously imposed sentence is valid. Even courts of appeal are without the authority to set aside a valid sentence. A sentence must be found disproportionate, or otherwise invalid, before an appellate court can overturn it.

2. No finding of invalidity was made by the Court of Appeals when, without expressing a view regarding the proportionality of the defendant's sentence, the Court vacated the sentence and remanded for resentencing. This was improper. The intent was to give the trial court the opportunity to reconsider the sentence in light of *Milbourn.*

3. The sentence is proportionate.

Affirmed.

*Frank J. Kelley,* Attorney General, *Thomas L.*

*Casey,* Solicitor General, *Arthur A. Busch,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Morris R. Kent,* Assisant Prosecuting Attorney, for the people.

*Herb Jordan,* for the defendant on appeal.

AFTER REMAND

Before: WAHLS, P.J., and CAVANAGH and GRIFFIN, JJ.

PER CURIAM. Although originally charged with first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), defendant was allowed to plead guilty of criminal sexual conduct in the second degree. MCL 750.520c; MSA 28.788(3). In exchange for his guilty plea, the prosecution agreed to dismiss charges that were pending of carrying a concealed weapon, MCL 750.227; MSA 28.424, receiving and concealing stolen property, MCL 750.535; MSA 28.803, and possessing a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). On August 16, 1988, defendant was sentenced to imprisonment for ten to fifteen years, a significant departure from the guidelines' recommended range of three to five years. As justification for the departure, the trial court cited the fact that defendant had terrorized the fourteen-year-old victim, locked her in his house, and then participated with another in her forcible rape.

On December 28, 1989, this Court affirmed defendant's sentence after determining that our consciences were not shocked by the sentence imposed. Unpublished memorandum opinion of the Court of Appeals, decided December 28, 1989 (Docket No. 114687). On November 16, 1990, the

Supreme Court, in lieu of granting leave to appeal, remanded this case to the Court of Appeals for reconsideration in light of *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). 437 Mich 861 (1990). On remand, we vacated defendant's sentence and remanded to the trial court for resentencing because the sentence represented a substantial departure from the guidelines' recommendation and was imposed without the benefit of *Milbourn.* Unpublished memorandum opinion of the Court of Appeals, decided Janauary 18, 1991 (Docket No. 135021). On remand the trial court imposed the same sentence that defendant originally received, ten to fifteen years.

In this appeal, brought as of right, defendant claims that the trial court erred in resentencing him to the same sentence after this Court expressed its view that that sentence violated the *Milbourn* standard. According to defendant, by imposing the same sentence, the trial court openly defied our directive to impose a sentence consistent with the standard of proportionality. Defendant also claims that his sentence is disproportionate. We disagree and affirm.

It is well-settled law in this state that a court's authority to resentence a defendant depends on whether the previously imposed sentence is valid. *People v Whalen,* 412 Mich 166, 169; 312 NW2d 638 (1981). "[E]ven courts of appeal are without the authority to set aside a *valid* sentence; rather, the sentence must be found disproportionate, or otherwise invalid, before an appellate court can overturn it." *In re Dana Jenkins,* 438 Mich 364, 369, n 3; 475 NW2d 279 (1991).

In this case, we made no finding of invalidity. Without expressing a view regarding whether defendant's sentence was disproportionate, we vacated defendant's sentence and remanded for re-

sentencing. This was improper. Our intent was solely to give the sentencing court the opportunity to reconsider its sentencing decision in light of *Milbourn, supra,* an intent that has been more clearly expressed by our Supreme Court. See *People v Martin,* 440 Mich 868 (1992), and *People v Herron,* 440 Mich 868 (1992).

With respect to the proportionality of defendant's sentence, we have reviewed his criminal history and the record in this case, and are convinced that the sentence imposed is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra,* p 636.

Affirmed.

PEOPLE v McCULLUM

Docket No. 154845. Submitted August 11, 1993, at Lansing. Decided September 8, 1993, at 9:05 A.M.

Howell J. McCullum was charged in the Oakland Circuit Court with being a prisoner in possession of a controlled substance and being an habitual offender, third offense. The court, Robert L. Templin, J., dismissed the charges, finding a violation of the 180-day rule provided in MCL 780.131; MSA 28.969(1). The people appealed.

The Court of Appeals *held:*

The 180-day rule does not apply to a charge of a criminal offense committed by an inmate of a state correctional facility while incarcerated in the correctional facility. Pursuant to the plain language of MCL 780.131(2)(a); MSA 28.969(1)(2)(a), the facility in which the defendant was incarcerated, the Pontiac Correctional Facility, is a state correctional facility under the control of the Department of Corrections. Furthermore, the purpose of the 180-day rule, to give an inmate the opportunity to have sentences run concurrently, is not applicable in this case because the defendant would be subject to consecutive sentencing if convicted.

Reversed and remanded.

1. PRISONS AND PRISONERS — 180-DAY RULE — STATE CORRECTIONAL FACILITIES — PONTIAC CORRECTIONAL FACILITY.

The 180-day rule does not apply to a charge of a criminal offense committed by an inmate of a state correctional facility while incarcerated in the correctional facility; the Pontiac Correctional Facility is a community corrections center under the control of the Department of Corrections and therefore is a state correctional facility within the meaning of the 180-day rule (MCL 780.131[2][a]; MSA 28.969[1][2][a]).

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REFERENCES

Am Jur 2d, Criminal Law § 552; Penal and Correctional Institutions § 2.

See ALR Index under Concurrent and Consecutive Sentences; Prisons and Prisoners.

2. PRISONS AND PRISONERS — 180-DAY RULE — MANDATORY CONSECUTIVE SENTENCING.

The purpose of the 180-day rule, to give an inmate of a state correctional facility the opportunity to have sentences run concurrently, does not apply in a case where a mandatory consecutive sentence is required upon conviction; the consecutive sentencing statute applies to a crime committed by an inmate of a community corrections center under the control of the Department of Corrections while incarcerated at the center (MCL 768.7a, 780.131[2][a]; MSA 28.1030[1], 28.969[1][2][a]).

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Richard Thompson,* Prosecuting Attorney, *Michael J. Modelski,* Chief, Appellate Division, and *Janice A. Kabodian,* Assistant Prosecuting Attorney, for the people.

*Gail Carr-Williams,* for the defendant on appeal.

Before: HOOD, P.J., and CAVANAGH and R. J. TAYLOR,* JJ.

PER CURIAM. Defendant was charged with being a prisoner in possession of a controlled substance, MCL 800.281(4); MSA 28.1621(4), and being an habitual offender, third offense, MCL 769.11; MSA 28.1083. The trial court dismissed the charges, finding a violation of the 180-day rule. MCL 780.131; MSA 28.969(1). The people appeal as of right. We reverse.

At the time of the alleged offense, defendant was a prisoner incarcerated at the Pontiac Correctional Facility. On July 19, 1991, he signed in from either a work release or a social leave and was asked to submit to a random body search. He then threw a balled-up piece of toilet paper that he was holding in his hand behind a book cabinet. It was retrieved and confiscated and determined to contain 0.29 grams of rock cocaine. A warrant was

* Circuit judge, sitting on the Court of Appeals by assignment.

issued on September 23, 1991, and a preliminary examination was held on October 22, 1991. On June 2, 1992, defendant moved to dismiss the case, alleging violation of the 180-day rule. The trial court agreed with defendant and dismissed the case.

Pursuant to MCL 780.131(2)(a); MSA 28.969(1)(2)(a), the 180-day rule does not apply to a charge of a criminal offense committed by an inmate of a state correctional facility while incarcerated in the correctional facility. The trial court here determined that a community corrections center is not a state correctional facility within the meaning of the foregoing statute. We disagree.

It is undisputed that the subject facility in this case is a correctional facility under the control of the Department of Corrections. Pursuant to the plain language of the statute, therefore, it is a state correctional facility.

Moreover, the purpose of the 180-day rule is to give an inmate the opportunity to have his sentences run concurrently; the purpose does not apply in a case where a mandatory consecutive sentence is required upon conviction. *People v Smith,* 438 Mich 715, 718; 475 NW2d 333 (1991). The consecutive sentencing statute, MCL 768.7a; MSA 28.1030(1), is applicable to a crime committed at a community corrections center. *People v Sanders,* 130 Mich App 246, 250-251; 343 NW2d 513 (1983); *People v Lakin,* 118 Mich App 471, 474; 325 NW2d 460 (1982). Here, defendant would be subject to consecutive sentencing if convicted.

Thus, both the plain language and the purpose of MCL 780.131(2)(a); MSA 28.969(1)(2)(a) lead to the conclusion that a community corrections center that is under the control of the Department of Corrections is a state correctional facility within the meaning of the statute. The trial court's reli-

ance on MCL 791.265a(6)(c); MSA 28.2325(1)(6)(c) is misplaced because the definition of state correctional facility contained in that statute is expressly limited to that section and is not applicable to this case.

Accordingly, because defendant was charged with a criminal offense committed while he was an inmate of a state correctional facility, the 180-day rule does not apply and dismissal was improper.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

VERMILYA v CARTER CROMPTON SITE DEVELOPMENT CONTRACTORS, INC

Docket No. 143779. Submitted March 7, 1993, at Lansing. Decided September 8, 1993, at 9:10 A.M.

Harlan Vermilya, as conservator for Matthew Vermilya, a minor, brought a products liability action in the Genesee Circuit Court against Carter Crompton Site Development Contractors, Inc., alleging the defective manufacture or design of a soccer goal that fell on Matthew while he was playing on the playground at a school in Bay County. The defendant moved for a change of venue to Bay County pursuant to MCL 600.1629(1)(b); MSA 27A.1629(1)(b). The circuit court, Thomas C. Yeotis, J., granted the motion. The defendant then moved for summary disposition in the Bay Circuit Court, alleging that the plaintiff was barred from pursuing the action because the plaintiff had been awarded a mediation evaluation in a prior lawsuit in the Bay Circuit Court against the children with whom Matthew was playing at the time of the accident, all the parties to the mediation had accepted the evaluation, and a judgment consistent with the evaluation had been awarded to the plaintiff and satisfied. The court, Eugene C. Penzien, J., granted the defendant's motion. The plaintiff appealed.

The Court of Appeals *held:*

1. Venue was proper in Genesee County because the defendant manufactured or designed the alleged defective goal there. The decision of the Genesee Circuit Court to change venue on the basis that venue was improper in Genesee County clearly was erroneous.

2. A judgment entered pursuant to a mediation evaluation is effective only against those parties who actually participated in the action and does not bind parties, such as the defendant in this case, who were not privy to the proceedings. The dollar figure suggested in a mediation panel's evaluation is not an

REFERENCES

Am Jur 2d, Arbitration and Award §§ 146, 147, 149; Torts § 85; Venue §§ 36, 37.

Place where claim or cause of action "arose" under state venue statute. 53 ALR4th 1104.

actual valuation of the plaintiff's damages, but, instead, is a suggested settlement figure that is reached by considering the plaintiff's damages as one of several factors. The Bay Circuit Court erred in concluding that the suit was barred as a result of the previous judgment entered pursuant to the acceptance of the mediation evaluation.

Reversed and remanded.

1. VENUE — PRODUCTS LIABILITY — SITUS OF MANUFACTURING OR DESIGN.

The provision in MCL 600.1629(1)(a); MSA 27A.1629(1)(a) that an action based on tort may be brought in a county in which all or a part of the cause of action arose properly is interpreted to include a county in which a product was manufactured or designed defectively.

2. VENUE — APPEAL.

The Court of Appeals will reverse a trial court's decision with regard to a motion for a change of venue where there was clear error.

3. JUDGMENTS — JOINT TORTFEASORS — DAMAGES.

Where the conduct of two or more actors proximately causes a single, indivisible injury to a plaintiff, the plaintiff may pursue any or all of the defendants for compensation for the injury, but is entitled to only one satisfaction; where a judgment for the plaintiff is based upon actual litigation of the amount of damages and the judgment is paid in full, the plaintiff has no enforceable claim against any other obligor responsible for the same loss (MCL 600.2925c[5]; MSA 27A.2925[3][5]).

4. PRETRIAL PROCEDURE — MEDIATION — JUDGMENTS — DAMAGES.

The acceptance of a mediation award is not analogous to a judgment entered after a trial; a judgment entered pursuant to a mediation award is effective against only those parties who actually participated in the action; a mediation panel's evaluation of a plaintiff's claim may not constitute a determination of the full extent of the plaintiff's damages because the plaintiff's damages are but one of the factors properly considered by the mediators in determining an award (MCR 2.403[M]).

*Sumpter, Perry & McDonald, P.C.* (by *Thomas E. McDonald*), for the plaintiff.

*Thomas J. Doyle,* for the defendant.

Before: DOCTOROFF, C.J., and SAWYER and MURPHY, JJ.

PER CURIAM. Plaintiff, Harlan Vermilya, as conservator for Matthew Vermilya, a minor, appeals from an order of the Bay Circuit Court granting defendant summary disposition and dismissing plaintiff's products liability action against defendant. We reverse and remand.

Matthew Vermilya was a sixth-grade student at Kolb Middle School in Bay County, Michigan, when he was injured while on the school's playground when a portable soccer goal fell on him. The goal was allegedly manufactured by defendant. Plaintiff filed suit in the Bay Circuit Court against Kolb Middle School, and later moved to add as defendants the children with whom Matthew was playing at the time of the accident and the principal of the school. The trial court permitted plaintiff to add the other children as defendants, but refused to allow the principal to be added on the basis of governmental immunity. The trial court also dismissed the action against the school on the basis of governmental immunity. The case regarding the remaining defendants was submitted to mediation, and all parties accepted the mediation panel's evaluation. A judgment was entered consistent with the mediation evaluation, awarding plaintiff $100,000, inclusive of costs and interest from all defendants. The judgment was fully satisfied.

Shortly after the judgment was entered, plaintiff filed this action against defendant in the Genesee Circuit Court, alleging that defendant manufactured the portable soccer goal in Genesee County and that the goal lacked adequate warnings, lacked adequate care and use instructions, and failed to contain instructions regarding the an-

choring of the goal or the devices to be used to anchor it. Defendant filed its answer and plaintiff filed an amended complaint, to which defendant also filed an answer. Defendant then moved for a change of venue to Bay County pursuant to MCL 600.1629(1)(b); MSA 27A.1629(1)(b), which the circuit court granted. Once in Bay County, defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that the satisfied mediation judgment barred plaintiff from pursuing this action against defendant. The Bay Circuit Court granted defendant's motion for summary disposition.

Plaintiff contends that the transfer of venue to Bay County was erroneous because venue was proper in Genesee County. We agree. MCL 600.1629; MSA 27A.1629 provides:

> (1) Subject to subsection (2), in an action based on tort, the following provisions apply:
>
> (a) A county in which all or a part of the cause of action arose and in which either of the following apply is a proper county in which to commence and try the action:
>
> (i) The defendant resides, has a place of business, or conducts business in that county.
>
> (ii) The registered office of a defendant corporation is located in that county.
>
> (b) If no county satisfies the criteria under subdivision (a), a county in which all or part of the cause of action arose and in which either of the following apply is a proper county in which to commence and try the action:
>
> (i) The plaintiff resides, has a place of business, or conducts business in that county.
>
> (ii) The registered office of a plaintiff corporation is located in that county.
>
> * * *
>
> (2) Either party may file a motion for a change in venue based upon hardship or inconvenience.

> Venue shall only be changed under this subsection to the county in which the moving party resides. . . .

In *Lorencz v Ford Motor Co,* 439 Mich 370, 377; 483 NW2d 844 (1992), our Supreme Court recently interpreted the requirement of MCL 600.1629(1)(a); MSA 27A.1629(1)(a) that an action be brought in a county "in which all or a part of the cause of action arose" to include a county in which a product was manufactured or designed defectively. Because defendant in this case manufactured or designed the allegedly defective goal in Genesee County, venue was proper in Genesee County. *Lorencz, supra.*

We review a trial court's decision to grant or deny a motion for a change of venue for clear error. *Coleman v Gurwin,* 195 Mich App 8, 10; 489 NW2d 118 (1992). Although it is possible for a trial court to grant a party's motion for a change of venue that is based upon hardship or inconvenience, in this case, defendant's motion was based upon the contention that venue was improper in Genesee County. The decision of the Genesee Circuit Court to change venue was therefore clearly erroneous. Because we conclude that the change of venue was in error, we need not reach plaintiff's contention that defendant failed to challenge venue in a timely manner.

Plaintiff also contends that the Bay Circuit Court erred in granting defendant summary disposition. We agree. Defendant argued, and the trial court determined, that plaintiff's judgment against the defendants in the previous litigation, which arose as a result of a mediation evaluation accepted by all parties in that case, constitutes a determination of the full amount of plaintiff's loss, and that satisfaction of that judgment constitutes

a full satisfaction of the amount to which plaintiff is entitled. Where the conduct of two or more actors proximately causes a single, indivisible injury to a plaintiff, the plaintiff may pursue any or all of the defendants for compensation for the injury, but is entitled to only one satisfaction. *Barkman v Montague,* 297 Mich 538, 542; 298 NW 273 (1941); *Verhoeks v Gillivan,* 244 Mich 367, 371; 221 NW 287 (1928); *Kaminski v Newton,* 176 Mich App 326, 328; 438 NW2d 915 (1989). See also MCL 600.2925c(5); MSA 27A.2925(3)(5). When a judgment is based upon actual litigation of the amount of damages and the judgment is paid in full, the plaintiff has no enforceable claim against any other obligor responsible for the same loss. See *Kaminski, supra,* 331; Restatement Judgments, 2d, § 50, comment d, p 40.

In *Espinoza v Thomas,* 189 Mich App 110, 117-118; 472 NW2d 16 (1991), however, this Court held that, although an accepted mediation evaluation serves as a final adjudication of the claims mediated and is binding upon the parties to the mediation, the acceptance of a mediation award is not analogous to a judgement entered after a trial. Rather, MCR 2.403(M) provides:

> (1) If all the parties accept the panel's evaluation, judgment will be entered in that amount. The judgment shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date of judgment.
>
> (2) In a case involving multiple parties, judgment shall be entered as to those opposing parties who have accepted the portions of the evaluation that apply to them.

This language suggests that a judgment entered pursuant to a mediation evaluation can be effective against only those parties who actually partic-

ipated in the action and cannot bind parties not privy to the proceedings. Further, the process used to arrive at a mediation evaluation differs from the trial process in that under the mediation rule no fact finding is necessary, no formal opinion is issued, and the parties are significantly limited in the presentation of evidence. See, generally, MCR 2.403. In arriving at a mediation evaluation, the mediation panel considers factors similar to those considered in the settlement process; for example, the mediators may consider insurance policy limits, the certainty of the claim, and the likelihood of recovery from the defendants. Thus, the dollar figure suggested in a mediation panel's evaluation does not constitute the actual valuation of the plaintiff's damages, but, instead, suggests a settlement figure that is reached by considering the plaintiff's damages as one of several factors. See *Espinoza, supra,* 118; see also *Klawiter v Reurink,* 196 Mich App 263, 266; 492 NW2d 801 (1992). The trial court therefore erroneously concluded that plaintiff's suit was barred by the previous judgment entered pursuant to acceptance of the mediation evaluation.

Reversed and remanded. We do not retain jurisdiction.

GEORGE v SANDOR M GELMAN, PC

Docket No. 145411. Submitted August 3, 1993, at Grand Rapids. Decided September 8, 1993, at 9:15 A.M.

Sandra E. George brought an action in the Wayne Circuit Court against Sandor M. Gelman, P.C., seeking the removal of an attorney's charging lien recorded by the defendant against realty awarded to the plaintiff after divorce proceedings in which she was represented by the defendant. On motions for summary disposition by both parties, the court, Samuel A. Turner, J., granted the defendant's motion and denied the plaintiff's motion. The plaintiff appealed.

The Court of Appeals *held:*

An attorney's charging lien, which represents an equitable right to have fees and costs due an attorney secured out of the judgment or recovery in a suit, may not be placed on a client's realty, even if the attorney successfully has prosecuted a suit to establish the client's title to or possession of the realty, unless the attorney and the client have an express agreement providing for such a lien, the attorney obtains a judgment for the fees and costs and follows the proper procedure for enforcing a judgment, or special equitable circumstances warrant imposition of a lien. Because none of those conditions are present in this case, the trial court erred in denying summary disposition for the plaintiff.

Reversed; lien removed.

ATTORNEY AND CLIENT — ATTORNEYS' CHARGING LIENS — REALTY.

An attorney may not place a special or charging lien against a client's realty for fees and costs due for services, even if the attorney successfully has prosecuted a suit to establish the client's title to or possession of the realty, unless the attorney and the client have an express agreement providing for such a lien, the attorney obtains a judgment for the fees and costs and follows the proper procedure for enforcing a judgment, or special equitable circumstances warrant imposition of a lien.

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REFERENCES

Am Jur 2d, Attorneys at Law §§ 324-327, 342.

Attorney's retaining lien: what items of client's property or funds are not subject to lien. 70 ALR4th 827.

Sandra E. George, in propria persona.

*Sandor M. Gelman,* for the defendant.

Before: FITZGERALD, P.J., and CONNOR and TAYLOR, JJ.

PER CURIAM. Plaintiff brought an action to remove an attorneys' lien recorded against her real property by defendant. Both parties moved for summary disposition. Following a hearing, the trial court granted summary disposition in favor of defendant and denied plaintiff's motion. Plaintiff appeals as of right. We reverse.

Plaintiff retained defendant in March 1988 to represent her in a divorce action that was finalized in January 1989. There is no dispute that the parties did not enter into a written fee agreement. The parties also agree that pursuant to an oral agreement, plaintiff paid defendant a retainer of $1,500 and agreed to an hourly fee of $150. Plaintiff alleges, and defendant denies, that defendant stated that the total fee would be "$5,000 to $6,000 tops."

Plaintiff was billed $12,569.90, which represented attorney fees in the amount of $11,212.50 and advanced costs in the amount of $1,357.40. After several requests, defendant provided plaintiff with an itemized fee statement. Plaintiff disputed several of the services and the fees charged for those services by defendant. Two meetings with defendant failed to resolve the dispute.

On March 29, 1989, defendant recorded an attorney's lien in the amount of $10,569.90 against a condominium awarded to plaintiff in the judgment of divorce. Defendant never sued plaintiff to collect the fee and never obtained a judgment against plaintiff for the lien amount.

Plaintiff alleges that she did not become aware

of the lien until months after it was recorded. On July 30, 1990, plaintiff filed the petition for release of the lien that is the subject of this lawsuit.

Defendant moved for summary disposition of plaintiff's claim pursuant to MCR 2.116(C)(8). Plaintiff also moved for summary disposition, arguing that defendant's charging lien could not attach to her real property without an express agreement between the parties providing for such a lien. After concluding that Michigan law "authorizes an attorney to impose a lien on work product that he is responsible for bringing about through the use of his services," the trial court granted defendant's motion and denied plaintiff's motion.

In an issue of first impression, we are asked to determine whether an attorneys' lien can attach to a client's real property.

I

An attorney's lien can be one of two kinds: (1) a general, retaining, or possessory lien, or (2) a special, particular, or charging lien. A general or retaining lien is the right to retain possession of all documents, money, or other property of the client until the fee for services is paid. *Kysor Industrial Corp v D M Liquidating Co,* 11 Mich App 438, 444; 161 NW2d 452 (1968). The special or charging lien is an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit. *Id.*; 3 Michigan Law & Practice, Attorneys & Counselors, § 161, pp 486-487. The attorney's charging lien creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services. *Doxtader v Sivertsen,* 183 Mich App 812, 815; 455 NW2d 437 (1990). In this case, defendant is asserting the right to a charging lien.

While not codified in a statute, the existence of a common-law attorney's charging lien is recognized in Michigan. *Kysor, supra* at 445. See also *Miller v Detroit Automobile Inter-Ins Exchange,* 139 Mich App 565, 568; 362 NW2d 837 (1984). Case law acts as the sole guide with regard to these liens. *Bruce v United States,* 127 F Supp 858 (ED Mich, 1955).

II

In Michigan, direct attachment of a debtor's real estate is disfavored. Chapter 60 of the Revised Judicature Act (RJA), MCL 600.6001 *et seq.*; MSA 27A.6001 *et seq.,* ordinarily governs collection of judgments and execution against real estate for monies owed. A judgment, by itself, does not create a lien against a debtor's property. Under the scheme provided in chapter 60, the creditor must first obtain a judgment for the amount owed, then execute that judgment against the debtor's property. A creditor may execute against real property owned by a debtor only after attempting to execute against the debtor's personalty and determining that the personal property is insufficient to meet the judgment amount. MCL 600.6004; MSA 27A.6004. To place a lien against a debtor's real property, the creditor must deliver the writ of execution and a notice of levy against the property to the sheriff, who then records the notice of levy with the register of deeds to perfect the lien.

III

A review of case law in Michigan involving attorneys' charging liens reveals that these liens automatically attach to funds or a money judgment recovered through the attorney's services. No Michigan authority, however, permits an attor-

ney's charging lien to attach to real property. Defendant's reliance on *Wolter v Wolter,* 332 Mich 229, 236; 50 NW2d 771 (1952), and *Tyrrell v Tyrrell,* 107 Mich App 435, 438-439; 309 NW2d 632 (1981), is misplaced. In those cases, statutory judicial liens to secure payment of attorney fees were ordered to attach against specific real property awarded in the judgment of divorce. MCL 552.13(1); MSA 25.93(1).

Common law established in other states does not permit an attorney's charging lien to attach to the client's real property "even where the attorney's services result in a judgment establishing title or possession for the client." *Rubel v Brimacombe & Schlecte, PC,* 86 Bankr 81, 83 (ED Mich, 1988). In *Rubel,* the court concluded that although Michigan courts had never directly ruled on the issue, they would follow the majority rule disallowing attorney liens upon real property owned by clients unless there is an express written contract between the parties providing for such a lien or unless special equitable circumstances existed. *Id.* at 83-84.

IV

We conclude that an attorney's charging lien for fees may not be imposed upon the real estate of a client, even if the attorney has successfully prosecuted a suit to establish a client's title or recover title or possession for the client, unless (1) the parties have an express agreement providing for a lien, (2) the attorney obtains a judgment for the fees and follows the proper procedure for enforcing a judgment,[1] or (3) special equitable circumstances exist to warrant imposition of a lien.

[1] We do not include a court order as one of the methods for procuring an attorney's charging lien on real property because such an order constitutes a statutory judicial lien on the real property, not

In this case, defendant has not alleged the existence of an express written agreement providing for the lien. Further, defendant failed to follow the legal procedure for collecting debts owed by obtaining a judgment for the amount owed. No special equitable circumstances exist that would support imposition of an attorney's charging lien on plaintiff's real property. Plaintiff has not attempted to evade paying for defendant's services. Rather, an ongoing dispute exists between the parties regarding the total fee charged by defendant, and the parties have been unable to resolve it. Defendant's pleadings are insufficient to establish that he had the right to assert a lien against plaintiff's property.

The grant of summary disposition in favor of defendant is reversed, the denial of plaintiff's motion for summary disposition is reversed, and the lien against plaintiff's real property is ordered released.

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an attorney's lien. See MCL 552.13(1); MSA 25.93(1). See also *Wolter* and *Tyrrell, supra.*

KNOKE v EAST JACKSON PUBLIC SCHOOL DISTRICT

Docket No. 138530. Submitted April 13, 1993, at Lansing. Decided May 26, 1993; approved for publication September 9, 1993, at 9:00 A.M.

The Michigan Employment Relations Commission affirmed a hearing referee's decision that dismissed charges brought by Richard Knoke, a counselor for the East Jackson Public School District, against the school district, the East Jackson Education Association, and the Jackson County Education Association, alleging that the associations, collectively referred to as the union, breached the duty of fair representation and that the school district breached the parties' collective bargaining agreement. Knoke appealed.

The Court of Appeals *held:*

1. The MERC's findings that the union did not breach its duty to fairly represent Knoke are supported by competent, material, and substantial evidence on the record considered as a whole.

2. The record does not support Knoke's argument that the union intended to pursue his grievances but failed to comply with the applicable time limits, or decided to abandon the grievances in bad faith. The union took the steps necessary to preserve the grievances and to extend the time limits for arbitration, aggressively pursued resolution of the underlying dispute, and adequately weighed the requisite factors in deciding whether to pursue the grievances.

3. Knoke did not demonstrate any breach of the collective bargaining agreement, and, therefore, could not prevail on a claim of unfair representation.

4. The MERC did not err in denying Knoke's motion to add his posthearing exhibits to the record.

Affirmed.

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REFERENCES

Am Jur 2d, Administrative Law §§ 525, 678-691; Labor Relations §§ 398-410.

See ALR Index under Administrative Law; Labor and Employment.

1. ADMINISTRATIVE LAW — EMPLOYMENT RELATIONS COMMISSION — APPEAL.

   Findings of the Michigan Employment Relations Commission are conclusive if supported by competent, material, and substantial evidence on the record considered as a whole (MCL 423.216[e]; MSA 17.455[16][e]).

2. LABOR RELATIONS — UNIONS — GRIEVANCES — DUTY OF FAIR REPRESENTATION.

   A union has discretion to decide which grievances will be submitted to arbitration and which will be settled, and must be permitted to assess each grievance to determine its individual merit; the union may consider the good of the general membership and weigh the burden on the contractual grievance machinery, the amount at stake, the likelihood of success, the cost, and the desirability of winning the award against considerations that affect the membership as a whole; the union must act without fraud, bad faith, hostility, discrimination, arbitrariness, caprice, gross nonfeasance, collusion, bias, prejudice, wilful, wanton, wrongful and malicious refusal, personal spite, ill will, bad feelings, improper motives, misconduct, overreaching, unreasonable action, or gross abuse of its discretion.

3. LABOR RELATIONS — UNIONS — DUTY OF FAIR REPRESENTATION.

   A member of a labor union, in order to prevail on a claim of unfair representation against the union, must establish a breach of the duty of fair representation and a breach of the collective bargaining agreement.

4. ADMINISTRATIVE LAW — EMPLOYMENT RELATIONS COMMISSION — HEARINGS — EVIDENCE.

   The Michigan Employment Relations Commission may reopen the record in a case and receive further evidence after the close of a hearing where the evidence is newly discovered and was unavailable through reasonably diligent discovery at the time of the earlier hearing (1979 AC, R 423.468[2]).

*Anthony A. Muraski,* for Richard Knoke.

*White, Beekman, Przybylowicz, Schneider & Baird, P.C.* (by *Thomas A. Baird*), for East Jackson Education Association and Jackson County Education Association.

*Thrun, Maatsch & Nordberg, P.C.* (by *Philip A. Erickson*), for East Jackson Public School District.

Before: WHITE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM. Charging party Richard Knoke appeals as of right a decision of the Michigan Employment Relations Commission dismissing charges against respondents of breach of a duty of fair representation and breach of a collective bargaining agreement. He claims that the MERC's findings that respondent labor organizations did not breach their duty of fair representation and that the school district did not breach its contract were not supported by substantial evidence. He also claims that the MERC erred in denying his motion to admit a posthearing response brief and exhibits. We affirm.

Knoke worked as a middle school counselor for respondent East Jackson Public School District. Respondents East Jackson Education Association and Jackson County Education Association (hereafter the union) represented Knoke in collective bargaining matters. In 1981, Knoke began to experience symptoms he attributed to changes in the ventilation system of East Jackson Middle School, where he worked. As a result, Knoke missed seven weeks of work in the spring of 1982. The following school year, Knoke worked until February 1983, but then stopped working for seventeen months. During this time, Knoke exhausted his individual sick-leave and sought additional days from the sick leave bank created under the collective bargaining agreement, submitting medical verification from his own physicians. He also saw two school-board-approved physicians, who found no illness. The school board refused Knoke's request for banked sick-leave days. Knoke's resulting grievance against the school district went to arbitration. Because of the conflicting evidence, the arbitrator

could not determine whether Knoke in fact was sick. However, she ruled that Knoke was nevertheless entitled to the sick-leave days because, under the terms of the 1981-83 agreement, the school district could not deny sick leave from the sick-leave bank solely by relying on the reports of school-board-approved doctors.

In January 1984, Knoke again requested sick leave to cover his absence during the first half of the 1983-84 school year. The school district refused his request, its position buttressed by changed terms in the 1983-86 bargaining agreement that permitted the district to request and rely on medical verification from school-board-approved doctors. That agreement also provided that sick leave would not accumulate during an unpaid leave of absence. The school board denied Knoke's subsequent grievance on March 12, 1984.

Under the terms of the new contract, the union had thirty days after denial of a grievance in which to file a written request for arbitration, notifying both the school board and an arbitrator. Union grievance officer William Owen testified that on April 13, 1984, he notified the school board in writing of the union's intent to pursue arbitration. He also orally agreed with the school district to hold the arbitration in abeyance while other related matters were pending. Owen also wrote to the American Arbitration Association, stating that the school district had agreed to hold the arbitration process in abeyance.

In the meantime, the union was pursuing a class grievance on behalf of a group of teachers, including Knoke, claiming that the school building was an environmental hazard and seeking the right either to draw on sick-leave-bank days or to be transferred. On March 16, 1984, an arbitrator issued an opinion that found that the union failed

to sustain its burden of proving the existence of a recognized health hazard in the school building. At about that time, Knoke filed another grievance concerning the school district's refusal to transfer him to a different school, which the school board denied on August 13, 1984, on the ground that Knoke was not qualified for the available positions. Knoke testified that the union informed him that it would pursue arbitration of this grievance as well.

In September 1984, Knoke met with Owen and the union's local president about the status of his grievances. Although Knoke testified that the two officials stated they had "until infinity" to take the grievances to arbitration, Owen testified that he told Knoke that the grievances would not be taken to arbitration, but that the union would use the arbitration requests as leverage in its negotiations with the school district.

In October 1984, Owen was succeeded by Larry Fischer, who notified the school superintendent that the union intended to submit Knoke's two grievances to arbitration. The superintendent responded that the arbitration deadline had passed.

On April 10, 1985, Knoke filed a petition with the MERC, charging the union with unfair labor practices for failing to process the two grievances to arbitration. The petition also charged the school district with failing to pay lost wages and benefits, including sick days and sick-bank days, failing to transfer Knoke to another school, and discriminating against Knoke for exercising his statutory rights. After a bifurcated hearing spanning four years, on April 30, 1990, a hearing referee issued a decision and a recommended order dismissing the charges against respondents. The decision and order were based on the referee's findings that, in light of facts indicating no established illness and

Knoke's inadequate qualifications for transfer, as well as a valid arbitration decision regarding the merits of Knoke's "sick building" complaint, the union had not acted unfairly in failing to take Knoke's grievances to arbitration because the union had no reasonable expectation of prevailing. The referee also found that the record did not justify a conclusion that the school district took any action against Knoke because of his grievances.

Knoke submitted exceptions to the decision and recommended order, to which respondents filed response briefs. Knoke then submitted a reply brief along with attached exhibits, which the union moved to strike. In his answer, Knoke moved to admit the exhibits. On February 20, 1991, the MERC issued a decision and order denying admission of the exhibits and affirming the hearing referee's recommendation. Knoke now appeals this decision and order.

Knoke's first argument is that the MERC's findings that the union did not breach its duty of fair representation and that the school district did not breach the collective bargaining agreement were not supported by substantial evidence. Although Knoke raises the issue that the MERC erred in concluding that the school district did not breach the contract in his statement of issues, he does not address this assertion in his brief. This issue has therefore been abandoned. *Midland v Helger Construction Co, Inc,* 157 Mich App 736, 745; 403 NW2d 218 (1987). Moreover, Knoke cannot pursue his breach of contract claim against the school district unless he is successful in his claim of breach of the duty of fair representation. *Saginaw v Chwala,* 170 Mich App 459, 464-465; 428 NW2d 695 (1988); *Pearl v Detroit,* 126 Mich App 228, 238-239; 336 NW2d 899 (1983). With regard to the fair

representation claim, Knoke argues that, rather than supporting the conclusion that the union purposefully and in good faith decided not to pursue the grievances, the record establishes that the union's failure to pursue the grievances was due to negligence in missing the deadline, or an arbitrary and bad-faith decision not to pursue "air quality" grievances, especially Knoke's. Knoke also argues that the MERC engaged in speculation and conjecture in reaching its conclusions. We disagree.

The MERC affirmed the referee's finding that the union had not breached its duty to fairly represent Knoke. The MERC's findings of fact are conclusive if supported by competent, material, and substantial evidence on the record considered as a whole, and will be accorded due deference by this Court. MCL 423.216(e); MSA 17.455(16)(e); *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transportation Authority,* 437 Mich 441, 450; 473 NW2d 249 (1991). We conclude that the MERC's findings are supported by competent, material, and substantial evidence on the record considered as a whole.

Knoke did not establish that the union breached its duty to fairly represent him. A union has considerable discretion to decide which grievances shall be pressed to arbitration and which shall be settled, and must be permitted to assess each grievance with a view to individual merit. The union may consider the good of the general membership and has discretion to weigh the burden on the contractual grievance machinery, the amount at stake, the likelihood of success, the cost, and the desirability of winning the award against considerations that affect the membership as a whole. *Lowe v Hotel & Restaurant Employees Union,* 389

Mich 123, 146; 205 NW2d 167 (1973). However, the union must act without fraud, bad faith, hostility, discrimination, arbitrariness, caprice, gross nonfeasance, collusion, bias, prejudice, wilful, wanton, wrongful and malicious refusal, personal spite, ill will, bad feelings, improper motives, misconduct, overreaching, unreasonable action, or gross abuse of its discretion in processing or refusing or failing to process a member's grievance. *Id.* at 146-147; *Goolsby v Detroit,* 419 Mich 651, 663-664; 358 NW2d 856 (1984).

Knoke argues that the record clearly shows that the union intended to pursue his grievances but failed to comply with the time limits, or decided to abandon the grievances in bad faith. However, the record indicates that the union followed the steps necessary to preserve the grievances and to extend the time limits for arbitration. It also aggressively pursued resolution of the underlying dispute by filing a class grievance on behalf of Knoke and others, and continued to discuss the building and possible transfers with the school district. According to the testimony of union grievance officer Owen, after arbitration with regard to the merits resulted in a ruling against the union, the union decided not to take Knoke's grievances to arbitration. The referee found Owen's testimony credible, and the MERC agreed. In response to Knoke's argument that correspondence by Fischer and the superintendent shows that the union intended to pursue the grievances but missed the deadlines, the MERC discussed a contrary view of the evidence that would support a conclusion that Fischer, Owen's successor, may have mistakenly refiled for arbitration after misinterpreting instructions that Owen had left for him. On appeal, Knoke mischaracterizes this discussion as speculation and conjecture. After reviewing the evidence, the MERC saw

no reason to overturn the referee's favorable appraisal of Owen's credibility. Nor do we.

The MERC also agreed with the referee's conclusion that the record supports a finding that the union adequately weighed the *Lowe* factors in deciding whether to pursue the grievances. We agree. Owen's testimony, taken in conjunction with the underlying weaknesses in Knoke's grievances, supports the MERC's conclusions in this regard.

Lastly, to prevail on a claim of unfair representation, a complainant must establish not only a breach of a union's duty of fair representation but also a breach of the collective bargaining agreement. *Martin v East Lansing School Dist,* 193 Mich App 166, 181; 483 NW2d 656 (1992).

Knoke was unable to demonstrate a breach of the collective bargaining agreement. As observed by the referee and the MERC, the 1983-86 agreement permitted the school board to deny a request for sick-leave-bank days on the basis of reports from school-board-approved doctors. The record includes two medical evaluations indicating that Knoke's symptoms were not environmentally induced, which provided one of the school board's bases for denying Knoke's request. With respect to Knoke's claim regarding the school board's denial of his transfer request, the referee observed that Knoke admittedly was not qualified for any position that was open or available. The collective bargaining agreement provided that in filling a vacancy, the school board would consider certification, length of service, and qualifications. The record includes both the superintendent's testimony that Knoke was refused a transfer because he was not sufficiently qualified and a copy of the collective bargaining agreement itself. Knoke of-

fered no evidence that there was a specific job to which he should have been transferred.

Knoke next argues that the MERC erred in denying his motion to admit his posthearing response brief and exhibits. Again, we disagree. First, we note that the MERC did admit his brief, although it denied admission of the exhibits. Under the Employment Relations Commission's Rule 68(2), the MERC may reopen the record in a case and receive further evidence after the close of a hearing. 1979 AC, R 423.468(2). In denying Knoke's motion to admit the exhibits, the MERC relied on one of its earlier opinions requiring the evidence to be newly discovered and to have been unavailable through reasonably diligent discovery at the time of the earlier hearing.[1] In this appeal, Knoke does not contest this requirement, but merely claims that justice and equity demand admission of the evidence because it purports to tell "the full story" and offers an explanation for the school board's conduct.

The exhibits consist of (1) an August 1982 article from the Jackson Citizen Patriot concerning ventilation problems at the East Jackson Middle School, (2) an April 1989 school district document assuring the Office for Civil Rights (OCR) that the school district would make certain accommodations for Knoke's illness, and (3) the counterpart OCR letter, also from April 1989, finding that Knoke was a handicapped person as defined by federal regulations and that the school district had violated those regulations by failing to provide reasonable accommodations for Knoke's handicap.

We note first that Knoke cites no authority for the contention that the administrative rule permitting the MERC to reopen the record actually

[1] *City of Lansing v Fraternal Order of Police, Lodge 141,* 1974 MERC Lab Op 625.

mandates such reopening under certain circumstances. We also note that the additional exhibits were indeed available and discoverable during the pendency of the original administrative hearing. Finally, and most importantly, the exhibits add nothing to the substance of Knoke's petition against respondents. We thus conclude that the MERC did not err in denying Knoke's motion to add his posthearing exhibits to the record.

Affirmed.

UNITED STATES FIDELITY & GUARANTY COMPANY v CITIZENS INSURANCE COMPANY OF AMERICA

Docket No. 149280. Submitted October 7, 1992, at Marquette. Decided March 25, 1993; approved for publication September 8, 1993, at 9:05 A.M.

United States Fidelity & Guaranty Company, the automobile insurer of Dickinson-Iron Community Action Agency, brought an action in the Dickinson Circuit Court against Citizens Insurance Company of America, the general liability insurer of the agency, seeking a declaration concerning which insurer has primary responsibility for defending and indemnifying the agency in a wrongful death action brought on behalf of a person who used the senior citizen bus services provided by the agency and sustained fatal injury after alighting from an agency bus and being struck by another motor vehicle. The court, John D. Payant, J., granted summary disposition for Citizens after determining that the accident fell within an exclusion under the Citizens policy for bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading, or unloading of an automobile owned or operated by or rented or loaned to the agency. USF&G appealed, contending that the complaint in the wrongful death action alleged a breach of duty as transporter and a breach of duty as caretaker and that liability for the latter breach was covered by the Citizens policy.

The Court of Appeals *held:*

As decided in *Vanguard Ins Co v Clarke*, 438 Mich 463 (1991), there is no compelling rationale, and no sound jurisprudential reason, to adopt the theory of dual or concurrent causation in the context of insurance liability to permit departure from the literal interpretation of unambiguous insurance contracts. In this case, the trial court did not err in giving effect to the clear and unambiguous exclusion in the Citizens policy for bodily injury or property damage related to automobile ownership, maintenance, or use.

Affirmed.

*Lori, Jaspen & Stopczynski, P.C.* (by *Daniel M. Jaspen*), for the plaintiff.

*Davis, Olsen, Filoramo, Jarvi & McNamara, P.C.* (by *Stephen T. Davis*), for the defendant.

Before: CONNOR, P.J., and BRENNAN and MARILYN KELLY, JJ.

PER CURIAM. This declaratory judgment action was commenced to determine which party was primarily liable for the defense of the Dickinson-Iron Community Action Agency and the satisfaction of a potential judgment. Both parties insured the Agency. The trial court granted summary disposition to defendant. On appeal, plaintiff argues that the court erred in ruling that defendant had no duty to defend or indemnify. We affirm.

The Agency provides bus services for senior citizens. In December, 1985, Marguerite Richard was a passenger on one of its buses. After her ride, Richard got out of the bus, walked behind it and into the street where she was struck by a vehicle and died. On the date of the accident, plaintiff covered the Agency with a general business automobile insurance policy and defendant covered it with a general liability insurance policy.

Richard's estate sued the Agency. Although plaintiff retained counsel to defend it, plaintiff reserved all policy rights and obligations. Richard's complaint alleged in part that the Agency failed to operate the transportation service in a safe manner. It alleged failure to properly train drivers, to provide an escort from the van to Richard's destination and to maintain safety features on the van.

Plaintiff filed a complaint for declaratory relief seeking to determine the rights and obligations of the parties under the Agency's insurance contracts. The trial court granted summary disposition for defendant after concluding that the auto-

mobile exclusion in defendant's insurance policy applied.

I

Plaintiff argues that the trial court erred in granting summary disposition to defendant. It asserts that it is defendant that had the duty to defend the Agency and to provide potential indemnification. Defendant's general liability insurance policy provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence, and arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental to the business of the named insured conducted at or from the insured premises . . . .
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> * * *
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> This insurance does not apply:
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> * * *
>
> (b) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of
>
> (1) any automobile or aircraft owned or operated by or rented or loaned to any insured.

The duty of an insurance carrier to provide a defense in an underlying tort action depends upon the allegations in the complaint. It extends to allegations which "even arguably come within the policy coverage." *Allstate Ins Co v Freeman,* 432 Mich 656, 662-663; 443 NW2d 734 (1989). However, the duty to defend and the duty to indemnify are not determined solely on the basis of the terminology used in a plaintiff's pleadings. *Freeman,* 662.

Instead, a court must focus on the cause of the injury to ascertain whether coverage exists. *Id.*, 662-663. It is the substance rather than the form of the allegations in the complaint which must be scrutinized. *Id.*

Plaintiff alleges that Richard's complaint contained two separate theories of liability: (1) damages arising from the Agency's breach of its duty as a transporter, and (2) damages arising from its breach of duty as a caretaker. Plaintiff argues that the damages arising from breach of duty as a caretaker could arguably fall within defendant's general liability insurance policy. Plaintiff acknowledges that it would be liable for damages arising from the Agency's breach of duty as a transporter.

Plaintiff characterizes the allegations in Richard's complaint as theories of liability or recovery, as opposed to theories of causation. The characterization is an apparent attempt to escape the rule enunciated in *Vanguard Ins Co v Clarke*, 438 Mich 463; 475 NW2d 48 (1991). The facts in *Vanguard* are that William Clarke drove home one night, closed the garage door and left the car running. Clarke, his wife and son died from carbon monoxide poisoning. William was still inside the car. His wife and son were inside the home. The Clarkes' homeowners' insurance policy excluded coverage for bodily injury arising out of the ownership, maintenance, operation or use of a motor vehicle. Clarkes' daughter filed a wrongful death action and sought recovery under the insurance policy. She argued that the deaths resulted from not one but two proximate causes, the closing of the garage door and the operation of the automobile.

The issue in *Vanguard* was whether Michigan should adopt the theory of dual or concurrent causation in the context of insurance liability.

Concurrent causation arises when one cause of the injury was insured and one or more additional causes were not. *Vanguard,* 465. In *Vanguard,* it was clear that the automobile insurance carrier was liable for damages arising out of the use of the automobile. In fact, the estate received insurance proceeds under William Clarke's automobile insurance policy. *Id.,* 473, n 8. It was less clear whether the homeowners' insurance carrier could be held liable, as well.

The Supreme Court refused to apply the theory of concurrent causation to hold the homeowners' insurance carrier liable. It found no compelling legal basis for or policy reason why the doctrine of dual causation should nullify an unambiguous insurance policy exclusion. Since the homeowners' insurance policy was unambiguous, the Court found that the carrier had no duty to defend or indemnify.

In this case, some of the allegations in Richard's complaint could arguably fall within defendant's general liability insurance policy. However, having examined the substance of Richard's allegations, we agree that, if the Agency is liable, it is for injuries arising from the ownership or use of its bus. See *Freeman,* 662-663. Had the Agency not owned the bus or operated it in the manner in which it did, there would have been no accident allegedly attributable to it.

Defendant's auto-related insurance policy exclusion is clear and unambiguous. See *Vanguard,* 471-472. There is no compelling legal basis or policy reason to nullify the policy exclusion. *Id.,* 474-475. Therefore, we refuse to distinguish between the Agency's alleged duties as transporter and caretaker under the facts presented. See *Vanguard,* 471-472. Moreover, the insured could have had no reasonable expectation that defendant would cover

Richard's injuries and subsequent death based on the policy's unambiguous exclusion. See *Vanguard*, 472. The trial court did not err in granting summary disposition to defendant.

Affirmed.

CITY OF MELVINDALE v TRENTON WAREHOUSE COMPANY

Docket No. 138475. Submitted February 4, 1993, at Detroit. Decided May 11, 1993; approved for publication September 9, 1993, at 9:15 A.M. Leave to appeal sought.

The City of Melvindale brought an action in the Wayne Circuit Court against the Trenton Warehouse Company, seeking an order permitting its agents to enter upon and inspect the defendant's property to determine the suitability of the property for public use. The defendant argued that a public use and purpose must be established before the court could issue an order permitting entry. The court, James A. Hathaway, J., granted summary disposition for the plaintiff. The defendant appealed.

The Court of Appeals *held:*

The inspection provision of the Uniform Condemnation Procedures Act, MCL 213.54; MSA 8.265(4), expressly provides that a government agency may enter property before filing an action for condemnation for the purpose of determining whether the property is suitable for public purposes. The government agency is not required to state a public purpose when seeking entry onto the property for such an inspection.

Affirmed.

*Pentiuk, Miller & Waterman, P.C.* (by *Randall A. Pentiuk*), for the plaintiff.

*Fitzgerald, Peters, Dakmak & Miller, P.C.* (by *John S. Regan*), for the defendant.

Before: NEFF, P.J., and GRIBBS and BRENNAN, JJ.

PER CURIAM. Defendant appeals as of right from a circuit court order granting plaintiff's motion for summary disposition and granting plaintiff a limited license to enter defendant's property for the purpose of inspecting and testing the property

pursuant to MCL 213.54(3); MSA 8.265(4)(3). We affirm.

In September 1990, defendant was advised by letter that agents of the Economic Development Corporation of the City of Melvindale intended to enter and inspect defendant's property to determine its suitability for a public purpose use. The letter indicated that this was "not a taking at this time."

Defendant replied by letter, denying the request, and plaintiff filed the present action seeking a court order permitting the entry pursuant to MCL 213.54(3); MSA 8.265(4)(3). The trial court subsequently granted plaintiff's motion for summary disposition, MCR 2.116(C)(10), and denied defendant's motion for rehearing.

On appeal, defendant argues that a public use and purpose must be established before the court can enter an order allowing entry. We do not agree.

MCL 213.54; MSA 8.265(4), states in pertinent part:

> (2) An agency or an agent or employee of an agency may enter upon property before filing an action for the purpose of making surveys, measurements, examinations, tests, soundings, and borings; or taking photographs or samplings; or appraising the property; or conducting an environmental inspection; or determining whether the property is suitable to take for public purposes.
>
> . . .
>
> (3) If reasonable efforts to accomplish entry under subsection (2) have been obstructed or denied, the agency may commence a civil action in the circuit court in the county in which the property or any part of the property is located for an order permitting entry. The complaint shall state the facts making the entry necessary, the date on which entry is sought, and the duration and the

> method proposed for protecting the defendant against damage. The court may grant a limited license for entry upon such terms as justice and equity require, including the following:
>
> (a) A description of the purpose of the entry.
>
> (b) The scope of activities that are permitted.
>
> (c) The terms and conditions of the entry with respect to the time, place, and manner of the entry.

The statute expressly provides that a government agency may enter property before filing an action for condemnation for the purpose of making surveys, measurements, examination, tests, soundings and borings, for taking photographs or samplings, or to determine whether the property is suitable to take for public purposes. Nothing in the statute requires the agency to state a public purpose when seeking entry.

In this case, defendant refused entry and, as is required by the statute, plaintiff filed a complaint that provided the facts making entry necessary, the date on which entry was sought, and the method proposed for protecting the defendant against damage. In its complaint, plaintiff indicated that entry was desired to establish whether defendant's property was suitable for a medical waste disposal facility and to aid in obtaining an appraisal before commencement of condemnation proceedings. No more is required. When statutory language is clear and unambiguous, judicial interpretation to vary the plain meaning is precluded. *People v Emig,* 188 Mich App 687, 688; 470 NW2d 504 (1991). The requirement of a public purpose that applies to other sections of the statute does not apply here, where an entry for inspection purposes rather than a taking, is intended and authorized. Contrary to defendant's claim, this is not a taking because it does not involve a transfer

of the ownership of the property. MCL 213.51(a); MSA 8.265(1)(a). Plaintiff will be required to pay for any actual damages it causes. MCL 213.54(2); MSA 8.265(4)(2). The trial court did not err in granting summary disposition.

Affirmed.

DOUGLAS v GENERAL MOTORS CORPORATION

Docket No. 128383. Submitted April 6, 1993, at Detroit. Decided September 20, 1993, at 9:00 A.M. Leave to appeal sought.

Victoria M. Douglas was awarded workers' compensation benefits from General Motors Corporation after a magistrate found her to be partially disabled as a result of a work-related injury to her hand and totally disabled because of a psychiatric condition arising out of the injury to her hand. The Workers' Compensation Appellate Commission affirmed, finding the magistrate's findings of fact to be supported by competent, material, and substantial evidence on the whole record. General Motors appealed by leave granted.

The Court of Appeals *held:*

1. There was substantial evidence to support the magistrate's determination that Douglas sustained a disabling physical injury caused by actual events of employment, that the physical injury contributed to her mental disability in a significant manner, and that she continues to be totally disabled because of her mental disability.

2. When a mental disability arises out of a disabling physical injury caused by actual events of employment, the employee is entitled to workers' compensation benefits for the duration of the resulting mental disability, even if the physical disability ceases to exist.

3. The WCAC's use of the substantial evidence test was proper because it reviewed the claim after October 1, 1986.

4. There is competent evidence supporting the WCAC's decision that the magistrate's determination was supported by substantial evidence.

Affirmed.

1. WORKERS' COMPENSATION — MENTAL DISABILITIES — PHYSICAL DISABILITIES.

Where a mental disability arises out of a disabling physical

REFERENCES

Am Jur 2d, Workers' Compensation §§ 339, 686, 689.

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

injury caused by actual events of employment, the employee is entitled to workers' disability compensation benefits for the duration of the mental disability, even if the physical disability ceases to exist (MCL 418.301[2]; MSA 17.237[301][2]).

2. WORKERS' COMPENSATION — APPELLATE COMMISSION — STANDARD OF REVIEW.

The appropriate standard of review by the Workers' Compensation Appellate Commission after October 1, 1986, of a claim for workers' compensation, is competent, material, and substantial evidence on the whole record (MCL 418.861a[3]; MSA 17.237[861a][3]).

*Zamler, Mellen & Shiffman, P.C.* (by *Joel W. Jonas*), for the plaintiff.

*Evans, Nelson, Pletkovic & Hays, P.C.* (by *John J. Hays*), and *Jack F. Wheatley,* for the defendant.

Before: MARILYN KELLY, P.J., and SHEPHERD and CONNOR, JJ.

CONNOR, J. A workers' compensation magistrate found plaintiff partially disabled as the result of a work-related injury to her right hand and totally disabled because of a psychiatric condition. The Workers' Compensation Appellate Commission found the magistrate's findings of fact supported by competent, material, and substantial evidence on the whole record, MCL 418.861a(3); MSA 17.237(861a)(3), and affirmed the magistrate's decision. Defendant appeals to this Court by leave granted.

We affirm the WCAC's findings that there was substantial evidence to support the magistrate's determination that plaintiff sustained a disabling physical injury caused by actual events of employment, that the physical injury contributed to her mental disability in a significant manner, and that she continues to be totally disabled because of her mental disability. We conclude that when a men-

tal disability arises out of a disabling physical injury caused by actual events of employment, the employee is entitled to benefits for the duration of the resulting mental disability, even if the physical disability ceases to exist.

Defendant first claims the WCAC used the wrong standard of review. Because the WCAC reviewed plaintiff's claim after October 1, 1986, it properly used the "substantial evidence" test. See *Farrington v Total Petroleum, Inc,* 442 Mich 201, 208; 501 NW2d 76 (1993).

Defendant next argues that plaintiff did not establish that actual events of employment contributed to her psychological disability in a significant manner. The magistrate found that actual events had done so. The WCAC found the magistrate's decision supported by substantial evidence. This Court's task is to determine whether there was competent evidence to support the facts found. See *Holden v Ford Motor Co,* 439 Mich 257, 260-261; 484 NW2d 227 (1992). We find that there was. Plaintiff presented expert testimony that her psychological disability was directly related to the injury to her hand. She also presented evidence that her hand was injured on the job.

Defendant contends that plaintiff failed to establish that the injury to her hand continues to be disabling. The magistrate found that plaintiff was partially disabled because of the injury to her hand. The WCAC affirmed that finding. After examining the record, the WCAC concluded that there was substantial evidence that plaintiff had suffered an injury to her hand and continued to be unable to use the hand. Because there is competent evidence to support the WCAC's decision, we affirm.

Like the WCAC, we see no reason why it should matter whether plaintiff is currently unable to use her hand because the organic problem has not

been corrected or because her work-related mental disability causes her to believe that she cannot use her hand. Mental disabilities are compensable if they arise out of actual events of employment. MCL 418.301(2); MSA 17.237(301)(2). The nature of plaintiff's mental disability causes her to harbor unfounded perceptions of reality. However, even if plaintiff is mistaken in believing that the disabling injury to her hand persists, it was conclusively found by the magistrate and the WCAC that the mental condition causing this misperception arose out of the work-related physical injury to her hand, an actual event of employment.

Finally, defendant claims that the plaintiff has reverted to her preinjury level of functioning. The magistrate did not find this to be the case, but, instead, found that plaintiff continues to be totally disabled. The WCAC affirmed the magistrate's determination, finding there to be substantial evidence to support the finding. We affirm the WCAC's decision, finding competent evidence to support it. There was ample testimony regarding plaintiff's ongoing disability, despite the opinion offered by defendant's doctor that plaintiff's condition was less severe than previously noted by other doctors.

Affirmed.

RIDGE v HOLLAND MOTOR EXPRESS

Docket No. 141551. Submitted August 4, 1993, at Grand Rapids. Decided September 20, 1993, at 9:05 A.M.

George B. Ridge sought workers' disability compensation benefits after he left his job with Holland Motor Express and began receiving retirement benefits from his labor union's pension fund, to which both he and Holland had made contributions. A magistrate found that the retiree presumption in MCL 418.373; MSA 17.237(373) applied and that Ridge successfully had rebutted the presumption and established his entitlement to workers' compensation benefits. The Workers' Compensation Appeal Board affirmed, finding that the statute was not applicable because Ridge had made contributions to the pension fund and, therefore, the pension benefits were paid on behalf of Ridge as well as Holland. Holland appealed by leave granted.

The Court of Appeals *held:*

1. MCL 418.373; MSA 17.237(373) does not require that an employer be the sole contributor to a program providing pension benefits. The presumption in the statute is applicable whenever the employer from whom weekly benefits are sought has contributed to a program providing the claimant with nondisability pension or retirement benefits, and even if others, including the claimant, have also contributed.

2. The WCAB erred in ruling that Holland was not entitled to the benefit of the statutory presumption merely because Ridge had also contributed to the pension fund.

3. The decision of the WCAB must be reversed and the matter remanded to the Workers' Compensation Appellate Commission for review of the magistrate's decision that Ridge overcame the statutory presumption.

Reversed and remanded.

FITZGERALD, P.J., dissenting, stated that the language of MCL 418.373(1); MSA 17.237(373)(1) is not ambiguous and, therefore, not subject to judicial interpretation.

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REFERENCES

Am Jur 2d, Pensions and Retirement Funds § 1694.

See ALR Index under Pensions and Retirement; Presumptions and Burden of Proof; Workers' Compensation.

WORKERS' COMPENSATION — RETIREE PRESUMPTION — NONDISABILITY PENSIONS — CONTRIBUTIONS TO PENSION PROGRAM.

An employee who terminates active employment and receives nondisability pension or retirement benefits under either a private or governmental pension or retirement program that was paid by or on behalf of an employer from whom weekly workers' compensation benefits are sought is presumed not to have a loss of earnings or earning capacity as the result of a compensable injury; this presumption applies whenever the employer from whom weekly benefits are sought has contributed to a program providing the claimant with nondisability pension or retirement benefits, and even if others, including the claimant, have also contributed to the program (MCL 418.373[1]; MSA 17.237[373][1]).

*Chambers, Steiner, Mazur, Ornstein & Amlin, P.C.* (by *Lisa A. Klaeren* and *Douglas A. Merrow*), for the plaintiff.

*Smith, Haughey, Rice & Roegge* (by *Lance R. Mather*), for the defendant.

Before: FITZGERALD, P.J., and CONNOR and TAYLOR, JJ.

CONNOR, J. Defendant appeals by leave granted a decision of the Workers' Compensation Appeal Board. We reverse.

Plaintiff was a truck driver for defendant. When he was fifty-seven years old, plaintiff left his job and began receiving retirement benefits from his labor union's pension fund. A magistrate found that the retiree presumption in MCL 418.373; MSA 17.237(373) applied. The magistrate also found that plaintiff had successfully rebutted the presumption and established that he was entitled to workers' compensation benefits. Defendant appealed to the WCAB. The WCAB found that MCL 418.373; MSA 17.237(373) was not applicable in this case and affirmed the magistrate's award. The

WCAB reasoned that, because plaintiff had made some contributions to his union's pension fund, the pension benefits were paid on behalf of plaintiff as well as defendant, and, consequently, the retiree presumption did not apply.

The presumption in MCL 418.373(1); MSA 17.237(373)(1) applies to certain employees receiving nondisability retirement benefits. It applies only when those benefits are "paid by or on behalf of an employer from whom weekly [workers' compensation] benefits . . . are sought." *Id.* Significantly, in the statute there is one example of retirement benefits that can trigger the presumption: social security old-age benefits. See *id.*

Throughout plaintiff's employment with defendant, both plaintiff and defendant paid social security taxes on plaintiff's behalf. Yet plaintiff's receiving social security old-age benefits would have triggered the presumption. This demonstrates that, contrary to the WCAB's decision, the statute does not require that the employer be the sole contributor to the program providing pension benefits. We hold that the presumption in MCL 418.373; MSA 17.237(373) is applicable whenever the employer from whom weekly benefits are sought has contributed to a program providing the claimant with nondisability pension or retirement benefits, and even if others, *including the claimant,* have also contributed.

In this case, plaintiff is receiving benefits from a union pension fund to which defendant had contributed. Consequently, the WCAB erred in ruling that defendant was not entitled to the benefit of the presumption in MCL 418.373; MSA 17.237(373) merely because plaintiff had also contributed to the pension fund. We reverse the decision of the WCAB and remand to its successor, the Workers' Compensation Appellate Commission, for review of

the magistrate's decision that plaintiff overcame the presumption.

Reversed and remanded. We do not retain jurisdiction.

TAYLOR, J., concurred.

FITZGERALD, P.J. *(dissenting).* I respectfully dissent. MCL 418.373(1); MSA 17.237(373)(1) creates a rebuttable presumption that workers receiving nondisability pension or retirement benefits are not entitled to collect workers' compensation benefits. *Peck v General Motors Corp,* 164 Mich App 580; 417 NW2d 547 (1987). Specifically, the statute provides in relevant part:

> An employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the social security act, 42 USC 301 to 1397f, *that was paid by or on behalf of an employer* from whom weekly benefits under this act are sought shall be presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under either this chapter or chapter 4. [Emphasis added.]

The Legislature is presumed to have intended the meaning plainly expressed in a statute. *Gordon v Allstate Ins Co,* 197 Mich App 609, 615; 496 NW2d 357 (1992). If the meaning of the language is clear and unambiguous, judicial construction is unnecessary and impermissible. *Wilson v League General Ins Co,* 195 Mich App 705, 709; 491 NW2d 642 (1992).

The statutory language in § 373(1) is clear and unambiguous, thus precluding judicial construction. Hence, I disagree with my colleagues' conclusion that the statute is ambiguous and subject to judicial interpretation.

## EDDIE v EDDIE

Docket No. 134980. Submitted July 7, 1993, at Detroit. Decided September 20, 1993, at 9:10 A.M.

Janet L. Eddie obtained a divorce from Scott L. Eddie in the Ingham Circuit Court, Carolyn Stell, J. The parties were awarded joint legal custody of their two minor children, with physical custody being awarded to the defendant. The plaintiff was awarded visitation of more than 128 days a year and was ordered to pay child support. The court apparently used the friend of the court's child support formula that applies when a party is given sole custody. The plaintiff appealed, challenging the amount of child support ordered.

The Court of Appeals *held:*

1. The trial court was obligated, pursuant to MCL 552.16(2); MSA 25.96(2), to base its support award on the child support formulas adopted by the friend of the court bureau or, if the court determined that deviation was warranted, to specify in writing or on the record the manner of deviation and the reasons for doing so. The statute became effective on December 26, 1989, and therefore was applicable in this case, decided August 17, 1990. The Court of Appeals incorrectly indicated in *Booth v Booth,* 194 Mich App 284 (1992), that the statute was not effective until October 10, 1990.

2. Because the custody order provides for visitation by the plaintiff in excess of the 128 days required for application of the friend of the court's shared economic responsibility formula for child support, and because the statute required the court to use that formula, the court erred in using the sole custody formula without having specified in writing or on the record the reasons for deviation. The matter must be remanded to the trial court for an adjustment of the support order in accordance

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REFERENCES

Am Jur 2d, Divorce and Separation §§ 576-583; Parent and Child § 45.

Excessiveness or adequacy of money awarded as child support. 27 ALR4th 864.

Excessiveness or adequacy of amount of money awarded for alimony and child support combined. 27 ALR4th 1038.

with the shared economic responsibility formula or for a statement, in accordance with the statute, of why it chooses not to do so.

3. The trial court's retroactive modification of an ex parte interim support order was proper.

Affirmed in part and remanded.

DIVORCE — CHILD SUPPORT — FRIEND OF THE COURT SUPPORT FORMULA.

Since December 26, 1989, trial courts in divorce actions have been obligated to base child support awards on the applicable child support formula adopted by the friend of the court bureau or, if they determine that deviation is warranted, to specify in writing or on the record the manner of deviation and the reasons for doing so (1989 PA 274, MCL 552.16[2]; MSA 25.96[2]).

*William H. Noud, Jr.*, for the plaintiff.

*Norman M. Gaffney, Jr., P.C.* (by *Norman M. Gaffney, Jr.*), for the defendant.

Before: DOCTOROFF, C.J., and MICHAEL J. KELLY and GRIBBS, JJ.

DOCTOROFF, C.J. Plaintiff appeals from a judgment of divorce entered in the Ingham Circuit Court on October 30, 1990, challenging the amount of child support ordered in the judgment. We remand to the trial court for an explanation of the court's reasons for deviating from the applicable child support formula or an admustment of the order in accordance with this opinion.

The parties were married on August 6, 1983, and two children were born of the marriage, Brandon (born September 11, 1984) and Amanda (born February 21, 1986). The parties were awarded joint legal custody of the two children, with physical custody being awarded to defendant. Plaintiff does not challenge the award of custody. She was given substantial visitation rights, including the

following: alternate weekends from Friday at 6:00 P.M. to Sunday at 6:00 P.M., one overnight visitation a week, alternate holidays, one week of spring vacation on alternate years, and six weeks of full custody in the summer, during which defendant would have alternate-weekend visitation similar to that given plaintiff throughout the year.

As part of the judgment of divorce, the court ordered that plaintiff pay defendant $27.50 a child or $55 a week in total child support. This amount was based upon the trial court's calculation of the support guidelines using numbers stipulated by the parties. From all appearances, the court used the child support formula that applies when a party is given sole custody. On appeal, plaintiff claims that the court erred in applying this formula and, instead, should have used the formula that applies where joint legal custody is awarded and the noncustodial parent is given substantial visitation rights. Plaintiff further claims that because the court deviated from the applicable support formula, it was obligated to state its reasons for doing so on the record. In response, defendant asserts that the trial court did explain its reasons for utilization of the sole custody formula, albeit in the judge's chambers. Plaintiff disputes defendant's recollection of the in-chambers conferences.

Pursuant to MCL 552.16(2); MSA 25.96(2), a court must calculate support by application of the child support manual developed by the state friend of the court bureau. *Booth v Booth,* 194 Mich App 284, 292; 486 NW2d 116 (1992). *Booth* indicates that the statute was amended effective October 10, 1990, in which case the amendment would not apply to this situation because the court's decision was made on August 17, 1990, almost two months before the purported effective date of the amend-

ment. *Id.* However, *Booth* incorrectly identified the date that the amendment became effective.

In 1989, Public Act No. 274 was passed amending §§ 15 and 16 of Chapter 84 of the Revised Statutes of 1846 containing the provisions regarding care, custody, and support of minor children in a divorce proceeding. See 1989 PA 274, being MCL 552.15; MSA 25.95, MCL 552.16; MSA 25.96. Section 16(2) of the statute contained the following provisions:

> The court shall order support in an amount determined by application of the child support formula developed by the state friend of the court bureau, except that the court may enter an order that deviates from the formula under either of the following circumstances:
>
> (a) If the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate and sets forth in writing or on the record all of the following:
>
> (i) The support amount determined by application of the child support formula.
>
> (ii) How the support order deviates from the child support formula.
>
> (iii) The value of property or other support awarded in lieu of the payment of child support, if applicable.
>
> (iv) The court's reasons for its determination.
>
> (b) If the parties agree to a different amount, provided that the party receiving child support is not a recipient of public assistance.

This amendatory act was filed with the Secretary of State on December 26, 1989, and was ordered to take immediate effect, conditioned on a number of other pending bills. See § 2 of 1989 PA 274. All of the bills upon which the act was conditioned took effect on December 26, 1989, thereby making the above-referenced amendment effective on Decem-

ber 26, 1989, nearly one year before the date that *Booth* suggested the amendment had taken effect. See compiler's note to 1989 PA 274.

Insofar as MCL 552.16(2); MSA 25.96(2) is concerned, the amendment referred to in *Booth* as taking effect on October 10, 1990, merely renumbered the section and added § 16a. See 1990 PA 243 (filed with the Secretary of State on October 10, 1990). Thus, contrary to what *Booth* suggests, the trial courts' obligation to order support in an amount determined with reference to the child support guidelines became effective on December 26, 1989, and not October 10, 1990. Accordingly, because the court in this case made its decision on August 17, 1990 (nearly eight months after the effective date of 1989 PA 274), the court was obligated to base its support award on the child support formulas adopted by the friend of the court.

In addition to requiring the court to follow the applicable friend of the court formula, MCL 552.16(2); MSA 25.96(2) provides that the court may deviate from the formula if it determines from the facts that its application would be unjust or inappropriate. The statute provides that, in the event a court determines that deviation is warranted, it must specify in writing or on the record the manner of deviation and the reasons for doing so. MCL 552.16(2)(a) and (b); MSA 25.96(2)(a) and (b). See also *Proudfit v O'Neal,* 193 Mich App 608, 611; 484 NW2d 746 (1992).

The Michigan Child Support Guideline Manual contains various tables and support formulas to be applied, depending upon the circumstances of the parties and the provisions of the custody order. See Manual (1989 rev) and Supp. The manual contains a formula (commonly called the "shared economic responsibility" formula) to be applied

where the parties have joint custody and the noncustodial parent will have visitation of the child for "substantial amounts of time." Manual (1990 rev, effective January 1990) at 19. "Substantial amounts of time" is specifically defined in the manual as "a minimum of 128 overnights annually." Manual (1990 rev) at 19. In this case, there is no dispute that the order provides for plaintiff to have visitation of the children in excess of 128 days. Although defendant claims that plaintiff will not exercise her rights of visitation for all of those days, there is no authority to suggest that she must do so before the shared economic responsibility formula is applicable.[1]

Because the custody order in this case provides for visitation by plaintiff in excess of the 128 days required for application of the shared economic responsibility formula, and because the court was obligated by MCL 552.16(2); MSA 25.96(2) to use that formula, the court erred in using the sole custody formula in its stead, without having articulated in writing or on the record the reasons for deviation. Accordingly, on remand the trial court shall adjust the support order on the basis of the shared economic responsibility formula, or state why it chooses not to do so in accordance with MCL 552.16(2)(a)-(d); MSA 25.96(2)(a)-(d).

Plaintiff's argument regarding the propriety of the trial court's retroactive modification of the ex parte interim support order has been expressly rejected by this Court in *Thompson v Merritt,* 192 Mich App 412, 421; 481 NW2d 735 (1991). See also *Proudfit, supra* at 611.

[1] Clearly, at the time the original custody order is entered, there is no way to tell whether the noncustodial parent will exercise all visitation rights. Rather, the support must be based upon the number of days that the noncustodial parent is entitled to visitation under the order, not the actual visitation that will be exercised in the future.

Affirmed in part and remanded to the trial court for application of the shared economic responsibility formula or articulation in accordance with MCL 552.16(2)(a)-(d); MSA 25.96(2)(a)-(d).

PEOPLE v POWELL

Docket No. 151214. Submitted February 17, 1993, at Lansing. Decided September 20, 1993, at 9:15 A.M. Leave to appeal sought.

Adie Powell, Jr., charged in the Genesee Circuit Court, Judith A. Fullerton, J., with first-degree criminal sexual conduct, moved in limine for the suppression of evidence obtained in a search of his home pursuant to a warrant and for the admission of evidence of the complainant's sexual history with persons other than himself. He contended that the affidavit submitted to a magistrate in support of the application for the search warrant violated a statutory requirement that an affidavit not naming the person from whom the affiant obtained information must contain affirmative allegations from which the magistrate may conclude that the unnamed source spoke with personal knowledge of the information and either that the source is credible or that the information is reliable. With regard to evidence of the complainant's sexual history, the defendant alleged that testimony indicating that the complainant was a topless dancer and was seen in the company of reputed prostitutes would establish that the complainant was a prostitute and had consented to sexual intercourse with the defendant. The trial court granted both motions. The prosecution appealed by leave granted.

The Court of Appeals *held:*

1. The trial court abused its discretion in ruling as admissible the proffered evidence that the complainant was a topless dancer and that she was seen with prostitutes. That evidence is barred by the rape-shield statute, MCL 750.520j; MSA 28.788(10), and it is more prejudicial than probative with respect to the claim that the sexual encounter between the complainant and the defendant was consensual.

2. The trial court erred in suppressing the evidence obtained with the search warrant. The affidavit submitted in support of the warrant application satisfies MCL 780.653; MSA 28.1259(3), as amended by 1988 PA 80. Pursuant to that statute, an affidavit may be based upon information supplied by a named or unnamed source. Where, as here, the source is not named, the allegations in the affidavit must show that the source is credible or that the information is reliable. In this case, a

common-sense reading of the affidavit establishes that the complainant was the source. Thus, the complainant may be considered a named source who, being the victim of the alleged crime, had personal knowledge of the facts alleged. Alternatively, if the complainant is considered an unnamed source, the reliability of the information was established by the self-authenticating details in the affidavit.

Reversed.

CORRIGAN, P.J., also stated that the trial court should have considered the prosecution's offer of proof that the affiant testified under oath at the time the warrant affidavit was presented that the complainant was the source of the allegations in the affidavit. A reconstruction of such oral testimony by the affiant, as a supplement to the affidavit, would not violate the defendant's Fourth Amendment rights and should be allowed. Finally, the exclusion of evidence for a technical violation of MCL 780.653; MSA 28.1259(3) is overly harsh under the circumstances of this case. A good-faith exception to the exclusionary rule should be recognized in this case.

MCDONALD, J., concurring in part and dissenting part, agreed that the proffered evidence of the complainant's sexual history is inadmissible, but stated that the warrant affidavit is deficient under MCL 780.563; MSA 28.1259(3) and that the trial court correctly suppressed evidence seized pursuant to the warrant.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people.

*Barney R. Whitesman,* for the defendant.

Before: CORRIGAN, P.J., and SHEPHERD and MCDONALD, JJ.

CORRIGAN, P.J. The people appeal by leave granted from an order granting defendant's motion to suppress evidence obtained pursuant to a search warrant and from an order granting defendant's motion to admit evidence of the victim's sexual conduct with third parties in this prosecu-

tion for criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). We reverse both orders.[1]

The incident underlying the charges occurred on October 19, 1991. The victim alleged that she was visiting defendant, a neighbor whom she had known for approximately four to five years, at his apartment. When the victim attempted to leave, defendant prevented her from doing so. After threatening her with a club, he sexually assaulted her. Defendant contends that the victim, a prostitute, consented to have sexual intercourse with him and then falsely accused him of sexual assault only because he failed to pay her. We address two issues on appeal: (1) whether the court erred in ruling admissible certain evidence pertaining to the victim's sexual activities with persons other than defendant and (2) whether the court erred in suppressing evidence obtained pursuant to a search warrant that was determined to be invalid.

## I. EVIDENCE OF THE VICTIM'S PRIOR CONDUCT

The court abused its discretion in ruling admissible certain evidence regarding the victim's employment as a topless dancer and allegations that the victim was a prostitute. The people contend admission of the evidence will violate the rape-shield statute, MCL 750.520j; MSA 28.788(10), while defendant argues preclusion of the evidence will violate his constitutional right to confront witnesses. The lower court found the rape-shield statute applicable, but ruled the evidence could be admitted because it was "material to a fact at issue," defendant's consent defense, and "the prejudicial nature [did] not outweigh its probative

[1] Judges SHEPHERD and MCDONALD concur in Section I; Judge SHEPHERD concurs in Sections I and II. The views stated in Section III of the opinion are mine alone.

value."[2] We disagree and hold that the evidence is inadmissible.

Enactment of the Michigan rape-shield statute reflected the Legislature's determination that, in the overwhelming majority of prosecutions, evidence of a rape victim's sexual conduct with parties other than the defendant, as well as the victim's sexual reputation, is neither an accurate measure of the victim's veracity nor determinative of the likelihood of consensual sexual relations with the defendant. *People v LaLone,* 432 Mich 103; 437 NW2d 611 (1989); *People v Wilhelm (On Rehearing),* 190 Mich App 574; 476 NW2d 753 (1991); *People v Lucas (On Remand),* 193 Mich App 298; 484 NW2d 685 (1992). Thus, the statute precludes all evidence of specific instances of a victim's sexual conduct, as well as opinion and reputation evidence of the same, except that a defendant may introduce evidence of the defendant's past sexual conduct with the victim or evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease, if the evidence is material and its prejudicial effect does not outweigh its probative value. MCL 750.520j(1); MSA 28.788(10)(1). However, recognizing that application of the statute's evidentiary exclusion might in some instances violate a defendant's Sixth Amendment right to confrontation, our Supreme Court has indicated that such evidence may be admissible when offered for the narrow purpose of showing a victim's bias or motive for filing a false claim. *People v LaLone, supra; People v Hackett,* 421 Mich 338; 365 NW2d 120 (1984).

[2] Although we recognize some jurists believe MRE 403(a)(3) to be the proper vehicle for analyzing this issue, the lower court and the parties have applied the analysis applicable to the rape-shield statute and, until a majority of our Supreme Court instructs us otherwise, we will do the same. See *People v LaLone,* 432 Mich 103; 437 NW2d 611 (1989).

In the instant case, defendant seeks the introduction of testimony by a third party that on a date before the assault he saw the victim walking with persons whom he had been informed were prostitutes and that on a date after the incident in question he viewed the victim dancing topless at a local topless club. Defendant also seeks to testify that, approximately two months after the incident, he saw the victim standing on a corner waving to passing cars while dressed in a short skirt. He contends she was engaging in what he believed to be attempts to solicit prostitution. Defendant claims this evidence is material to his defense that the victim consented to have intercourse in exchange for money. We agree that in an appropriate case a defense such as defendant's might require the admission of evidence demonstrating the victim's employment as a prostitute at the time of the alleged assault. This, however, is not the case. The majority of the evidence defendant attempts to introduce is not material to his claim that the victim was a prostitute from whom he solicited services on the date in question. A victim's employment as a topless dancer does not render her a prostitute. The offer of this evidence constitutes nothing more than an attempt to place before the jury the victim's "questionable" sexual character. Clearly, this is the type of evidence that the rape-shield statute was enacted to address.

Moreover, we find defendant's remaining evidence considerably more prejudicial than probative. The person who viewed the victim in the company of alleged prostitutes testified that he did not know whether the women were in fact prostitutes. In any event, he had never heard anything bad about the victim's reputation. Likewise, defendant's self-serving testimony that two months after the crime, he witnessed the victim allegedly

soliciting was of questionable probative value with respect to whether she had solicited him two months earlier. The court erred in ruling the proffered evidence admissible.[3]

### II. SUPPRESSION OF EVIDENCE—SUFFICIENCY OF AFFIDAVIT

We next conclude that the court erred in suppressing the fruits of the search of defendant's apartment. The crime occurred just before noon; the warrant was procured the same day. The search warrant affidavit did not explicitly state that the victim herself was the source of the information. However, a common-sense reading of the affidavit, taken as a whole, establishes that the named victim was the actual source of the allegations underlying the search warrant affidavit. A crime victim, in contrast to an underworld informant, is presumptively reliable. Additionally, the victim's reliability was proven by the self-authenticating details of the crime contained in the affidavit. Accordingly, MCL 780.653; MSA 28.1259(3), as amended by 1988 PA 80, was satisfied.

The affidavit states that the affiant, a Flint police sergeant with ten years experience, was investigating a criminal sexual conduct case earlier that day at the defendant's apartment. The affidavit then identifies the complainant by name. It stated that the complainant visited the defendant's apartment, her neighbor of four years. After talking and drinking gin with him for about forty-five minutes, the complainant asked him for her

[3] Because we find the evidence either irrelevant or more prejudicial than probative, we need not address whether exclusion was mandated because of defendant's apparent failure to meet the requisite ten-day notice requirement of the statute. However, we note failure to file such a notice may require the exclusion of evidence otherwise admissible under the statute. *People v Lucas, supra.*

coat. When defendant declined to get it, she went to the bedroom to look for it. Defendant subsequently grabbed the complainant from behind and threatened her with a carved wooden club. The affiant then furnished specific details of three counts of first-degree criminal sexual conduct, as well as explicit details of the crime—for example, the presence of semen on defendant's cranberry-colored robe and the bed. The affiant also described the location of items of physical evidence that the complainant and the defendant had touched. The affiant sought permission to search for these items, including the drinking glasses, the gin bottle, the brown club or stick, the cranberry-colored robe, and bed clothing.

Pursuant to MCL 780.653; MSA 28.1259(3), an affidavit may be based upon information supplied by a named or unnamed source. If the source is named, the affidavit need only contain affirmative allegations that permit the magistrate to conclude that the source had personal knowledge of the facts alleged. If the source is unnamed, allegations in the affidavit must show that the source is credible *or* that the information is reliable.

A common-sense reading of the affidavit, taken as a whole, yields the conclusion that the affiant obtained her information directly from the named crime victim. The victim was not an "unidentified informant" in the classical sense. Neither police officers nor identified crime victims are subject to the requirements once applied to confidential informers from the criminal milieu under *Aguilar/Spinelli*.[4] Indeed, the United States Supreme Court has traditionally assumed the veracity of information supplied by the victim. *Chambers v Maroney,*

[4] *Aguilar v Texas,* 378 US 108; 84 S Ct 1509; 12 L Ed 2d 723 (1964); *Spinelli v United States,* 393 US 410; 89 S Ct 584; 21 L Ed 2d 637 (1969).

399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970). *Jaben v United States,* 381 US 214; 85 S Ct 1365; 14 L Ed 2d 345 (1965). Michigan courts also consider identified citizens and police officers to be presumptively reliable. See, e.g., *People v Goeckerman,* 126 Mich App 517, 522; 337 NW2d 557 (1983), and cases noted therein; *People v Harris,* 95 Mich App 507; 291 NW2d 97 (1980); *People v Emmert,* 76 Mich App 26; 255 NW2d 757 (1977). Because the rape victim was identified by name by an experienced police officer, both the officer and the victim are considered presumptively reliable. The magistrate properly concluded that the source had personal knowledge of the facts alleged.

Alternatively, if we apply the second prong of the statute, and conclude that the source is unnamed, reliability of the information is established by the self-authenticating details in the search warrant affidavit. The affiant gave a thorough and particularized description of the crime. These details alone establish reliability. *United States v Mahler,* 442 F2d 1172 (CA 9, 1971). In *McCreary v Sigler,* 406 F2d 1264, 1269 (CA 8, 1969), the Eighth Circuit Court of Appeals, in discussing the probable cause analysis for an unknown informant, recognized that reliability may be established by the nature of the facts alleged:

> Under such circumstances, reliability of an informant may best be established by the affiant relating some corroboration of the story which the informant tells. *Furthermore, the underlying circumstance (sic), even without corroboration, may have built-in credibility guides to the informant's reliability. The essence of reliability may be found in an informant's statement of facts rather than an allegation of mere conclusory suspicion.* An informant who alleges he is an "eye witness" to an actual crime perpetrated demonstrates sufficient

"reliability" of the person. . . . Probable cause for an arrest may exist where the unknown citizen makes complaints, as a victim or eyewitness to a crime, where the underlying circumstances demonstrate his firsthand knowledge. [Citations omitted; emphasis added.]

The *McCreary* court pointed out that *Aguilar/Spinelli* related only to the problems of informants from the criminal underworld and to arrests based on mere suspicion because of the target's general reputation. *Id.* at 1268. Neither situation is present in this case.

### III. SUPPRESSION OF EVIDENCE—*MITCHELL*[5] REMAND AND THE VALIDITY OF EXCLUSIONARY REMEDIES FOR STATUTORY VIOLATIONS

I write part III separately because I also conclude that the circuit court could have entertained the prosecutor's offer of proof that the affiant testified under oath at the time the warrant affidavit was presented that the rape victim herself was the source of the allegations in the affidavit.

Further, in light of the amendments contained in 1988 PA 80, the intervening federal precedent relating to the exclusionary rule, and the continuing refinement of the supervisory powers doctrine in the nine years since *People v Sherbine,* 421 Mich 502; 364 NW2d 658 (1984), was decided,[6] I question the continuing validity of *Sherbine*'s conclusion that exclusion of probative evidence is

[5] *People v Mitchell,* 428 Mich 364; 408 NW2d 798 (1987).

[6] See, e.g., *United States v Leon,* 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984); *Illinois v Krull,* 480 US 340; 107 S Ct 1160; 94 L Ed 2d 364 (1987); *Murray v United States,* 487 US 533; 108 S Ct 2529; 101 L Ed 2d 472 (1988) (good-faith exception); see also, e.g., *Bank of Nova Scotia v United States,* 487 US 250; 108 S Ct 2369; 101 L Ed 2d 228 (1988); *United States v Mechanik,* 475 US 66; 106 S Ct 938; 89 L Ed 2d 50 (1986); *United States v Hastings,* 461 US 499; 103 S Ct 1974; 76 L Ed 2d 96 (1983) (supervisory power).

justified for a mere statutory violation. See, especially, Judge GRIFFIN's discussion in *People v Tejeda,* 181 Mich App 450, 466-467; 449 NW2d 908 (1989) *People v Tejeda (On Rehearing),* 188 Mich App 292; 469 NW2d 77 (1991); *People v Tejeda (On Remand),* 192 Mich App 635; 481 NW2d 814 (1992).

A. ABSENCE OF FOURTH AMENDMENT VIOLATION

As a preliminary matter, I conclude that a procedure permitting reconstruction of oral testimony actually heard by the authorizing magistrate would not offend the Fourth Amendment. *Aguilar v Texas,* 378 US 108, 109, n 1; 84 S Ct 1509; 12 L Ed 2d 723 (1964), recognized that in assessing the validity of a warrant, a reviewing court should consider *only* information brought to the magistrate's attention. *Whiteley v Warden,* 401 US 560, 565, n 8; 91 S Ct 1031; 28 L Ed 2d 306 (1971), suggests that an otherwise insufficient affidavit can be rehabilitated by sworn oral testimony presented during the warrant application process. By contrast, an insufficient affidavit can never be rehabilitated if the information was not disclosed to the issuing magistrate. These precautions guarantee that the central purpose of the Fourth Amendment will be served. That is, a neutral and detached magistrate reviews an investigator's determination of probable cause.

The United States Supreme Court, however, has not directly decided whether and under what circumstances oral information can supplement a written search warrant affidavit. Numerous federal circuit courts, however, have held that the Fourth Amendment does not require a written sworn statement supporting the application for a search warrant. The government may prove that the issuing magistrate had oral information, apart

from the allegations in the affidavit, to authorize issuance of the search warrant. *United States v Hill,* 500 F2d 315, 320-321 (CA 5, 1974); *United States ex rel Gaugler v Brierley,* 477 F2d 516, 522-523 (CA 3, 1973); *Frazier v Roberts,* 441 F2d 1224, 1226 (CA 8, 1971); *Sherrick v Eyman,* 389 F2d 648, 652 (CA 9, 1968). Nor is recording of the oral information required by the Fourth Amendment. The magistrate's duty is to take testimony under oath, whether or not that testimony is preserved for later review. *United States v Goyett,* 699 F2d 838 (CA 6, 1983). See, generally, LaFave, *Search and Seizure,* § 4.3(b); anno: *Federal court determination of probable cause for search warrant: consideration of oral testimony which was, in addition to affidavit, before officer who issued warrant.* 24 ALR Fed 107.

In *United States v Hill, supra* at 322, the Fifth Circuit Court of Appeals allowed supplementation of the affidavit with oral testimony and declined to exclude relevant evidence:

> [T]his situation furnishes no occasion to apply the exclusionary rule to bar the evidence of Hill's criminality that was obtained in executing the warrant. Phillips acted properly in going to the magistrate and seeking a warrant. Magistrate Sear acted properly in calling for additional information to demonstrate credibility. Thus, the only error attributable to the procedure they followed is a technical one that would in no way serve the deterrent purposes of the rule.

See also *United States v Williams,* 622 F2d 830 (CA 5, 1980).

### B. REMAND TO RECONSTRUCT ORAL TESTIMONY

In response to *People v Sherbine, supra,* the

Legislature, in 1988 PA 80, amended the search warrant statute, MCL 780.653; MSA 28.1259(3). The Legislature repudiated *Sherbine*'s conclusion that the statute had codified and expanded the *Aguilar/Spinelli* test. (In *Sherbine,* this construction of the statute allowed the Supreme Court to avoid deciding whether Michigan followed *Illinois v Gates,* 462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 [1983].) The current statutory test is now far more lenient than the former wooden and inflexible *Aguilar/Spinelli* test. The Legislature certainly did not contemplate the situation at hand when it amended the statute in response to *Sherbine.* Nor did the Legislature choose suppression as a remedy for technical violations of the statute or foreclose remands to reconstruct testimony actually presented to the examining magistrate. See *Tejeda, supra* at 464.

Even more significantly, after *Sherbine* was decided, the Supreme Court in *People v Mitchell,* 428 Mich 364; 408 NW2d 798 (1987), directed a remand to reconstruct oral testimony actually heard by the authorizing judge. In *Mitchell,* the defect involved was an unsigned search warrant. *Id.* at 366. I see no principled reason to deny a *Mitchell*-type remand in these circumstances. Such a remedy is especially appropriate because the search warrant and affidavit in this case explicitly state that the affiant was examined under oath before the magistrate. The first sentence of the search warrant states, in relevant part, "*On examination on oath and in writing of the affiant* . . . and after reading and evaluating the affidavit . . . ."

### C. EXCLUSIONARY REMEDY FOR STATUTORY VIOLATIONS

Suppression of seized evidence, a judge-made

remedy designed to deter violations of the Fourth Amendment, is too harsh a remedy for the deficient search warrant draftsmanship depicted by these facts. A technical violation of the Michigan search warrant statute should not require exclusion of probative evidence in the absence of an explicit legislative directive. *Sherbine*'s sole justification for an exclusionary remedy for statutory violations is a reference to *People v Chartrand,* 73 Mich App 645; 252 NW2d 569 (1977), in a footnote. See 421 Mich 511-512, n 18. The Supreme Court did not so much as discuss *Chartrand. Chartrand,* in turn, at 652, does not discuss, much less attempt to justify, why suppression of probative evidence is warranted for a mere statutory violation.

The Supreme Court's failure to discuss this difficult question in *Sherbine* is troubling. The issue of the Supreme Court's authority to suppress evidence for statutory violations is significant and complex. Indeed, the Supreme Court may lack the authority to impose an exclusionary remedy for a statutory violation. See, e.g., Beale, *Reconsidering supervisory power in criminal cases: Constitutional and statutory limits on the authority of federal courts,* 84 Columbia L R 1433 (1984). Professor Beale examines cases where the United States Supreme Court declined to apply requested remedies for statutory violations because Congress had not explicitly authorized those remedies. Professor Beale explores the separation-of-powers problems in the judicial usurpation of unexercised legislative powers to fashion remedies for purely statutory violations. Her well-developed analysis raises similar questions about Michigan's scheme. See also *Tejeda, supra* at 461-467 (GRIFFIN, J., dissenting).

Moreover, an exclusionary remedy is cruel and

disproportionate in these circumstances. Physical evidence corroborating the commission of a serious crime would be suppressed so that this investigator will be deterred from future "misconduct." The theory is that, through this punishment, the detective would learn to inform judges in the future *in writing* about the actual source of the allegations. As noted, the Fourth Amendment itself does not command a written submission.

In *Michigan v Tucker,* 417 US 433; 94 S Ct 2357; 41 L Ed 2d 182 (1974), the Supreme Court recognized that the deterrent purposes of the exclusionary rule assume that the police have engaged in wilful or negligent conduct that has deprived the defendant of some right. The remedy ignores the prospect of unjust acquittal on the theory that the lesson to offending police officers is worth the high cost. In this case, the violation is de minimis, but the cost is extreme. The disproportionate nature of the punishment is even more extreme if the investigator actually informed the district judge about the source of the allegations. The detective complied with the Fourth Amendment by applying for a warrant. She apparently acted in complete good faith.

The deterrence rationale has no force whatsoever in this setting. The investigator did not engage in misconduct worth deterring in a rational society. The "error" attributable to the police procedure was technical. I am unwilling to equate the slight human imperfection in draftsmanship depicted here in the "midst and haste of a criminal investigation" with misbehavior warranting the drastic remedy of suppression. Far from advancing the deterrent purposes of the exclusionary rule, exclusion of this evidence promotes public disrespect for the legal process.

The Supreme Court has recognized a good-faith

exception for constitutional violations in obtaining a search warrant. *United States v Leon,* 497 US 897, 903, n 1; 104 S Ct 3405; 82 L Ed 2d 677 (1984). If judicial power to suppress for statutory violations does exist in Michigan, then Michigan judges should surely recognize a good-faith exception for the statutory violation at issue.

Reversed; jurisdiction not retained.

SHEPHERD, J., concurred with parts I and II only.

MCDONALD, J. *(concurring in part and dissenting in part).* Although I concur with part I of Judge CORRIGAN's opinion, I respectfully dissent from the balance of the opinion.

The people concede the affidavit relied on in issuing the search warrant failed to satisfy the requirements of MCL 780.653; MSA 28.1259(3). Although the affidavit contained thorough, specific, and particularized facts, it failed to name the source of the information. Even though it appears obvious the information was obtained from the victim and that the magistrate was so informed, the statutory language is mandatory and unambiguous. It states the finding of probable cause "shall be based upon all the facts related *within* the affidavit" (emphasis added) and, if the affidavit is based upon information supplied by an unnamed person, it must contain

> affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable. [MCL 780.653(b); MSA 28.1259(3)(b).]

Violation of the statute results in suppression of the evidence obtained pursuant to the warrant.

*People v Sherbine,* 421 Mich 502; 364 NW2d 658 (1984). Although suppression of the evidence seems to be a harsh remedy in this case, I do not believe we are at liberty to ignore the directives set forth in the opinions of our Supreme Court. I would hold the trial court did not err in granting defendant's motion to suppress.

GERRISH TOWNSHIP v ESBER

Docket No. 146295. Submitted April 1, 1993, at Grand Rapids. Decided September 20, 1993, at 9:20 A.M.

Gerrish Township brought an action in the Roscommon Circuit Court against Rafic and Linda Esber, seeking removal of two signs located on property that belongs to the state that advertise the defendants' store. The signs have been in place since approximately 1946 and 1980. A zoning ordinance was passed in 1960 that prohibited such signs. The court, Carl L. Horn, J., ruled that the signs do not constitute a nonconforming use and must be removed. The defendants appealed, arguing that the signs constitute a nonconforming use that cannot be removed without just compensation being paid.

The Court of Appeals *held:*

1. Because the signs are on land that belongs to the state, the defendants have no property right that may be protected. The defendants did not acquire title to the property by adverse possession.

2. The presence of the signs on state land violates 1979 AC, R 299.331(1)(f).

Affirmed.

1. ZONING — NONCONFORMING USES — NONOWNED PROPERTY.

Permitting the continuation of a nonconforming use is designed to avoid the imposition of hardship upon the owner of property; a person who seeks to continue a nonconforming use on property belonging to another has no property right to be protected.

2. ADVERSE POSSESSION — LAND OWNED BY STATE.

Title to real property belonging to the state may not be acquired through adverse possession.

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REFERENCES

Am Jur 2d, Adverse Possession § 205; Zoning and Planning §§ 624, 630, 660.

Acquisition by adverse possession or use of public property held by municipal corporation or other governmental unit otherwise than for streets, alleys, parks, or common. 55 ALR2d 554.

Classification and maintenance of advertising structure as nonconforming use. 80 ALR3d 630.

*Hess & Hess, P.C.* (by *Robert A. Hess*), for the plaintiff.

*Ronald C. Meiring,* for the defendants.

Before: MICHAEL J. KELLY, P.J., and WEAVER and D. E. SHELTON,* JJ.

WEAVER, J. Plaintiff, Gerrish Township, brought suit seeking the removal of two signs advertising a grocery store owned by defendants Rafic Esber and Linda Esber. The signs are each located approximately one mile from the store on property that the parties concede belongs to the State of Michigan. The signs have been in place since approximately 1946 and 1980. A zoning ordinance was passed in 1960 that prohibited such signs. Following a bench trial, the court ruled that the signs did not constitute a nonconforming use and would have to be removed. Defendants appeal. We affirm.

Defendants argue that the signs constitute a nonconforming use that cannot be removed without just compensation being paid, citing MCL 125.583a; MSA 5.2933(1), *Wolverine Sign Works v Bloomfield Hills,* 279 Mich 205; 271 NW 823 (1937). What defendants overlook in their argument, however, is the fact that the signs are not on their property. Rather, they are on land that defendants believe belongs to the State of Michigan.[1]

Permitting the continuation of a nonconforming use is designed to avoid the imposition of hardship upon the owner of property. *South Central Improvement Ass'n v St Clair Shores,* 348 Mich 153; 82 NW2d 453 (1957). Here, defendants have no

* Circuit judge, sitting on the Court of Appeals by assignment.

[1] The record does not establish which state department or agency controls the property. Although some state land may be exempt from local use regulation pursuant to *Dearden v Detroit,* 403 Mich 257; 269 NW2d 139 (1978), defendants waived any such possible issue by failing to raise it at trial.

property right to be protected,[2] nor have they asserted one.

We also note that the presence of the signs on state land violates 1979 AC, R 299.331(1)(f).[3]

We affirm.

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[2] Title may not be acquired by adverse possession against the state. *Young v Thendara, Inc,* 328 Mich 42; 43 NW2d 58 (1950).

[3] 1979 AC, R 299.331(1)(f) provides:

> Rule 1. (1) On state lands other than state parks and recreation areas, it is unlawful for any person:
>
> * * *
>
> (f) To post, place, or erect signs; to place or distribute advertising material; to erect a fence or barrier; to construct or occupy improvements or to enclose the lands without proper written permission.

PETRASZEWSKY v KEETH (ON REMAND)

Docket No. 144362. Submitted April 21, 1993, at Detroit. Decided September 20, 1993, at 9:25 A.M.

Linda Petraszewsky brought an action in the 35th District Court against Don Keeth, also known as Don Keith, seeking damages for injuries sustained when she fell on steps leading to the front porch of an apartment building owned by the defendant while on her way to a companion's apartment in the building. Following a jury trial, she was awarded $125,000, diminished by fifteen percent for her comparative negligence. The court granted the defendant's motion for remittitur, reducing the verdict to $20,000, diminished by fifteen percent for the plaintiff's comparative negligence. The Wayne Circuit Court, John R. Kirwan, J., denied the plaintiff's application for leave to appeal. The Court of Appeals, BRENNAN, P.J., and MAHER and WAHLS, JJ., vacated the order of the district court and remanded to the district court for reconsideration in light of *Palenkas v Beaumont Hosp,* 432 Mich 527 (1989), finding that the district court had utilized an erroneous standard of review in granting remittitur. *Petraszewsky v Keith,* unpublished order of the Court of Appeals, entered August 1, 1989 (Docket No. 117394). On remand, the district court entered an order granting a new trial on the ground that the jury had been instructed incorrectly regarding the distinction in the duties owed to licensees and invitees. The court opined that the defendant owed the plaintiff, a social guest of a tenant, the same duty as owed by the tenant, that of a licensee. The court also held that a new trial was warranted because it had erred in excluding evidence of the plaintiff's habitual consumption of twelve beers a day. The plaintiff appealed, and the Wayne Circuit Court, John R. Kirwan, J., affirmed. The Court of Appeals, GILLIS, P.J., and SULLIVAN and BRENNAN, JJ., denied the plaintiff's application for leave to appeal, citing authority for the proposition that the

REFERENCES

Am Jur 2d, Evidence §§ 315-317; New Trial §§ 33-35, 39, 83, 84; Premises Liability §§ 16, 136.

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser. 22 ALR4th 294.

plaintiff was merely a licensee of the tenant, and as such was owed only a limited duty of care. *Petraszewsky v Keith,* unpublished order of the Court of Appeals, entered October 26, 1990 (Docket No. 131701). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted, noting that the authority cited by the Court of Appeals did not appear responsive to the distinction that the plaintiff had drawn between her status as a licensee of the tenant and an invitee of the landlord with regard to the common areas of the building. *Petraszewsky v Keeth,* 438 Mich 851 (1991).

On remand, the Court of Appeals *held:*

1. A trial court will be found to have acted within its discretion in granting a new trial where the reasons assigned by the trial court are legally recognized and supported by any reasonable interpretation of the record.

2. The duties owed by a landlord to the social guests of a tenant are duties owed to invitees, not licensees. The trial court properly instructed the jury that the defendant owed the plaintiff the duties of an invitee. Therefore, a new trial could not have been awarded properly on the ground of improper instructions to the jury with regard to this issue.

3. The evidence regarding the plaintiff's habitual consumption of alcohol was admissible pursuant to MRE 406, was relevant, and, because it originated in the plaintiff's medical records, was not hearsay. The exclusion of the evidence was not harmless error. The district court did not err in granting a new trial on this basis, and the circuit court did not err in affirming the order granting a new trial.

Affirmed.

1. MOTIONS AND ORDERS — NEW TRIAL.

A trial court does not abuse its discretion in granting a new trial where the reasons assigned by the court for its determination are legally recognized and supported by any reasonable interpretation of the record.

2. LANDLORD AND TENANT — TENANT'S SOCIAL GUESTS — COMMON AREAS — INVITEES — DUTY.

The duties owed by a landlord to the social guests of a tenant with regard to the common areas of the property that are under the retained control of the landlord are the duties owed to invitees.

3. EVIDENCE — HABITS OF A PERSON.

Evidence of a habit of a person is relevant to prove that the

conduct of the person on a particular occasion was in conformity with the habit (MRE 406).

*Zeff & Zeff, P.C.* (by *A. Robert Zeff*) (*Donald M. Fulkerson,* of Counsel), for the plaintiff.

*Poling, McGaw & Poling, P.C.* (by *Richard B. Poling, Jr.*), for the defendant.

ON REMAND

Before: HOLBROOK, JR., P.J., and GRIBBS and SAWYER, JJ.

HOLBROOK, JR., P.J. At approximately 2:30 A.M. on February 6, 1983, plaintiff was on her way to socialize with her companion, Ed Pepper, at his flat in an apartment house owned by defendant Keeth. In order to reach the front porch, visitors to the apartment house had to ascend steps made out of railroad ties. Plaintiff slipped during the climb and sustained what she claims were serious injuries to the facial bones of the cheek and left eye, requiring three surgical procedures that, nonetheless, have left her with persistent double vision and consequent lost wages due to inability to resume industrial employment.

In a jury trial in the 35th District Court, plaintiff was awarded $125,000, diminished by fifteen percent for comparative negligence. Among the issues at trial were the extent of the duty that defendant landlord owed to plaintiff, and, in terms of comparative negligence, whether and to what extent plaintiff was intoxicated at the time of the accident. Plaintiff testified that she had consumed at least four or five beers in the evening hours preceding the climb up the stairs; Ed Pepper, in a deposition admitted into evidence at trial, testified

that he thought that plaintiff had been consuming mixed drinks, that she had consumed quite a few, and that she was loud, drunk, and stumbling around the bar where the drinking took place.

Also admitted into evidence were medical records from plaintiff's hospital admission, including a nurse's bedside notation reciting plaintiff's medical history statement that "she has not eaten for two days and drinks a lot (especially on weekends)." Excluded from evidence, however, were portions of the medical records in which plaintiff acknowledged that she normally consumed twelve beers a day.[1]

Initially, the district court granted defendant's motion for remittitur, reducing the verdict to $20,000, diminished by fifteen percent for comparative negligence. Plaintiff's application for leave to appeal was denied by the Wayne Circuit Court, but, on appeal to this Court, the order of remittitur was vacated as having been based on an erroneous review standard, and the cause was remanded to the district court for reconsideration in light of *Palenkas v Beaumont Hosp,* 432 Mich 527; 443 NW2d 354 (1989). On remand, the district court concluded that remittitur was not appropriate, but that a new trial should be granted on the basis of an error in the jury instructions regarding the distinction in the duties owed licensees and invitees. The court opined that defendant landlord owed plaintiff, a social guest of a tenant, the same duty owed her by the tenant, that of a licensee.

[1] Our reading of the record indicates that the parties in the trial court intended to redact this reference from the medical records exhibit that was admitted into evidence. Through inadvertence, this material remained in the exhibit submitted to the jury. However, because of the trial court's ruling, defense counsel was not allowed to make an argument based on the reference in summarizing the defense position for the jury, and, of course, there is no reliable evidence regarding whether the jury noted the reference or what weight it might have given to it.

The court also gave an alternative reason for granting a new trial, its error in excluding the evidence of plaintiff's habitual consumption of a dozen beers daily, where plaintiff's intoxication was at the heart of defendant's comparative negligence argument. The Wayne Circuit Court affirmed, and this Court denied leave to appeal, citing *Bradford v Feeback,* 149 Mich App 67, 70-71; 385 NW2d 729 (1986), and 2 Restatement Torts, 2d, § 330, comment e (final sentence) and comment h(3), pp 174-175. The Supreme Court, in lieu of granting leave to appeal, remanded this case for our consideration as on leave granted, noting:

> The authority cited in support of the conclusion in the Court of Appeals denial order that the application for leave to appeal lacked merit does not appear responsive to the distinction plaintiff has consistently drawn between her acknowledged status as a licensee of the tenant, but as an invitee of the landlord regarding common areas of the premises over which the landlord retained control. [*Petraszewsky v Keeth,* 438 Mich 851; 472 NW2d 849 (1991).]

Our review of the trial court's order granting a new trial is extremely limited. As this Court first phrased the standard in *Benmark v Steffen,* 9 Mich App 416, 420; 157 NW2d 468 (1968), if the reasons assigned by the trial court for granting a new trial are legally recognized, and those reasons are supported by any reasonable interpretation of the record, the trial court has acted within its discretion. The Supreme Court has never expressly adopted that formulation of the standard, but acting on the assumption that the *Benmark* standard is appropriate, it has merely noted that, in such situations, the appellant bears the burden of presenting the reviewing court with a record that

allows proper review. *Kailimai v Firestone Tire & Rubber Co,* 398 Mich 230, 233; 247 NW2d 295 (1976). *Kailimai* is, of course, consistent with the principle that, generally, the appellant bears the burden of furnishing the reviewing court with a record that verifies the basis of any argument on which reversal or other claim for appellate relief is predicated. *Lemanski v Ford Motor Co,* 82 Mich App 244, 252; 266 NW2d 775 (1978).

Our first inquiry, therefore, must be whether the trial court erred in its instructions to the jury. No specific instruction was addressed in the trial court's written opinion, nor has our review of the record disclosed a specific focus for this issue. However, conceding that the trial court left the jury with the impression that defendant landlord owed the plaintiff, as a social guest of a tenant, the duty of an invitee, we now think it clear that such instruction was correct. In previously denying leave to appeal with regard to this issue, citing *Bradford v Feeback, supra,* and 2 Restatement Torts, 2d, § 330, comments e and h(3), we cited authority for the proposition that the plaintiff was merely a licensee of the tenant, her social invitor, and as such was owed only a limited duty of care. *Preston v Sleziak,* 383 Mich 442; 175 NW2d 759 (1970), discusses the different duties owed to licensees and invitees.

However, the duties owed by a landlord to the social guests of a tenant are duties owed to invitees, not licensees, as the Supreme Court made clear in *Quinlivan v Great Atlantic & Pacific Tea Co, Inc,* 395 Mich 244, 257, n 10; 235 NW2d 732 (1975):

> The same standard of care is owed by the landlord to the tenant and his invitees as is owed by the proprietor and landowner to the business invi-

> tee. *See* Prosser, Torts (3rd ed), § 63, pp 418, 419. Discussion of the duty owed a business invitee pertains with equal force to the duty owed a tenant and his invitees.

This distinction between the social guest's status as licensee with respect to the tenant but as business invitee with respect to the landlord is also recognized in 2 Restatement Torts, 2d, § 360, and explained in comment f, p 253:

> If the terms of the lease entitle the lessee to permit third persons to come upon the part of the land retained within the lessor's control, it is immaterial whether they come as invitees of the lessee or as his licensees. It is the lessor's business, as such, to afford his lessee facilities for receiving all persons whom he chooses to admit for any legitimate purpose. Therefore, a person who, as between himself and the lessee, is a licensee enters the land on a matter directly connected with the business of the lessor. He is, therefore, entitled to expect that the lessor will exercise reasonable care to discover and remedy any condition which makes his acceptance of the lessee's license dangerous to him.

Accord *Hiller v Harsh,* 100 Ill App 3d 332, 336-338; 55 Ill Dec 635; 426 NE2d 960 (1981); *Murray v Lane,* 51 Md App 597, 600-604; 444 A2d 1069 (1982); *Flott v Cates,* 528 NE2d 847 (Ind App, 1988); *Butler v Watson,* 193 Mich 322; 159 NW 507 (1916).

Accordingly, the trial court's instructions in this case regarding duty were correct. As a matter of law, the plaintiff was an invitee of the defendant landlord because she was injured in a common area of which he retained control. This accords with public policy considerations, which ought to encourage landlords to make common areas of

leaseholds safe for tenants and tenants' guests. *Bellikka v Green,* 306 Or 630, 644-645; 762 P2d 997 (1988). Because the instructions were not erroneous in this respect, a new trial could not properly be awarded on this basis. *Hoag v Hyzy,* 339 Mich 163; 63 NW2d 632 (1954).

The remaining issue concerns the trial court's ruling excluding from evidence information indicating plaintiff's alcohol consumption habits. We agree with defendant that this evidence qualifies for admission under MRE 406, and that it was relevant, because it tended to support the testimony of Mr. Pepper and contradict plaintiff's testimony concerning her level of intoxication at the time she slipped and fell on defendant's makeshift staircase. Because the information originated with plaintiff, it was not hearsay, MRE 801(d)(2)(A). The evidence was therefore admissible.

The question remains whether the failure to admit this evidence was prejudicial to defendant's right to a fair trial. It is suggested that the evidence was merely cumulative. Although this is to some extent true, the evidence also directly contradicted plaintiff's testimony concerning her alcohol consumption at the time in question. Because the evidence concerning plaintiff's intoxication essentially consisted of her exculpatory claims and Mr. Pepper's more damaging description of her consumption and behavior, we think the issue sufficiently closely drawn that exclusion of the additional relevant evidence that might well have swayed the balance more to defendant's favor was not a harmless error. The excluded evidence indicated plaintiff's general pattern of consuming twelve beers each day, contrasted with her assertion that she had had only four or five beers, and would tend to suggest that plaintiff habitually consumes alcoholic beverages generally in large

quantities. The jury might reasonably have concluded that plaintiff was telling the truth when she said that she had had only four or five beers on the night in question, but that Mr. Pepper was also being truthful when he asserted that plaintiff was drinking mixed drinks; the mixed drinks might have been seen by the jury to have been a substitute for beer in order to allow plaintiff to achieve the blood alcohol level she was accustomed to after drinking twelve beers.

We are constrained to note that, whatever might have been our appellate reaction had a new trial been denied and defendant had raised this issue by appealing the judgment entered on the verdict, we cannot say on this record that the trial court abused its discretion in granting a new trial on the basis of this issue. The reason given for granting a new trial, the exclusion of relevant, admissible evidence, is legally recognized, MCR 2.611(A)(1)(g), and the record provides more than arguable support for applying this legal principle. Accordingly, the trial court did not err in granting a new trial on this alternative basis.

The decision of the Wayne Circuit Court, affirming the order granting a new trial in the 35th District Court, is affirmed.

Affirmed.

LEMMERMAN v FEALK

Docket No. 131850. Submitted December 16, 1992, at Detroit. Decided September 20, 1993, at 9:30 A.M. Leave to appeal sought.

Marlene Lemmerman brought an action in the Oakland Circuit Court against the estate of Benjamin Fealk, Bella Fealk, and Rachael Levy, seeking damages on the basis of the theories of assault and battery, negligence, and tortious infliction of emotional distress and alleging that Benjamin Fealk, her father, and Rachael Levy, her aunt, physically and sexually assaulted her as a child and Bella Fealk, her mother, physically abused her and knew or should have known of the other alleged acts of abuse. The plaintiff averred that she had repressed completely any memory of the alleged acts of abuse from the time of the occurrence in her early childhood until about a year before the action was brought, when she was fifty-four years of age. Bella Fealk and Rachael Levy moved for summary disposition on the basis of the running of the limitation period. The court, Robert L. Templin, J., granted summary disposition for the defendants and dismissed the plaintiff's complaint, holding that the plaintiff's claim was barred by the statute of limitations because there was no corroboration of her claim of physical and sexual abuse. The plaintiff appealed.

The Court of Appeals *held:*

1. Application of the delayed-discovery rule is appropriate in a case such as this where there is the allegation of childhood abuse followed by repression of the memory of that abuse. There is no need to offer corroborating evidence of the alleged abuse before seeking application of the delayed-discovery rule. Accordingly, the action was timely if it was brought within the statutory period after the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, her injury and its likely cause. Because there exists a question of fact concerning when the plaintiff knew or should have known that she had

REFERENCES

Am Jur 2d, Limitation of Actions §§ 107, 109, 135, 146, 147, 177, 178, 181, 182.

Running of limitations against action for civil damages for sexual abuse of child. 9 ALR5th 321.

a cause of action, the trial court erred in granting summary disposition.

2. Even if the delayed-discovery rule were inapplicable, summary disposition would have been inappropriate. A person under a disability has one year after the disability is removed to bring an action. Because repression of childhood memories, such as is alleged here, is insanity within the meaning of the tolling provision and there is a jury question concerning when the disability was removed, summary disposition was inappropriate.

3. Service of the summons and complaint on the defendants was timely.

Reversed and remanded.

1. LIMITATION OF ACTIONS — MINORS — SEXUAL ABUSE — REPRESSION OF MEMORY — ACCRUAL OF ACTIONS.

An action by an adult for damages resulting from alleged sexual abuse that occurred during childhood, the memory of which allegedly was repressed, accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its likely cause; evidence corroborating the sexual abuse is not necessary to the application of the delayed-discovery rule.

2. LIMITATION OF ACTIONS — REPRESSION OF MEMORY — INSANITY.

Repression of the memory of childhood sexual abuse is insanity within the meaning of the statute that extends the period of limitation within which to bring an action to one year from the date the disability of insanity is removed (MCL 600.5851; MSA 27A.5851).

*Rogers & Twanmoh, P.C.* (by *Lore A. Rogers*), for the plaintiff.

*Bruce J. Lazar,* for Bella Fealk.

*Provizer, Lichtenstein, Pearlman & Phillips, P.C.* (by *Martin N. Fealk*), for Rachael Levy.

Before: JANSEN, P.J., and MURPHY and MARILYN KELLY, JJ.

MARILYN KELLY, J. This case questions whether plaintiff is barred by expiration of the applicable

statutory period of limitations from bringing an action for sexual abuse occurring during her minority. Plaintiff has appealed as of right from an order of the Oakland Circuit Court granting summary disposition to defendants under MCR 2.116(C)(7). She argues that the trial court erred in ruling that the statute of limitations barred her claim. She argues that the delayed discovery rule should apply to her, an adult who was sexually abused as a child. She asserts, also, that the statutory period of limitations was tolled during the long period during which she repressed the abuse. We reverse.

Plaintiff, a fifty-four-year-old female, filed suit against her mother, her father's estate and her aunt for assault and battery, negligence and tortious infliction of emotional distress. She alleged that her father, Benjamin Fealk, and her aunt, Rachael Levy, physically and sexually abused her from the time she was three until she reached puberty. She claimed that her mother, Bella Fealk, physically abused her, and knew or should have known of the other alleged abuse. Plaintiff declares that she repressed memories of the abuse until 1989.

In March, 1989, plaintiff avers that she began having flashbacks about the sexual abuse. On May 19, 1989, she confronted her father in his hospital room. She showed him pictures of herself as an infant and toddler and said to him, "You did something very bad to this little girl." He replied, "I'm sorry. I loved you so much. You were so beautiful and intelligent." He believed, plaintiff says, that God would never forgive him. As a result of intensive therapy, plaintiff relates that she has since remembered additional instances of abuse.

The trial court granted defendants' motion for

summary disposition, because plaintiff lacked corroboration of her allegations of physical and sexual abuse. See *Meiers-Post v Schafer,* 170 Mich App 174; 427 NW2d 606 (1988).

I

A

The statutory period of limitations for assault and battery is two years from the time a claim accrues. MCL 600.5805(2); MSA 27A.5805(2). The limitations period for personal injuries is three years from the date of accrual. MCL 600.5805(8); MSA 27A.5805(8). Policy considerations behind the enactment of statutes of limitation are: 1) recovering damages promptly; 2) penalizing plaintiffs who are not industrious in pursuing their claims; 3) providing security against stale demands; 4) relieving defendants' fear of litigation; 5) preventing fraudulent claims; and 6) providing a remedy for the general inconvenience resulting from delay. *Nielsen v Barnett,* 440 Mich 1, 8-9; 485 NW2d 666 (1992).

Generally, a claim accrues when all the elements have occurred and can be alleged in a proper complaint. *Moll v Abbott Laboratories,* 192 Mich App 724, 730; 482 NW2d 197 (1992), lv gtd 441 Mich 878 (1992), citing *Connelly v Paul Ruddy's Equipment Repair & Service, Co,* 388 Mich 146, 150; 200 NW2d 70 (1972). Once the elements of a cause of action for personal injury are present, including the element of damages, the claim accrues and the statute of limitations begins to run. *Connelly,* 151.

The trial court in this case granted summary disposition, finding that plaintiff's claim was precluded by the holding in the *Meiers-Post* case. In *Meiers-Post,* a thirty-year-old plaintiff filed suit

claiming to have been sexually abused while a teenager. The Court held

> that the statute of limitations can be tolled under the insanity clause if (a) plaintiff can make out a case that she has repressed the memory of the facts upon which her claim is predicated, such that she could not have been aware of rights she was otherwise bound to know, and (b) there is corroboration for plaintiff's testimony that the sexual assault occurred. [*Id.,* 182-183; MCL 600.5851(1); MSA 27A.5851(1).]

In *Meiers-Post,* the Court specifically indicated that it did not need to decide whether a less restrictive rule was justified, since the plaintiff's claim was corroborated by her abuser. *Id.,* 176, 182. Here, we do need to decide if a less restrictive rule is justified, because there is no corroboration.

B

In certain circumstances, Michigan has applied the "delayed discovery rule" in determining when a claim has accrued. A cause of action accrues under the rule when the plaintiffs discover or, through the exercise of reasonable diligence, should have discovered the injury and its likely cause. *Moll,* 731. Our courts have used it most frequently in products liability actions. See *Bonney v Upjohn Co,* 129 Mich App 18, 31; 342 NW2d 551 (1983). However, the Supreme Court advises that it should be applied "when the situation requires it." *Larson v Johns-Manville Sales Corp,* 427 Mich 301, 310; 399 NW2d 1 (1986).

C

In *Meiers-Post,* the Court did not specifically find

that the delayed discovery rule applies to claims brought by adults who repressed knowledge of their childhood sexual abuse. Instead, it indicated that running of the statutory period of limitations may be tolled under the disability insanity clause. MCL 600.5851(1); MSA 27A.5851(1). However, in making that decision, the Court relied on a Washington state supreme court case which interpreted the delayed discovery rule. *Tyson v Tyson,* 107 Wash 2d 72; 727 P2d 226 (1986). *Tyson* found the rule inapplicable except where there exists objective manifestation of the abuse alleged. *Tyson* was superseded by statute in Washington. See *North Coast Air Services, Ltd v Grumman Corp,* 111 Wash 2d 315; 759 P2d 405 (1988).

Although *Meiers-Post* relied on the delayed discovery rationale from *Tyson,* its holding did not turn on the applicability of the rule. *Meiers-Post* does not mandate that corroborating evidence be available before invocation of the delayed discovery rule, nor does any other Michigan case.

D

We find it illogical to require corroborating evidence under the delayed discovery rule. See *Osland v Osland,* 442 NW2d 907, 909 (ND, 1989), citing *Tyson* (Pearson, dissenting), 80. Mandating corroboration is inconsistent with the history of the rule's application. Fundamental fairness, not availability of objective evidence, has been "the linchpin of the discovery rule." *Tyson,* 82. A plaintiff should not be denied the benefit of the rule on the basis that he or she would have difficulty proving his or her case. Corroboration is a proof problem, not a requirement to be met before courts can apply the rule. Moreover, a cause of action should not be foreclosed merely because the

ultimate result hinges on the parties' credibility. *Id.,* 82-83.

E

Although we find no corroborating evidence is necessary under the delayed discovery rule, we must still determine whether the rule should apply to prevent running of the limitations period here. Other jurisdictions have used the delayed discovery rule to preclude expiration of the statutory period of limitations where adults repressed knowledge of sexual abuse occurring during their minority. See *Johnson v Johnson,* 701 F Supp 1363 (ND Ill, 1988); *Evans v Eckelman,* 216 Cal App 3d 1609; 265 Cal Rptr 605 (1990); *Hammer v Hammer,* 142 Wis App 2d 257; 418 NW2d 23 (1987); *Osland, supra.*

In *Johnson,* the plaintiff alleged that, as a child, she was sexually abused by her father, and her mother failed to protect her. *Johnson, supra.* She claimed to have suppressed all memories of the abuse until years later. The federal district court denied the defendants' motion for summary disposition, ruling that Illinois courts would apply the delayed discovery rule to prevent running of the statutory limitations period. The court took cognizance of studies showing that as much as one third of the population has experienced some form of child sexual abuse. Moreover, a significant amount of it occurred within the family. *Id.,* 1370. Given the extensiveness of the problem, the federal judge concluded that Illinois courts would apply the discovery rule. Three years later, the Illinois state court did grant defendants' motion for summary disposition, because the Illinois legislature enacted a twelve year statute of repose for childhood sexual abuse claims. *Johnson v Johnson,* 766 F Supp 662 (ND Ill, 1991).

In *Evans,* the California court determined that dismissal was unwarranted, because it was conceivable that the complaint could be amended to show circumstances justifying use of the discovery rule. *Evans, supra.* It recognized that the psychological trauma attendant upon child sexual abuse is likely to activate repression mechanisms which can prevent a victim from consciously recognizing the abuse. *Id.,* 1615 Moreover, the plaintiffs in *Evans* had been molested by their foster father. The Court opined that the fact there is a fiduciary relationship between the parties may tip the balance in favor of allowing plaintiffs the benefit of the rule. *Id.,* 1616.

F

The decision whether to apply the delayed discovery rule involves a balancing test. We balance the harm to a defendant of being sued on a stale claim against the harm to a plaintiff of being denied a remedy. *Tyson,* 107 Wash 2d 90. The goal is fundamental fairness. *Id.* Factors tipping the balance in favor of allowing a plaintiff benefit of the rule include: (1) the plaintiff's unawareness that the defendant breached a duty owed to her; (2) the plaintiff's trust in the defendant; (3) the defendant's sole control over the facts giving rise to the plaintiff's cause of action; and (4) the necessity of some triggering event which makes plaintiff aware of defendant's potential liability. *Id.*

G

We agree with those jurisdictions which initially consider as more weighty the harm to the plaintiff denied a remedy than the harm to the defendant confronted with a stale claim. See *Johnson, supra;*

*Evans, supra; Hammer, supra; Osland, supra.* The fact that sexual molestation of children exists, is extensive and leaves deep scars on its victims can no longer be seriously questioned. Adults who have repressed child sexual abuse bring to the courts unusual circumstances and injuries not readily conforming to the ordinary constructs on which periods of limitations are imposed. See *Petersen v Bruen,* 106 Nev 271, 281; 792 P2d 18 (1990).

In this case, it would be fundamentally unfair to bar plaintiff's claim. We should not penalize plaintiff for failing to pursue her claim earlier. Her allegation is that, because of repression of the abuse, she was unaware that defendants may have breached a duty owed to her. See *Nielsen,* 440 Mich 8-9. Considering the present broad acknowledgement that child sexual abuse can be suppressed, we believe that plaintiff's claims should not be sacrificed in favor of a policy discouraging stale claims. *Evans,* 216 Cal App 3d 1615; *Hammer,* 142 Wis App 2d 266; *Petersen,* 106 Nev 279.

We are concerned with the defendants' interest in being protected from litigation delayed through alleged repression of abuse. However, if plaintiff's allegations are well based, defendants had sole control over the facts giving rise both to plaintiff's cause of action and her repression of it. *Id.* Moreover, to protect parents or relatives at the expense of the children works an intolerable perversion of justice. See *Hammer,* 267. Finally, we believe that it will not encourage the wholesale filing of fraudulent claims to allow this plaintiff to bring a lawsuit at age fifty-four as opposed to age eighteen. *Id.*

H

Having determined that the discovery rule

should apply here, we must next determine whether the trial court properly granted summary disposition. As indicated earlier, a cause accrues under the discovery rule when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered the injury and its likely cause. *Moll,* 192 Mich App 731. To trigger running of the limitations period, the plaintiff need only have information that would lead a reasonable person to be aware, or after diligent inquiry to become aware, of (1) the injury and (2) a likely cause of the injury. *Id.* On the basis of the present record, we conclude that a question of fact exists regarding when plaintiff knew or should have known that she had a cause of action. Therefore, the trial court erred in granting summary disposition to defendants.

II

Even were the delayed discovery rule inapplicable under the facts of this case, we would nonetheless find summary disposition inappropriate. Someone under a disability has one year after the disability is removed to bring an action. MCL 600.5851; MSA 27A.5851. Insanity is a recognized disability. *Id.*

> [Insanity is a] condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependant on whether or not the person has been judicially declared to be insane. [MCL 600.5851(2); MSA 27A.5851(2).]

No cases prior to *Meiers-Post* required corroboration in order to apply the one-year grace period

provided under § 5851.[1] For the reasons stated above, we believe corroboration is an unnecessary restraint. Corroboration is an evidentiary question unrelated to the statute of limitations. *Tyson,* 232.

If reasonable minds could differ on whether an individual suffered from a mental condition, a question of fact exists for the jury. *Hogan v Allstate Ins Co,* 124 Mich App 465, 467-468; 335 NW2d 6 (1983). A jury question exists also if reasonable minds could differ on when the disability had been removed. On the facts of this case, reasonable minds could differ on both. Therefore, the trial court erred in granting summary disposition to defendants.

III

Defendants assert that plaintiff may not maintain her claim, because she failed to serve the complaint and summons in a timely fashion. MCL 600.5856; MSA 27A.5856. We conclude that the tolling provision in § 5856 does not affect plaintiff's action. The provision becomes relevant only when the statutory period of limitations has run, barring an action. See *Buscaino v Rhodes,* 385 Mich 474; 189 NW2d 202 (1971). Accepting plaintiff's allegations as true, the statutory period of limitations did not expire; therefore, § 5856 does not come into play. *Id.,* 481-482.

Reversed and remanded. We do not retain jurisdiction.

[1] A panel of this Court has recently held that § 5851 does not allow tolling of the general statute of limitations. It merely provides a year of grace. *Honig v Liddy,* 199 Mich App 1; 500 NW2d 745 (1993).

AUTO-OWNERS INSURANCE COMPANY v HOADLEY

HOADLEY v AUTO-OWNERS INSURANCE COMPANY

Docket Nos. 141580, 142854. Submitted June 3, 1993, at Lansing. Decided September 20, 1993, at 9:35 A.M.

Auto-Owners Insurance Company, the no-fault insurer of a motor vehicle involved in an accident with an uninsured motorcycle ridden by Ronald T. Hoadley, brought an action in the Genesee Circuit Court against Hoadley, seeking a declaration that it had no liability to Hoadley for personal protection insurance benefits under the no-fault act. Hoadley, who was not the title holder or registrant of the motorcycle, brought an action against Auto-Owners in the same court, seeking personal protection insurance benefits. The court, Valdemar L. Washington, J., granted summary disposition for Auto-Owners in both actions. Hoadley appealed in each case. The appeals were consolidated.

The Court of Appeals *held:*

MCL 500.3113(b); MSA 24.13113(b) provides that a person is not entitled to personal protection insurance benefits for accidental bodily injury if at the time of the accident the person was the owner or registrant of an uninsured motorcycle involved in the accident. The term "owner" is defined by MCL 500.3101(2)(g)(i); MSA 24.13101(2)(g)(i) as a person renting or having the use of a motor vehicle for a period longer than thirty days. "Owner" is also defined by MCL 500.3101(2)(g)(ii); MSA 24.13101(2)(g)(ii) as a person who holds the legal title to a vehicle. MCL 500.3101(2)(c); MSA 24.13101(2)(c) defines "motorcycle" as a vehicle with no more than three wheels and powered by a motor that exceeds fifty cubic centimeters in piston displacement, and MCL 500.3101(2)(e); MSA 24.13101(2)(e) defines "motor vehicle" to not include motorcycles. Under

REFERENCES

Am Jur 2d, Automobile Insurance §§ 340-356.

Effect of statutory exclusion, from personal injury protection of no-fault insurance coverage, of owner, registrant, or occupant of uninsured vehicle. 27 ALR4th 176.

What constitutes "motor vehicle" for purposes of no-fault insurance. 73 ALR4th 1053.

the specific definitions of the terms "owner," "motor vehicle," and "vehicle" in the no-fault act, only the person who holds legal title to an uninsured motorcycle may be denied personal protection insurance benefits for accidental bodily injury under MCL 500.3113(b); MSA 24.13113(b).

In this case, because Hoadley is not the owner of the motorcycle, he is not precluded by MCL 500.3113(b); MSA 24.13113(b) from seeking personal protection insurance benefits for the injuries he sustained.

Reversed.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — UNINSURED MOTORCYCLES.

Personal protection insurance benefits under the no-fault act are available to a rider of an uninsured motorcycle for accidental bodily injury sustained in an accident involving an insured automobile only if the rider does not hold legal title to the motorcycle (MCL 500.3101[2][c], [e], [g][i], [ii], 500.3113[b]; MSA 24.13101[2][c], [e], [g][i], [ii], 24.13113[b]).

*Charles F. Filipiak,* for Auto-Owners Insurance Company.

*David S. Leyton,* for Ronald T. Hoadley.

Before: REILLY, P.J., and SAWYER and P. J. CLULO,* JJ.

SAWYER, J. The circuit court granted summary disposition in favor of Auto-Owners Insurance Company in its action for declaratory judgment and in Ronald Hoadley's action for payment of personal protection insurance benefits under the no-fault act. Hoadley now appeals and we reverse.

Hoadley was operating a motorcycle when he became involved in an accident with a motor vehicle insured by Auto-Owners. The motorcycle at the time of the accident was not insured and was

* Circuit judge, sitting on the Court of Appeals by assignment.

titled in Hoadley's mother's name.[1] Hoadley sought the payment of personal protection insurance benefits under MCL 500.3114(5); MSA 24.13114(5). Auto-Owners denied coverage under the provisions of MCL 500.3113(b); MSA 24.13113(b), which denies personal protection insurance benefits to the owner or registrant of a motor vehicle or motorcycle who has failed to have the required insurance coverage. That statute provides in pertinent part as follows:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The *person was the owner* or registrant *of a* motor vehicle or *motorcycle* involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect. [MCL 500.3113; MSA 24.13113. Emphasis added.]

It is undisputed that the insurance required under § 3103 was not in effect. It is disputed, however, whether Hoadley comes within the definition of "owner" of a motorcycle.

The no-fault act, under MCL 500.3101(2)(g); MSA 24.13101(2)(g), defines the term "owner" as follows:

> (2) As used in this Chapter:
>
> * * *
>
> (g) "Owner" means any of the following:
>
> (i) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (ii) A person who holds the legal title to a

[1] Hoadley had previously held title to the motorcycle, but had transferred title to his mother approximately one year before the accident in repayment of a debt.

vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.

(iii) A person who has the immediate right of possession of a motor vehicle under an installment sale contract.

Auto-Owners argues that Hoadley is an owner of the motorcycle, although title to the motorcycle was held by his mother, because he had use of the motorcycle for a period greater than thirty days, thus coming within the definition of "owner" under § 3101(2)(g)(i). We disagree. That definition, as well as the definition contained in subdivision iii, refers to the owner of a "motor vehicle," while the definition of "owner" in subdivision ii refers to the person who holds legal title to a "vehicle." Section 3101(2) also defines the terms "motorcycle" and "motor vehicle":

(c) "*Motorcycle" means a vehicle* having a saddle or seat for the use of the rider, designed to travel on not more than 3 wheels in contact with the ground, which is equipped with a motor that exceeds 50 cubic centimeters piston displacement. The wheels on any attachment to the vehicle shall not be considered as wheels in contact with the ground. Motorcycle does not include a moped, as defined in section 32b of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.32b of the Michigan Compiled Laws.

* * *

(e) "*Motor vehicle" means a vehicle,* including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels. *Motor vehicle does not include a motorcycle* or a moped, as defined in section 32b of Act No. 300 of the Public Acts of 1949, being section 257.32b of the Michigan

> Compiled Laws. Motor vehicle does not include a farm tractor or other implement of husbandry which is not subject to the registration requirements of the Michigan vehicle code pursuant to section 216 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.216 of the Michigan Compiled Laws.

In reading these definitions, it can be seen that the term "vehicle" is not interchangeable with "motor vehicle." Rather, "vehicle" is a broad category of objects that includes both motorcycles and motor vehicles. "Motor vehicle" is, on the other hand, a narrower category of objects that specifically excludes motorcycles by definition. Thus, while both motorcycles and motor vehicles are vehicles, a motorcycle is not a motor vehicle.

Returning to the definition of "owner" under § 3101(2)(g), the Legislature employs both the term "vehicle" and the term "motor vehicle" in its definitions. Specifically, two of the definitions of "owner," that relating to persons renting a motor vehicle or having use for a period greater than thirty days and persons who have immediate right of possession of a motor vehicle under a sales contract, involve only "motor vehicles." The remaining definition, referring to persons who hold legal title to a vehicle, employs the broader term "vehicle." Inasmuch as the Legislature had previously within the same section defined "motor vehicles" as being a subset of the category of "vehicles," we must assume that the Legislature understood that the two terms were not interchangeable. Accordingly, we must also conclude that the Legislature intentionally used the term "motor vehicle" in two definitions of the term "owner," while using the broader term "vehicle" in the remaining definition of owner. Thus, the Legislature must have intended one definition of owner to

apply to all vehicles, while the remaining two definitions were only to apply to motor vehicles. Therefore, it must also be concluded that only one of the definitions of "owner" applies to motorcycles, namely the definition contained in subdivision ii, which refers to persons who hold legal title to a vehicle. Accordingly, while persons other than the individual who holds legal title to a motor vehicle may be the owner of a motor vehicle under the no-fault act, only those persons who hold legal title to a motorcycle are owners of the motorcycle under the no-fault act.

Because only the person who holds legal title to a motorcycle is the owner of that motorcycle under the no-fault act, it necessarily follows that Ronald Hoadley was not an owner of the motorcycle because legal title to the motorcycle was held by his mother. Returning to § 3113(b), only a person who is the owner or registrant of a motorcycle is excluded from receiving personal protection insurance benefits for the failure to maintain the insurance required under the act. Because Ronald Hoadley is neither the owner nor the registrant of the motorcycle, he is not precluded under § 3113(b) from obtaining personal protection insurance benefits.

Auto-Owners argues that we should read the no-fault act in pari materia with the Vehicle Code in defining the term "owner" and that, if we do so, Ronald Hoadley comes within the definition of owner of the motorcycle. There are certainly cases arising under the no-fault act in which this Court will look to the Vehicle Code for guidance in determining the meaning of a term used in the no-fault act or in an insurance policy. See, e.g., *Stanke v State Farm Mutual Automobile Ins Co*, 200 Mich App 307; 503 NW2d 758 (1993) (use of the definition of "owner" under the Vehicle Code,

MCL 257.37[a]; MSA 9.1837[a], in interpreting the definition of a non-owned car under an insurance policy).

In the case at bar, however, the no-fault act itself provides specific definitions of the terms involved. Specifically, the Legislature chose to limit the definition of "owner" where the person has use of the vehicle for more than thirty days to those circumstances involving motor vehicles only, while elsewhere providing a definition of the word "owner" that applies to all vehicles. The Legislature provided a specific definition of the word "owner" and specifically chose which portions of that definition were to apply to motor vehicles only and which portions of the definition were to apply to all vehicles, including motorcycles. It would therefore be inappropriate to look to the Vehicle Code in order to apply a definition of "owner" to motorcycles that the Legislature specifically limited to motor vehicles, not including motorcycles, in its definitions under the no-fault act. In other words, while reference to the Vehicle Code may be used to clarify the meaning of a term used in the no-fault act, it cannot be used to change the meaning of a term specifically defined in the no-fault act.

Finally, Auto-Owners also argues that this interpretation of the word "owner" as applied to motorcycles would allow motorcyclists to avoid the requirement to procure insurance without losing the right to personal protection insurance benefits merely by transferring title of the motorcycle to another family member. This is true. However, it is for the Legislature, and not this Court, to determine whether and to what extent to penalize motorcyclists for failure to procure insurance. It would be inappropriate for us to presume that this represents an unintended result by the Legislature

and change the definitions carefully crafted by the Legislature. The Legislature has clearly treated motorcycles differently from motor vehicles under the no-fault act. Therefore, reasoning and policy that apply to motor vehicles do not necessarily translate to motorcycles.

Perhaps this "loophole" was not intended by the Legislature; perhaps, on the other hand, the Legislature simply chose not to penalize motorcyclists as harshly as motor vehicle drivers with respect to the failure to maintain the required insurance coverage in keeping with the different treatment of motorcycles and motor vehicles under the no-fault act. If the latter is the case, then for us to change the statutory definitions would improperly usurp the power of the Legislature. If the former is the case, then we trust that the Legislature will move to close the "loophole" if it deems it advisable. In any event, that represents a decision for the Legislature to make, not this Court.

For the above reasons, we conclude that the trial court erred in granting summary disposition in favor of Auto-Owners. Because Ronald Hoadley did not hold legal title to the motorcycle, he was not an owner of the motorcycle under the no-fault act and, therefore, was not prevented from receiving personal protection insurance benefits under MCL 500.3113(b); MSA 24.13113(b).

Reversed. Appellant may tax costs.

ROTH v ROTH

Docket No. 138031. Submitted March 3, 1993, at Lansing. Decided September 20, 1993, at 9:40 A.M.

Gertrude A. Roth obtained a divorce from Irvin G. Roth in the Macomb Circuit Court, Kenneth N. Sanborn, J., on December 13, 1983. The plaintiff was awarded an interest in the defendant's defined benefit pension plan, which was fully vested, but she would not receive any benefits until the defendant received his. The plaintiff was not awarded survivorship rights. On August 17, 1990, the plaintiff filed a motion for entry of a qualified domestic relations order and for addition of preretirement and survivorship rights to her pension rights. The defendant died on October 23, 1990, before receiving any pension benefits. The court, Kenneth N. Sanborn, J., thereafter denied the motion, finding no valid reason to amend the judgment of divorce and that the Retirement Equity Act of 1984, PL 98-397, 98 Stat 1433, which specifically requires retirement plans to provide a divorced spouse preretirement and postretirement survivorship benefits if ordered by a court, does not apply retroactively. The plaintiff's motion for rehearing was denied, George E. Montgomery, J. The plaintiff appealed.

The Court of Appeals *held:*

1. There are no extraordinary circumstances warranting modification of the judgment of divorce. Given the state of the law and the language of the pension plan in 1983, the plaintiff knew that a former spouse could not acquire survivorship rights in the defendant's pension, and the parties did not intend the plaintiff to have survivorship rights.

2. Even if extraordinary circumstances did exist warranting modification of the judgment of divorce, the plaintiff's motion for entry of the qualified domestic relations order was not filed within the reasonable time requirement of MCR 2.612(C)(2). The plaintiff's delay of five years after the Retirement Equity Act of 1984 became applicable before seeking modification of the judgment was unreasonable.

3. Because no grounds exist warranting modification of the judgment of divorce, the plaintiff was not entitled to entry of a

qualified domestic relations order that provides her with survivorship rights in the defendant's pension plan.

4. Denial of the motion for rehearing was proper. The trial court was aware before its ruling that defense counsel had misrepresented to the court that the defendant had remarried.

Affirmed.

*Serra & Isopi, P.C.* (by *Susan Isopi*), for the plaintiff.

Before: MICHAEL J. KELLY, P.J., and MARILYN KELLY and CONNOR, JJ.

MARILYN KELLY, J. This case addresses the question whether a person divorced before 1985 can be awarded direct survivorship benefits in a former spouse's vested pension plan absent provision in the original judgment. Plaintiff appeals from a Macomb Circuit Court order denying her motion for a qualified domestic relations order (QDRO) containing survivorship benefits and for modification of her judgment of divorce. On appeal, plaintiff argues that the court erred in failing to amend the divorce judgment and in refusing to enter the QDRO. She asserts, also, that the court erred in denying her motion for rehearing, because it was misled by defendant's attorney. We affirm.

## THE FACTS

The parties were divorced on December 13, 1983, following a twenty-three-year marriage. Plaintiff was awarded a portion of defendant's pension. Specifically, the judgment provided she receive:

C. A 50% interest in the present value of defendant's pension plan with the Sheet Metal Workers Local Union No. 80, subject to the terms and conditions set forth herein.

1. Plaintiff shall have no interest in any future

contribution made by defendant or his employer to defendant's pension plan subsequent to the date of this Judgment.

2. Plaintiff shall be bound by all of the terms of defendant's pension plan and shall accept distribution according to the terms thereof.

3. Plaintiff's interest in defendant's pension plan is limited to her right to receive distribution in the future as set forth herein.

4. Any taxes paid by defendant upon distribution which are attributable to plaintiff's interest as set forth herein will result in a dollar-for-dollar reduction in the amount due plaintiff hereunder.

5. Plaintiff shall receive monthly payments of her interest in defendant's pension plan at such time as defendant begins to receive his payments. Plaintiff's monthly receipts shall be calculated in accordance with the following formula:

$$[\$470.21 \times 50\%] \times \frac{23}{\text{total no. of years of employment through SMU Local No. 80}}$$

Defendant's pension plan was a defined benefit plan. Defendant was one hundred percent vested at the time of the divorce. He was eligible to receive an early retirement pension beginning April 1, 1990, and a normal retirement pension beginning April 1, 1992.

On August 17, 1990, plaintiff filed a "Motion for Entry of a Qualified Domestic Relations Order and for Addition of Pre-retirement and Survivorship Rights to Plaintiff's Pension Rights." She filed the motion after having served the divorce judgment on the pension fund administrator and being informed that she was not entitled to survivorship rights. Plaintiff averred that, before enactment of the Retirement Equity Act (REA) of 1984, an ex-spouse was not entitled to receive survivorship rights in a former spouse's pension plan. PL 98-

397, 98 Stat 1433. Since enactment of the REA, QDROs routinely contain provisions designating an ex-spouse as a surviving spouse, entitling him or her to survivorship rights in a former spouse's pension.

Defendant argued that plaintiff's motion was an attempt to modify the divorce judgment without legally justifiable grounds. Defense counsel alleged that defendant's second wife would be substantially and materially prejudiced if that were accomplished. He argued, also, that the REA may be applied only prospectively; therefore, it has no effect on the parties' divorce judgment which was entered before its enactment.

Defendant died on October 23, 1990, after oral argument on plaintiff's motion but before the trial court's ruling. Defendant had not remarried at the time of his death and had drawn none of his pension. Plaintiff filed a motion to add the estate and pension fund as parties and to enjoin the pension fund from paying benefits. The court entered a temporary restraining order, prohibiting the pension fund from distributing payments until ordered. Neither the estate nor the pension fund was added as a party.

The trial judge denied plaintiff's motion for entry of a QDRO and for modification of the divorce judgment. He concluded that the REA cannot be applied retroactively. Moreover, he found, nothing in the consent divorce judgment reveals any intent by the parties to provide plaintiff with survivorship rights. The trial judge found no valid reasons to amend the divorce judgment.

Plaintiff filed a motion for rehearing. She argued that the trial court was misled by defense counsel's representation that defendant had remarried. The motion was denied.

AN OVERVIEW OF ERISA AND REA

Congress passed the Employee Retirement Income Security Act (ERISA) of 1974 in order to provide better protection for beneficiaries of private employee pension plans. *Rohrbeck v Rohrbeck,* 318 Md 28; 566 A2d 767 (1989), citing PL 93-406, 88 Stat 829. ERISA contained an anti-alienation provision which precluded plan participants from assigning or alienating their benefits under pension plans subject to the act. See 29 USC 1056(d)(1); 26 USC 401(a)(13). The statute also contained a preemption provision, designed to establish pension plan regulation as exclusively a federal concern. *Rohrbeck,* 31, citing 29 USC 1144; *Pilot Life Ins Co v Dedeaux,* 481 US 41, 46; 107 S Ct 1549; 95 L Ed 2d 39 (1987).

The combination of anti-alienation and preemption provisions eventually raised a question as to the validity of state domestic relations orders requiring payment of pension benefits to ex-spouses, ineligible plan beneficiaries. *Rohrbeck, supra.* Apparently, the question had not been anticipated by Congress. *Id.* It was eventually answered by enactment of the REA. Legislative history of the REA provides:

> The bill clarifies the spendthrift provisions of the Internal Revenue Code by providing new rules for the treatment of certain domestic relations orders. The bill creates an exception to the ERISA preemption provision with respect to these orders. The bill provides procedures to be followed by a plan administrator and an alternate payee (a child, spouse, or former spouse of a participant) with respect to domestic relations orders.
>
> Under the bill, if a domestic relations order requires the distribution of all or a part of a participant's benefits under a qualified plan to an

> alternate payee, then the creation, recognition, or assignment of the alternate payee's right to the benefits is not considered an assignment or alienation of benefits under the plan if and only if the order is a qualified domestic relations order. Because rights created, recognized, or assigned by a qualified domestic relations order, and benefit payments pursuant to such an order, are specifically permitted under the bill, State law providing for these rights and payments under a qualified domestic relations order will continue to be exempt from Federal preemption under ERISA. [*Rohrbeck*, 33, citing H Rep No 655 at 18; S Rep No 575 at 19; US Code Cong & Admin News 2547, 2565 (1984).]

Before enactment of the REA, ERISA did not allow an ex-spouse to obtain survivorship rights in a former spouse's pension fund. Now, the REA specifically requires retirement plans to provide a divorced spouse pre- and post retirement survivorship benefits if ordered by a court. 26 USC 401(a)(11). If a married vested participant dies before payment of an annuity commences, a qualified preretirement survivor annuity can be provided to the surviving spouse. 26 USC 401(a)(11). A former spouse may be designated as a surviving spouse under a QDRO and receive the same survivorship benefits. 26 USC 414(p)(5).

> A preretirement survivor annuity provides an annuity to a surviving spouse if the participant dies before retirement. If an alternate payee is not designated as the surviving spouse under a plan's preretirement survivor annuity and the participant dies before retirement, the alternate payee's entire interest is forfeited. [2 Michigan Family Law (3d ed), § 12.28, p 12-35.]

The REA made QDROS a limited exception to ERISA's anti-alienation provision. 26 USC 401, 404; 29 USC 1056(d). It is applicable to plan years

beginning after December 31, 1984. The parties' divorce was final before that date. However, a plan administrator can treat any pre-1985 domestic relations order as a QDRO, even if it does not meet the statutory requirements. *In re Eichelberger,* 100 Bankr 861, 866 (SD Tex, 1989), citing § 303(d)(2) of REA.

In this case, the plan administrator did treat the parties' divorce judgment as a QDRO. However, since the judgment did not provide for survivorship rights, the plan administrator refused to extend them to plaintiff.

THE DIVORCE JUDGMENT CANNOT BE INTERPRETED TO PROVIDE SURVIVORSHIP RIGHTS

Even if we applied the REA amendments retroactively, plaintiff would be entitled to entry of the QDRO she seeks only if the divorce judgment were modified. Modification would be necessary because, as written, the judgment precludes distribution of pension benefits to plaintiff until defendant begins to and only for so long as he does receive them. Defendant died before drawing any pension benefits.

Plaintiff argues that the court should exercise its discretion to modify the divorce judgment, because extraordinary circumstances exist and defendant's substantial rights will not be detrimentally affected. See *Tomblinson v Tomblinson,* 183 Mich App 589, 594-595; 455 NW2d 346 (1990), citing MCR 2.612(C)(1)(f).

We find no extraordinary circumstances warranting modification of the divorce judgment. Given the state of the law and the language of defendant's pension plan in 1983, plaintiff knew a former spouse could not have acquired survivorship rights in defendant's pension. Having weighed

that information in the balance, we refuse to allow modification of the divorce judgment to include survivorship rights; they could not reasonably have been intended by the parties. Granted that plaintiff's pension award in this case was potentially illusory. However, plaintiff is charged with the knowledge that the mortality tables showed defendant was likely to predecease her. In order to fully secure her rights to the pension value awarded her, plaintiff would have had to negotiate an alternative payment method to take effect if defendant predeceased her.

Even if extraordinary circumstances did exist warranting modification of the divorce judgment, plaintiff's motion for entry of the QDRO did not fall within the "reasonable time" requirement of MCR 2.612(C)(2). See *Tomblinson,* 595. As stated earlier, the REA is applicable to plan years beginning after December 31, 1984; plaintiff did not file her motion until August, 1990. She offers no explanation for her delay in seeking a modification. In this case, allowing a five year time lapse was unreasonable.

Since no grounds exist warranting modification of the divorce judgment, plaintiff is not entitled to entry of a QDRO which provides her with survivorship rights in defendant's pension plan.

### THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR REHEARING

Plaintiff argues that the trial court was misled by defense counsel's representation that defendant had remarried. However, plaintiff filed a supplemental brief prior to the issuance of the trial court's opinion, informing it that defendant was not married at the time of his death. Therefore, the trial court is presumed to have been notified of defendant's counsel's misrepresentation when ruling on plaintiff's motion for rehearing.

We find no error in the court's denial of the motion because, in any event and most regrettably, the law affords plaintiff no relief from the terms of her 1983 agreement.

Based on our disposition of these issues, plaintiff's remaining issues have been rendered moot.

Affirmed.

CONNOR, J., concurred.

MICHAEL J. KELLY, P.J., concurred in the result only.

DAVIS v WAYNE COUNTY SHERIFF

Docket No. 122594. Submitted July 7, 1993, at Detroit. Decided September 20, 1993, at 9:45 A.M.

Diana Davis, for herself and as next friend of her minor children, Danielle Y. and Marc A. Davis, and Tod A. Wilson, for himself and as personal representative of the estate of his deceased wife, Kimberly S. Wilson, brought an action in the Wayne Circuit Court against Wayne County Sheriff Robert Ficano. The plaintiffs alleged that a shooting rampage, in which Kimberly Wilson died, Diana Davis sustained injuries that rendered her a paraplegic, and Tod Wilson was seriously injured, by Marc Davis, estranged husband of Diana Davis and a Wayne County sheriff's deputy, while off duty deprived them of their federal constitutional rights as protected by 42 USC 1983. The plaintiffs claimed that the defendant failed to train and supervise employees in the use and control of department-issued weapons; failed to provide adequate psychological and social counseling programs specific to the stress suffered by police officers; permitted, encouraged, or otherwise failed to disallow a departmental "code of silence" among employees that interfered with the monitoring and correction of employee misconduct; and failed to supervise and select employees adequately through periodic evaluations and other screening methods. Following a jury trial in which the court, J. Phillip Jourdan, J., denied motions by the defendant for a directed verdict and judgment notwithstanding the verdict, a judgment consistent with the verdict was entered in favor of, and damages were awarded to, Diana Davis in her individual capacity and Tod Wilson in his individual and representative capacities. The defendant appealed, and the plaintiffs cross appealed.

The Court of Appeals *held:*

1. Liability under 42 USC 1983 may be imposed on a police

REFERENCES

Am Jur 2d, Civil Rights §§ 16, 20.

Defense of good faith in action for damages against law enforcement official under 42 USCS sec. 1983, providing for liability of person who, under color of law, subjects another to deprivation of rights. 61 ALR Fed 7.

agency or its director for an officer's off-duty conduct that results in death or bodily injury to citizenry only where that conduct is directly related to a policy adopted, or not adopted, with deliberate indifference to the rights of citizens. No liability under § 1983 may be imposed where the agency's policy, or lack of policy, merely reflects a negligent failure to train or supervise its officers. The record in this case fails to indicate a direct link between the shooting rampage and the defendant's alleged failure to train, supervise, or otherwise screen employees. Assuming that such a link exists, the defendant's alleged failures constituted only negligence, not deliberate indifference. Accordingly, no liability under § 1983 can be imposed on the defendant, and the trial court erred in denying the defendant's motions for a directed verdict and judgment notwithstanding the verdict.

2. The trial court did not abuse its discretion in refusing to allow the plaintiffs to treat former Wayne County Sheriff William Lucas as an adverse witness under MCL 600.2161; MSA 27A.2161. Because Lucas was no longer connected with the sheriff's department at the times pertinent to this action, the statute did not apply to him.

3. The trial court did not abuse its discretion in excluding as irrelevant the testimony of a criminal suspect who allegedly was mistreated by Marc Davis. The plaintiffs' offer of proof with respect to that proffered witness did not indicate that the witness could establish any wrongdoing by Marc Davis that was attributable to the defendant.

Reversed and remanded for entry of judgment in favor of the defendant.

CIVIL RIGHTS — VIOLATIONS BY POLICE AGENCIES — TRAINING AND SUPERVISION OF OFFICERS — DELIBERATE INDIFFERENCE.

Liability under 42 USC 1983 may be imposed on a police agency or its director for an officer's off-duty conduct that results in death or bodily injury to citizenry only where that conduct is directly related to a policy adopted, or not adopted, with deliberate indifference to the rights of citizens; no liability may be imposed where the agency's policy, or lack of policy, merely reflects a negligent failure to train or supervise its officers.

*Hugh M. Davis, Jr.,* for Diana Davis.

*Robert Horvath,* for Tod A. Wilson.

*Saul A. Green,* Corporation Counsel, *Mary S.*

*Rowan,* Assistant Counsel, and *Garan, Lucow, Miller, Seward, Cooper & Becker* (by *James G. Gross, Mary T. Nemeth,* and *Rosalind Rochkind*), for Wayne County Sheriff Robert Ficano.

Before: DOCTOROFF, C.J., and MICHAEL J. KELLY and GRIBBS, JJ.

DOCTOROFF, C.J. Following a lengthy jury trial, plaintiffs were awarded various amounts of money in relation to their claims against the Wayne County Sheriff, Robert Ficano (hereafter the defendant), premised upon alleged violations of their constitutional rights as protected by 42 USC 1983.[1] Defendant appeals the June 13, 1989, judgment incorporating the terms of the verdict, and plaintiffs cross appeal, each raising a number of issues. We reverse and remand to the trial court for entry of judgment in favor of defendant.

The facts giving rise to plaintiffs' claims are tragic and essentially undisputed.[2] Marc Davis (hereafter Davis) was employed by the County of Wayne as a deputy sheriff under the supervision of defendant. His wife, Diana Davis (hereafter Diana), was also employed by Wayne County under defendant's supervision and was nearing completion of the deputy sheriff training academy. Diana and Davis had been experiencing marital difficulties and were separated at the time of the incident. Diana and her two children were living with

[1] Throughout this opinion, we will use "defendant" to refer exclusively to Robert Ficano, who was sued in his official capacity as sheriff of Wayne County. See *Monell v New York City Dep't of Social Services,* 436 US 658, 691, n 54; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Where appropriate, the other parties that were named as defendants will be referred to in the specific manner designated in the opinion.

[2] Throughout this opinion, we will use "plaintiffs" to refer to all of the parties to the 42 USC 1983 claim. Where appropriate, we will designate the individual plaintiffs by their names as specified in the opinion.

her half-sister, Kimberly Wilson (hereafter Kim), and Kim's husband, Tod Wilson (hereafter Tod). While off duty on the night of September 18, 1983, Davis came to the Wilson residence. An argument between Davis and Diana ensued. At one point, a Garden City police officer was dispatched to the scene to investigate the disturbance. After Diana assured the officer that she was not in danger, the officer left the scene.

About a half hour later, the argument again became heated. Tod and Kim also became engaged in the argument and attempted to offer Diana assistance. Testimony revealed that Davis had opened the trunk of Diana's car and began throwing her personal belongings on the Wilsons' driveway and front yard. Diana made some comments to the effect that she would take everything Davis had, including his job. At this point, Davis produced his service revolver and began shooting. As a result of the shooting rampage, Kim was killed, Tod was seriously wounded, and Diana was rendered a paraplegic. Davis was later convicted of various crimes related to the shooting, and all of the victims filed this action claiming, among other things, that they had been deprived of their constitutional rights as protected under 42 USC 1983.

Initially, plaintiffs named Wayne County and defendant jointly, arguing common-law negligence. However, following a motion for summary disposition under MCR 2.116(C)(7), the court dismissed Wayne County pursuant to the doctrine of governmental immunity. The court also dismissed the negligence count against defendant on the same ground. Davis was initially named as a defendant in the suit, but was dismissed before trial, apparently pursuant to the provisions of a settlement. Plaintiffs proceeded to trial against defendant solely upon the theory that defendant violated

their constitutional rights by adopting and maintaining departmental policies that precluded defendant from recognizing the danger attendant to Davis' continued possession and use of a firearm. Following a four-week trial, the jury awarded Diana $803,416, Kim's estate $651,752, Tod $50,000, and no recovery for the Davis' children.[3] We reverse the verdict and remand for entry of judgment in favor of defendant.

Pursuant to its terms, 42 USC 1983 provides a remedy against any person who, under color of state law, deprives another of the rights protected by the Constitution. *Collins v Harker Heights,* 503 US —; 112 S Ct 1061, 1066; 117 L Ed 2d 261 (1992); *Monell v New York City Dep't of Social Services,* 436 US 658, 690; 98 S Ct 2018; 56 L Ed 2d 611 (1978). The statute creates no substantive rights, but instead merely supplies a remedy for deprivation of rights created by other laws. *Graham v Connor,* 490 US 386, 393-394; 109 S Ct 1865; 104 L Ed 2d 443 (1989); *York v Detroit (After Remand),* 438 Mich 744, 757-758; 475 NW2d 346 (1991). Liability under this section must be premised upon more than the fact that the municipality employs a tortfeasor. *Monell, supra* at 691. In other words, respondeat superior is not a sufficient theory upon which to premise liability. *Id.*; Schuck, *Municipal liability under Section 1983: Some lessons from tort law and organization theory,* 77 Geo L J 1753 (1989).

A cause of action under § 1983 is stated where a plaintiff shows (1) that the plaintiff was deprived of a federal right, and (2) that the defendant

[3] The children's claims were obviously derivative because they were not physically injured or present at the time of the shooting. On cross appeal, the lack of recovery for the children is also raised as an issue. However, for reasons that will become apparent, the argument is moot.

deprived the plaintiff of that right while acting under color of state law. *Mollett v Taylor,* 197 Mich App 328, 344; 494 NW2d 832 (1992). In order to establish such a claim against a municipality or an agency thereof, the plaintiff must show that a policy or custom tantamount to a deliberate indifference for the constitutional rights of others actually caused the violation. *Canton v Harris,* 489 US 378, 381; 109 S Ct 1197; 103 L Ed 2d 412 (1989); *Monell, supra* at 691 and n 5; *York, supra* at 758. Our Supreme Court has held that deliberate indifference requires something more than mere negligence. *York, supra* at 757 (relying on *Estelle v Gamble,* 429 US 97, 104; 97 S Ct 285; 50 L Ed 2d 251 [1976], reh den 429 US 1066 [1977]).

Defendant's first contention is that plaintiffs failed to state a claim under § 1983 because Davis was acting outside the scope of his employment and, thus, not under color of state law when he shot the victims. It is true that in order to impose liability there must be a deprivation under color of state law. *Adickes v S H Kress & Co,* 398 US 144, 150; 90 S Ct 1598; 26 L Ed 2d 142 (1970). However, defendant's argument that Davis was not acting under color of state law when he shot the victims is not dispositive of the claim against defendant.

Defendant is correct that, ultimately, plaintiffs' alleged violations resulted from Davis' shooting the victims while off duty. However, Davis was already dismissed from the suit and was not named as a defendant in the § 1983 action. Instead, plaintiffs' theory of recovery under § 1983 was premised upon the assertion that Davis' conduct was directly attributable to the policies adopted or not adopted by defendant. Specifically, plaintiffs' claim was based on the notion that defendant should have recognized Davis' propensity for violence and should have discharged him

from his position as a deputy or at least taken away his service revolver.

A recent federal decision offers guidance in this regard. In *Gibson v Chicago,* 910 F2d 1510 (CA 7, 1990), a police officer who had been declared unfit for duty and stripped of his powers as an officer shot and killed Gibson with his department-issued revolver. The federal appeals court concluded that it was proper for the trial court to summarily dismiss the police officer from the § 1983 action because he was not acting under color of state law when he shot Gibson. *Id.* at 1519. Nonetheless, the court reversed the trial court's decision to summarily dismiss the City of Chicago from the § 1983 action because the plaintiff had alleged that the city had adopted policies that also contributed to the violations. The court concluded that there were sufficient factual allegations in the plaintiff's complaint to survive summary disposition even though it was clear that the police officer was acting without lawful authority when the shooting occurred. *Id.* at 1519-1523. See also *Stoneking v Bradford Area School Dist,* 882 F2d 720 (CA 3, 1989), cert den sub nom *Smith v Stoneking,* 493 US 1044 (1990).

As in *Gibson,* plaintiffs' claim against defendant is based upon defendant's formulation of policy regarding the operation of the department and supervision of officers. Defendant does not, and indeed cannot, argue that the formulation of policy within the department is done outside the color of state law. See *Gibson, supra* at 1519 ("[T]he municipality itself is the state actor and its action in maintaining the alleged policy at issue supplies the 'color of law' requirement under § 1983."). Therefore, we agree with plaintiffs that defendant's assertion that Davis was not acting under color of state law does not automatically imply

that defendant is absolved from § 1983 liability. We do not believe that it is appropriate to mesh the "color of law" issue with the causation issue. Accordingly, while we agree with defendant's argument that the violations asserted by plaintiffs were not *caused by the policies* adopted by defendant, we address that argument separately. For purposes of addressing the "color of law" issue, we assume that the policies caused the violations at issue. See *Stengel v Belcher,* 522 F2d 438, 441 (CA 6, 1975). But see *Bonsignore v New York,* 683 F2d 635 (CA 2, 1982).

Defendant's next argument is that the court should have granted a directed verdict or judgment notwithstanding the verdict because plaintiffs, as a matter of law, failed to present sufficient evidence to support a cause of action under § 1983 against the department. At the conclusion of plaintiffs' proofs, defendant moved for a directed verdict and, following the verdict, defendant moved for a judgment notwithstanding the verdict. The court denied both motions.

In evaluating a directed verdict or a judgment notwithstanding the verdict, we are obligated to consider the evidence in a light most favorable to the nonmoving party. *Bradley v Philip Morris, Inc (On Remand),* 199 Mich App 194, 197; 501 NW2d 246 (1993). If the evidence is such that reasonable minds could differ, then judgment notwithstanding the verdict is improper. *Constantineau v DCI Food Equipment, Inc,* 195 Mich App 511, 515; 491 NW2d 262 (1992). In this case, considering the evidence presented in a light most favorable to plaintiffs, we are persuaded that the record, as a matter of law, was insufficient to support a conclusion that reasonable minds could differ regarding whether plaintiffs suffered a § 1983 violation caused by a policy of indifference adopted by defendant. Ac-

cordingly, we reverse the verdict in favor of plaintiffs and remand for entry of judgment in favor of defendant.

Perhaps as much as any area of § 1983 jurisprudence, the liability attached in conjunction with a municipal policy or custom has created confusion and controversy in the courts. Shuck, *supra* at 1753-1754. In *Canton, supra,* the Supreme Court attempted to clarify the parameters of policy-related § 1983 liability, this time in the context of a municipality's failure to adequately train its police officers. *Canton, supra* at 382. The Court acknowledged that there are situations where a municipality's failure to train its employees can provide a basis for liability under § 1983. *Id.* at 387. Recognizing the direct causal connection that must exist between the policy or failure to train and the violation, the Court concluded that the failure to train must reflect a " 'deliberate' or 'conscious' choice" to follow a certain course of action that results in a violation. *Id.* at 389. The Court further stated that the plaintiff must demonstrate that the need for training is so obvious, and the inadequacy so likely to cause a violation, that an inference of deliberate indifference may be made. *Id.* at 390; *Barber v Salem,* 953 F2d 232, 236 (CA 6, 1992).

In *Oklahoma City v Tuttle,* 471 US 808, 824; 105 S Ct 2427; 85 L Ed 2d 791 (1985), Justice Rehnquist (joined by three other justices), wrote:

> But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

In a footnote, Justice Rehnquist went on to suggest that there must be an "affirmative link" between

the alleged training inadequacies and the violation at issue before liability could be found. *Id.* at n 8. While not all federal courts have expressly adopted the "affirmative link" requirement, the Sixth Circuit has cited it with approval. See *Lewis v Irvine,* 899 F2d 451, 456 (CA 6, 1990). Regardless of how the causation element is described, it is clear that there must be some connection between the failure to train and the violation that permits an inference of deliberate indifference. *Collins,* 112 S Ct 1068.

Just as our Supreme Court applied the *Canton* "deliberate indifference" standard to a deprivation of rights in the context of inmate suicide, *York, supra* at 759-760, we believe that liability for an officer's off-duty conduct that results in death or bodily injury to citizenry may only be imposed where that officer's conduct is directly related to a policy, or lack of policy, adopted, or not adopted, with deliberate indifference to the rights of citizens. Accordingly, no § 1983 liability should be imposed where the department's policy or lack of policy merely reflects a negligent failure to train or supervise its employees. *Id.*

Given the conclusion that the need for training or other departmental action must be obvious, *Canton, supra* at 390, we believe that there must be some knowledge on the part of the defendant that an off-duty officer is likely to commit a violation and, yet, the defendant fails to take steps to prevent that officer from so doing. *York, supra* at 757 ("Deliberate indifference contemplates knowledge, actual or constructive, and a conscious disregard of a *known* danger." [emphasis supplied].); *Hays v Jefferson Co,* 668 F2d 869, 874 (CA 6, 1982). It is against this backdrop that we turn to the allegations of § 1983 liability in this case.

Essentially, plaintiffs relied upon four separate

areas of department policy or inaction in asserting their claims for violation of § 1983. First, plaintiffs claimed that defendant failed to train and supervise employees in the use and control of their department-issued weapons. As part of this assertion, plaintiffs offered substantial proofs regarding defendant's twenty-four-hour duty policy, during which deputies were to carry their service revolvers. Second, plaintiffs claimed that defendant failed to provide adequate psychological and social counseling programs specific to the unique stress suffered by police officers. Third, plaintiffs claimed that defendant permitted, encouraged, or otherwise failed to disallow a departmental "code of silence" that interfered with the ability to properly monitor and correct misconduct of departmental employees. Finally, plaintiffs claimed that defendant failed to adequately supervise and select employees through the use of periodic written evaluations and other screening methods.

Plaintiffs relied on specific instances of alleged "misconduct" committed by Davis, including but not limited to the following: (1) that Davis received a reckless driving ticket before he was hired; (2) that Davis was seen coming out of the kitchen of the Detroit House of Corrections with blood on his hands and pants, which Davis explained as chicken blood; (3) that Davis intervened in a fight between a couple in a restaurant while he was off duty; (4) that Davis was seen by a deputy entering an inmate's cell and that the deputy heard sounds indicative of the prisoner being beaten; (5) that a deputy noticed what appeared to be a bullet hole in his locker and briefcase and that Davis offered to pay for the damage, suggesting that Davis was responsible for discharging his weapon in the locker room; (6) that, after an inmate punched Davis, the officers had to separate Davis from the

inmate to keep him from retaliating; (7) that a deputy saw Davis talking to another deputy in the cafeteria and subsequently saw Davis take his gun out of his holster and place it against the deputy; (8) that a deputy saw Davis threaten to beat Diana if she did not hand over his paycheck; and (9) that Davis while on county property was intoxicated and apparently ran his motorcycle into a brick wall.

Significantly, the incidents mentioned above were, for the most part, admittedly never reported through the chain of command, and each person responsible for disciplining Davis testified that they had no knowledge of the alleged misconduct. Moreover, the incidents addressed above (and the other less significant incidents presented at trial) took place over an extended period spanning the course of Davis' eight-year career. To the extent that Davis inflicted physical abuse on Diana while off duty, she admitted that she did not tell her superiors at the department about the abuse because she was afraid it would adversely affect her position with the department and possibly cost Davis his job. She admitted that no one in the department left her with that impression. Diana further testified that the only time she remembered discussing the abuse was with a friend in strict confidence. Most of the testimony, including that of plaintiffs' expert, suggested that deputies only had a duty to report personal problems when those problems adversely affected a deputy's work.

Even if we were to take as fact that Davis' activity before the night of the shooting should have been reported, there is nothing in the record to suggest that defendant dissuaded or furthered the failure of the deputies to report the activity. Almost without exception, employees and administrators within the department testified that the so-

called code of silence was in no way a policy of the office. In fact, the testimony suggested that defendant had adopted training procedures and informal directives to supervisors to infiltrate and break down any barriers that might exist between themselves and the deputies for whom they were responsible. Absent some evidence that the department deliberately furthered the code of silence, or was consciously indifferent to its existence, it cannot be said to be a departmental policy. On this record, there is no such evidence.

Furthermore, in this case, we perceive no link between the tragic events that occurred on September 18, 1983, and defendant's alleged failure to train, supervise, or otherwise screen its employees. Assuming, arguendo, that defendant's alleged failure to train and supervise amounted to a policy of deliberate indifference (an assumption we expressly reject on the basis of the evidence presented), we are still not persuaded that the violations that took place were caused by those policies. All the evidence suggests that the violations were caused by personal differences between Davis and his wife. Davis was not acting in the course of his duties as a deputy sheriff and was not acting in furtherance of departmental goals. In fact, the only significant relationship that existed between defendant and the incident was that Davis and his wife were departmental employees and that Davis' gun was sanctioned by the department. On this record, there is simply not enough evidence to suggest that defendant's failure to train, supervise, or provide specific services to employees was the cause of the violations at hand.

Alternatively, and as an independent basis for reversal, even if we conclude that the action or inaction of defendant with respect to supervision and retention of employees and operation of the

department constituted a policy that was the moving force behind the violations the plaintiffs suffered, we cannot conclude that those policies amounted to "deliberate indifference." Rather, we are persuaded that each of the failings alleged to exist within the department amounted to, at most, mere negligence. See *Pembaur v Cincinnati,* 475 US 469, 483; 106 S Ct 1292; 89 L Ed 2d 452 (1986).

With regard to the screening of applicants and psychological testing, uncontroverted testimony established that some screening was done and that background investigations were conducted on all applicants. With regard to the assertion that defendant lacked psychological and sociological support services, uncontroverted testimony established that general county-wide programs were in existence since Davis' retention as an employee. With regard to the periodic written evaluations, uncontroverted testimony established that attempts to use such a program were resisted by the union. In any case, the testimony established that supervisors conducted on-site evaluations day to day. Finally, with regard to the allegations that there existed a code of silence within the department, the uncontroverted testimony established that it was not the policy of the department to permit such activity. In fact, much of the testimony of the supervisors and the training personnel suggested that every possible effort to break the code of silence was undertaken. Under the circumstances, all of the allegations amount to, at worst, negligence, which is an insufficient degree of culpability for imposition of liability under § 1983. *York, supra* at 757.

Having concluded that the record, when viewed in a light most favorable to plaintiffs, was insufficient as a matter of law to support a claim for damages under § 1983, we now turn to those issues

raised by plaintiffs on cross appeal to determine whether a new trial is warranted.

Initially, plaintiffs named Wayne County as a defendant in this matter, arguing common-law negligence as a theory of recovery. However, as stated above, Wayne County was dismissed on the basis of the doctrine of governmental immunity. On several occasions, plaintiffs moved to add Wayne County as a defendant to the § 1983 action, relying on *Rushing v Wayne Co,* 436 Mich 247, 259-260; 462 NW2d 23 (1990), cert den 111 S Ct 1310 (1991). On appeal, defendant concedes that Wayne County would have been a proper defendant in relation to the § 1983 claim. However, inasmuch as we have concluded that the record was insufficient to support a § 1983 claim, the question whether Wayne County may also be held liable on this theory is moot because there are no specific allegations of policy-related deliberate indifference attributable to the county.

In the midst of the litigation, plaintiffs also sought to add a count against defendant based upon violations of the Michigan Constitution, citing *Smith v Dep't of Public Health,* 428 Mich 540; 410 NW2d 749 (1987), reh den 429 Mich 1207 (1987), aff'd sub nom *Will v Michigan Dep't of State Police,* 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). While it is true that our Supreme Court recognized that a cause of action for violation of the Michigan Constitution existed in theory, the Court was unable to articulate what constitutes such a claim.[4] In this case, having concluded that the actions of defendant were not the cause of whatever violations may have occurred,

[4] At least four justices of the Court, in a memorandum opinion, agreed that a claim for damages against the state arising from a violation of the Michigan Constitution by the state may be recognized. *Smith, supra* at 544.

the question whether a claim under the state constitution exists independently of this § 1983 claim is also moot.

Plaintiffs next argue that the court erred in refusing to allow former Wayne County Sheriff William Lucas to be treated as an adverse witness under MCL 600.2161; MSA 27A.2161.[5] The purpose of the "adverse witness" statute is to permit the free cross-examination of adverse parties that are called as witnesses by the opposing party. *Shields v Reddo,* 432 Mich 761, 779; 443 NW2d 145 (1989). In this case, Lucas was no longer employed in the Wayne County Sheriff's Department and was not an agent for that entity at the time the alleged violations took place. While it is true that Lucas was a Wayne County executive at the time the incident at issue occurred, Wayne County was dismissed as a party defendant before trial. Accordingly, the adverse witness statute did not apply to Lucas because he was not an agent or employee of a defendant at the time of the occurrence. *Thompson v Essex Wire Co,* 27 Mich App 516, 530; 183 NW2d 818 (1970).

In any event, the decision to allow cross-examination under the "adverse witness" statute is left to the trial court's discretion. *Id.* Even if the statute applied to Lucas, plaintiffs are unable to point to anything that would have been admissible under the statute. Plaintiffs' request to examine Lucas regarding prior cases brought against defendant for violation of inmates' constitutional rights had little or no relevance to the case at hand.[6]

[5] This issue, and the one that follows, were not specifically raised in plaintiffs' brief on cross appeal. Rather, the issues were raised in plaintiffs' responsive brief.

[6] Plaintiffs requested that they be permitted to examine Lucas and Ficano regarding *Marchese v Lucas,* 758 F2d 181 (CA 6, 1985), and *Jail Inmates v Wayne Co Executive,* 178 Mich App 634; 444 NW2d 549 (1989). These cases were brought against the department for

Plaintiffs examined Lucas at length regarding his recollection of policies and procedures adopted when he was the sheriff. For the most part, Lucas was unable to recall most of the policy decisions made during his tenure as Wayne County Sheriff. No amount of cross-examination under the "adverse witness" statute would have made Lucas remember those events. Accordingly, the trial court did not abuse its discretion in denying plaintiffs' request to examine Lucas under the statute.

Finally, plaintiffs claim that the trial court erred in excluding the testimony of a suspect who was allegedly mistreated by Davis. A trial court's decision to admit evidence is within its sound discretion and will not be reversed absent an abuse of that discretion. *Price v Long Realty, Inc,* 199 Mich App 461, 466; 502 NW2d 337 (1993). In plaintiffs' offer of proof, the suspect stated that he had been arrested by Davis for reckless driving and was subsequently beaten by other deputies. However, the suspect was unable to positively identify Davis as being responsible for the beating because he was transported to the station by the other deputies. On the basis of the offer of proof, the court concluded that the testimony of the suspect was irrelevant because he could not establish any wrongdoing on the part of Davis that would be attributable to the department. We cannot say that the court abused its discretion in this regard.

Having concluded that the trial court did not err in the manner in which trial was conducted, and having concluded that the record was insufficient as a matter of law to support plaintiffs' claim

violations of inmates' Eighth Amendment rights and were specific to the physical conditions in the jail. Their relevance in regard to the lack of control that defendant exerted over its employees is questionable.

under § 1983, plaintiffs' arguments related to additur and to costs and attorney fees are moot. We recognize the tragic circumstances underlying the claims made by plaintiffs in this case. However, we are not ready to impose monetary liability on municipalities or other government agencies for employee conduct that occurs outside the scope of employment unless that conduct is very clearly motivated by official policies or customs to which the employee is expected to adhere. Accordingly, the verdict in favor of plaintiffs is reversed, and the cause is remanded for entry of judgment in favor of defendant.

Reversed and remanded for further proceedings consistent with this opinion.

PEOPLE v CRAMER

Docket No. 128160. Submitted March 2, 1993, at Lansing. Decided September 20, 1993, at 9:50 A.M. Leave to appeal sought.

Jerry A. Cramer was convicted by a jury in the Macomb Circuit Court, John B. Bruff, J., of first-degree criminal sexual conduct and was sentenced to a prison term of from sixty to ninety years. At trial, the defendant asserted the defense of insanity, and the trial court failed to give the statutorily mandated preliminary jury instructions concerning legal insanity and mental illness before allowing expert testimony relating to the insanity defense. The defendant appealed.

The Court of Appeals *held:*

1. Although it was error for the trial court to fail to give the mandated instructions before taking the expert testimony relating to the insanity defense, the error was harmless in view of the fact that there was no objection to the failure to give the preliminary instructions, the court gave proper instructions concerning the distinctions between mental illness and insanity at the end of the trial, and the jury returned a verdict of guilty rather than guilty but mentally ill.

2. Because the minimum sentence imposed by the court will have been served while the defendant is still in his early eighties, and binding precedent has held that a defendant reasonably can be expected to survive to such an age, the life-expectancy rule of *People v Moore,* 432 Mich 311 (1989), was not violated.

3. Although a departure from the minimum sentence of ten to twenty-five years recommended by the sentencing guidelines is appropriate in this case, the sixty-year minimum sentence imposed by the trial court is unwarranted and violates the principle of proportionality of *People v Milbourn,* 435 Mich 630 (1990).

Affirmed but remanded for resentencing.

MICHAEL J. KELLY, J., dissenting in part, stated that the conviction should be reversed because the failure to give the

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REFERENCES

Am Jur 2d, Trial §§ 1105, 1482.

See ALR Index under Instructions to Jury.

preliminary instructions was error that may have resulted in prejudice to the defendant.

CRIMINAL LAW — INSANITY — JURY INSTRUCTIONS — HARMLESS ERROR.

The failure of a court in a trial in which the defense of insanity is raised to give to the jury the statutorily mandated preliminary instructions concerning mental illness and legal insanity before expert testimony is taken is harmless error where there is no defense objection, the jury is given proper instructions at the end of the trial, and the jury returns a verdict of guilty rather than guilty but mentally ill (MCL 768.29a[1]; MSA 28.1052[1][1]).

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Carl J. Marlinga,* Prosecuting Attorney, *Robert J. Berlin,* Chief Appellate Lawyer, and *Richard J. Goodman,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Ronald J. Bretz*), for the defendant on appeal.

Before: MICHAEL J. KELLY, P.J., and MARILYN KELLY and CONNOR, JJ.

MARILYN KELLY, J. Following a jury trial, defendant was convicted of first-degree criminal sexual conduct. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). His sentence was sixty to ninety years in prison. On appeal, he argues that his conviction must be reversed, because the trial court failed to give the jury the insanity instruction before expert witnesses testified. He asserts, also, that he is entitled to resentencing, as his sentence is disproportionate and violates *People v Moore,* 432 Mich 311; 439 NW2d 684 (1989). We affirm defendant's conviction, but remand for resentencing.

The underlying facts in this case are not in dispute. Defendant sexually assaulted a twelve-year-old boy in a public restroom of a department

store. When apprehended outside the store, he said, "Thank God you've got me; it's finally over."

Defendant's father testified that defendant had been adopted as an infant. Defendant's biological family had a history of mental illness. Defendant was first treated for emotional problems while in kindergarten. During high school, he saw a psychologist and was prescribed the drug Stelazine to help control his mental problems. He stopped taking Stelazine in order to pass a military physical. After two years in the Navy, he was discharged for alcoholism. Defendant did not take Stelazine while in the Navy or after he was discharged. The instant assault occurred less than a year after his discharge from the Navy.

Dr. Ryan, a clinical psychologist, treated defendant while he was in high school. He diagnosed defendant as a schizophrenic. Dr. Tanay, a psychiatrist, evaluated defendant pursuant to court order. Dr. Tanay was not certain whether defendant had schizophrenia, but he had no doubt that defendant was mentally ill. He believed defendant was legally insane at the time of the assault; as a result of his mental illness, defendant could not conform his conduct to the law.

The prosecution called psychologist Dr. Carole Holden as a rebuttal witness. In her opinion, defendant was not mentally ill when the assault occurred; he knew it was wrong to act on his sexual impulses, but did so heedless of the consequences. She agreed that defendant had a psychological disorder, but she saw no evidence of schizophrenia.

I

On appeal, defendant argues that the trial court erred in failing to give the legal insanity jury

instruction before the experts took the stand. CJI2d 7.9. Defendant did not request the instruction prior to the testimony. Section 29a(1) of the Code of Criminal Procedure provides in part:

> If the defendant asserts a defense of insanity in a criminal action which is tried before a jury, the judge shall, before testimony is presented on that issue, instruct the jury on the law as contained in sections 400a and 500(g) of Act No. 258 of the Public Acts of 1974 and in section 21a of chapter 8 of this act. [MCL 768.29a(1); MSA 28.1052(1)(1).]

In this case, the trial court was required by statute to define mental illness and legal insanity before taking expert testimony on the insanity defense. MCL 330.1400a; MSA 14.800(400a); MCL 768.21a; MSA 28.1044(1). It neglected to do so.

Another panel of this Court has concluded that the failure of the trial court to instruct on legal insanity before taking expert testimony on the subject is always reversible error. *People v Mikulin,* 84 Mich App 705, 707-708; 270 NW2d 500 (1978). This is true even if the instruction is not requested. *Id.* In *Mikulin,* the Court indicated that the purpose of § 29a(1) is to prepare the jury for the proposed expert testimony. *Id.,* 708. Due to the mandatory language in the statute, it reasoned, the Legislature must have concluded that the instruction is essential for a fair disposition of an insanity claim. *Id.*

Subsequent panels of this Court have held that the failure to properly instruct on legal insanity may be harmless error. See *People v Mazzie,* 137 Mich App 60, 66; 357 NW2d 805 (1984), aff'd 429 Mich 29; 413 NW2d 1 (1987), citing *People v Crawford,* 89 Mich App 30; 279 NW2d 560 (1979). In *Crawford,* the defendant presented an insanity defense, but was convicted of second-degree mur-

der. Although some of the jury instructions pertaining to the insanity defense were erroneous, any error was harmless, because the jury found the defendant guilty, as opposed to guilty but mentally ill. Therefore, it could not have rendered a verdict of not guilty by reason of insanity; by definition, a person must be mentally ill in order to be found legally insane. *Id.,* 36; MCL 768.21a(1); MSA 28.1052(1)(1).

Neither *Crawford* nor *Mazzie* addressed that part of § 29a(1) which mandates that trial courts instruct on legal insanity before the experts testify. See *Mikulin, supra.* Moreover, it is unclear from the opinions in those two cases whether the juries were instructed before the experts' testimony or later. Therefore, we must determine if the *Crawford* harmless error analysis should be applied where, as here, clearly no preliminary insanity instruction was given. See *People v Girard,* 96 Mich App 594, 603; 293 NW2d 639 (1980).

Prior to the expert's testimony in *Girard,* the trial court erroneously defined insanity and failed to define mental illness. *Id.,* 602. This Court indicated that it is critical to the *Crawford* harmless error analysis that the jury be properly instructed on the distinctions between mental illness and legal insanity. *Id.,* 603. The trial court also confused the concepts of mental illness and insanity in the final instructions. Due to this confusion, the Court refused to apply the harmless error analysis and reversed defendant's second-degree murder conviction. See also *People v Giuchici,* 118 Mich App 252; 324 NW2d 593 (1982).

In *Giuchici,* the trial court's preliminary insanity jury instruction was ambiguous and confusing. *Id.,* 264. However, the defendant's guilty but mentally ill, first-degree murder conviction was af-

firmed on appeal. No manifest injustice resulted by the erroneous preliminary instruction, because the insanity instructions given at the end of trial were correct and clarified any ambiguity. *Id.,* 265.

Both *Giuchici* and *Girard* recognize that "erroneous" preliminary insanity jury instructions may be harmless error. By analogy, we conclude that the failure to give any preliminary insanity jury instruction may also be harmless error. Section 29a(1) of the Code of Criminal Procedure does not prevent us from applying a harmless error analysis to the facts of this case. Normally, we reverse a conviction only if the error complained of has resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096.

The trial court in this case failed to define mental illness and legal insanity prior to the experts' testimony; it properly instructed the jury on both concepts at the end of the trial. The fact that correct instructions were given coupled with defendant's failure to object may be sufficient to find the error harmless. See *Giuchici,* 265. Moreover, unlike *Girard,* the judge here properly instructed the jury at the end of the trial on the distinctions between mental illness and insanity. *Girard,* 602-603. Therefore, the *Crawford* harmless error analysis applies to this case. Our decision is influenced by the fact that the jury found defendant guilty as opposed to guilty, but mentally ill. Given that finding, it is illogical to expect that the jury could have rendered a verdict of not guilty by reason of insanity. Therefore, it was irrelevant that the distinction between mental illness and legal insanity was not explained to the jury before the experts testified. We conclude that manifest injustice did not result from the trial court's failure preliminarily to give the insanity and the mental illness jury instructions. See *Crawford,* 36;

*People v Van Dorsten,* 441 Mich 540; 494 NW2d 737 (1993).

II

Defendant was twenty-two years old when sentenced to a minimum prison term of sixty years. He argues that the sentence violates *Moore.* We disagree.

In determining whether a defendant has a reasonable prospect of actually serving a sentence, the appellate court properly takes into account possible disciplinary credits. *People v Rushlow,* 437 Mich 149, 155; 468 NW2d 487 (1991). Even without disciplinary credits, defendant will be in his early eighties when his minimum term ends. We are bound by this Court's precedent which requires us reasonably to expect that a defendant may live into his eighties in prison. *People v Schollaert,* 194 Mich App 158, 171; 486 NW2d 312 (1991), citing *People v Redman,* 188 Mich App 516, 518; 470 NW2d 676 (1991). Administrative Order No 1990-6, 436 Mich lxxxiv, as extended by Administrative Order No 1991-11, 439 Mich cxliv, as extended by Administrative Order No 1992-8, 441 Mich cxi. Therefore, we find no violation of *Moore.*

However, defendant's sentence does violate *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). The sentencing guidelines' recommended minimum sentence range is ten to twenty-five years in prison. The trial court exceeded the guidelines, saying they failed to account for defendant's prior juvenile record or two prior similar offenses. The trial court did not have the benefit of *Milbourn* at the time of sentencing. *Milbourn, supra.*

Sentences within the guidelines are presumptively not excessively severe or unfairly disparate. *People v Broden,* 428 Mich 343, 354; 408 NW2d

789 (1987). Trial courts should not depart from the guidelines, unless there are circumstances about the offense or offender not reflected there. *Milbourn,* 659-660. Even where some departure appears to be appropriate, the extent of it may constitute a violation of the principle of proportionality. *Id.,* 660.

Here, the trial court sentenced defendant to a term more than double the maximum minimum term recommended by the sentencing guidelines. As a juvenile, defendant had been placed on one-year probation for a similar offense. Defendant also admitted to Dr. Tanay that, while he was in the Navy, he had sexual activities with his girlfriend's children. These circumstances concerning the offender were not reflected in the guidelines' recommendation. *Id.,* 659-660.

Although we believe a departure from the guidelines is appropriate, we believe that such a severe departure as occurred here is unwarranted and violates the principle of proportionality. Therefore, we vacate defendant's sentence.

The conviction is affirmed. The sentence is vacated and the case remanded for resentencing.

CONNOR, J., concurred.

MICHAEL J. KELLY, P.J. *(concurring in part and dissenting in part).* I agree with the majority opinion with regard to the fact that defendant's sentence violates *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). I also agree with my colleagues that the trial court was required by statute to define mental illness and legal insanity *before* taking expert testimony on the insanity defense. MCL 330.1400a; MSA 14.800(400a); MCL 768.21a; MSA 28.1044(1). However, I disagree with the majority's harmless error analysis. I would

follow this Court's decision in *People v Mikulin,* 84 Mich App 705; 270 NW2d 500 (1978).

In *Mikulin,* this Court held that failure of the trial court to instruct concerning the question of insanity before taking expert testimony regarding the subject is error requiring reversal even without a request for such instruction. Here, the trial court failed to define mental illness and legal insanity before the experts' testimony was taken. Under the facts of this case, I cannot conclude that this error was harmless. This trial involved a "battle of the experts." Defendant's mental state was the only issue. Apparently, during deliberation the jury wanted a transcript of the testimony of defendant's expert witness. Within forty-five minutes of being told a transcript was unavailable, the jury returned its verdict. Under these circumstances, I cannot conclude that the trial court's failure to instruct concerning the question of insanity before taking expert testimony regarding the subject did not result in prejudice to defendant.

I would reverse.

HERRON v BIGGIES WOLF DEN, INC

Docket No. 165772. Submitted August 24, 1993, at Lansing. Decided September 21, 1993, at 9:00 A.M.

Terry Herron, as next friend of Richard and Alicia Herron, and Gregory Herron, as personal representative of the estate of Gary Herron, brought an action in the Lake Circuit Court against Everett A. Howell, Biggies Wolf Den, Inc., and Joyce's Bar, seeking damages in the death of Gary Herron. Plaintiffs alleged that Gary Herron died as a result of a gunshot wound inflicted by Howell as a result of intoxication caused by his being served alcoholic beverages while intoxicated at Biggies Wolf Den and Joyce's Bar. Plaintiff Terry Herron brought claims under the dramshop act, and plaintiff Gregory Herron brought claims pursuant to the wrongful death act. The court, Richard I. Cooper, J., granted partial summary disposition for defendant Biggies Wolf Den with respect to the claim brought pursuant to the wrongful death act and dismissed the claims of Gregory Herron against the dramshop defendants. The plaintiffs sought leave to appeal the order of partial summary disposition. The Court of Appeals, in lieu of granting leave, issued a peremptory opinion.

The Court of Appeals *held:*

The trial court erred in holding that the dramshop act precluded the personal representative of the decedent's estate from pursuing a claim for the damages that the decedent could have sought under the dramshop act had he survived. The dramshop act allows the personal representative to bring a wrongful death action based on the dramshop act under the circumstances of this case.

Reversed.

INTOXICATING LIQUORS — DRAMSHOP ACT — WRONGFUL DEATH ACT — PERSONAL REPRESENTATIVES — STANDING.

A personal representative of a decedent's estate may bring a

REFERENCES

Am Jur 2d, Death §§ 39, 40; Intoxicating Liquors §§ 553-556, 561-565, 592.

Tavernkeeper's liability to patron for third person's assault. 43 ALR4th 281.

wrongful death action based on the dramshop act where the damages sought against the dramshop defendant are those that the decedent could have sought under the dramshop act had the decedent survived (MCL 436.22; MSA 18.993).

*Lakin, Worsham & Victor, P.C.* (by *Larry A. Smith*), for the plaintiffs.

*Sullivan, Crowley & Smith, P.C.* (by *Randy H. Smith*), for the defendant.

Before: DOCTOROFF, C.J., and MICHAEL J. KELLY and MARILYN KELLY, JJ.

PER CURIAM. Plaintiffs seek leave to appeal a portion of a Lake Circuit Court order granting partial summary disposition to defendant Biggies Wolf Den, Inc., and dismissing the claim of the personal representative of the decedent's estate under the dramshop act. In lieu of granting leave, and in light of the frequency with which this issue is likely to arise in the lower courts, we elect to resolve this issue by peremptory opinion and reverse the order of partial summary disposition. *Kerby v Judges' Retirement Bd of Michigan,* 166 Mich App 302; 420 NW2d 195 (1988).

Plaintiffs allege that the decedent, Gary Herron, died when a shotgun was discharged by defendant Howell. Plaintiffs further allege that before the incident Howell had been served alcoholic beverages while visibly intoxicated on the premises of defendants Biggies Wolf Den and Joyce's Bar. Plaintiff Terry Herron, acting as next friend of decedent's minor children, brought claims under the dramshop act, MCL 436.22(4); MSA 18.993(4). Plaintiff Gregory Herron, as personal representative of decedent's estate, made claims pursuant to the wrongful death act, MCL 600.2922; MSA 27A.2922.

Biggies Wolf Den filed a motion for partial summary disposition, claiming, in part, that the personal representative of the estate was not a proper party to the dramshop action. In an opinion and order dated March 19, 1993, the circuit court agreed for the following reasons:

> IT IS FURTHER THE OPINION OF THE COURT that the Dramshop Act, MCL 436.22(4) is more specific than the Wrongful Death Act, MCL 600.2922 insofar as the provisions of the Dramshop Act are more limited in terms of who has a right to pursue an action and it is further the opinion of the Court that the dramshop statutory provisions are controlling in this action and therefore, it is the Order of the Court that the claims made by Gregory Herron, as Personal Representative of the Estate of Gary Herron, Deceased, be and are dismissed with prejudice against the dramshop Defendants, including the Defendant Biggies Wolf Den, Inc., so Defendant Biggie's motion for partial summary disposition is GRANTED for the reasons stated herein and for the reasons further set forth on the record.

The circuit court denied plaintiffs' motion for rehearing or reconsideration on June 7, 1993.

Plaintiffs applied for leave to appeal, arguing that the circuit court erred in dismissing the personal representative of the estate under the facts of this case. We agree and reverse.

MCL 436.22; MSA 18.993 provides in part:

> (4) Except as otherwise provided in this section, an individual who suffers damage or is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of

> that individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death. In an action pursuant to this section, the plaintiff shall have the right to recover actual damages in the sum of not less than $50.00 in each case in which the court or jury determines that intoxication was a proximate cause of the damage, injury, or death.
>
> (5) An action under this section shall be instituted within 2 years after the injury or death. . . . In the event of the death of either party, the right of action under this section shall survive to or against his or her personal representative. . . .
>
> * * *
>
> (11) This section provides the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor.
>
> (12) Except as otherwise provided for under this section and section 22h [MCL 436.22h; MSA 18.993(8)], a civil action under subsection (4) against a retail licensee shall be subject to the revised judicature act of 1961. . . .

Plaintiffs argue that because the decedent would have been entitled to bring a dramshop action pursuant to subsection 4 if he had lived and because his right of action survives and may be brought by a personal representative pursuant to subsection 5, the circuit court erred in dismissing the personal representative's claim. Defendant Biggies responds that this Court has held "that the personal representative in a wrongful death action is not a proper party to bring a dramshop action." See *Brannstrom v Tippman,* 141 Mich App 664, 669; 367 NW2d 902 (1985).

We agree with plaintiffs that the statute allows the personal representative to bring a wrongful

death action based on the dramshop act under the circumstances of this case. We find *Brannstrom* distinguishable, inasmuch as the question there presented was whether dramshop actions brought in the name of individuals enumerated in the dramshop act were barred by a consent judgment entered in the wrongful death action on behalf of the estate. This Court answered that question in the negative, because injured parties may bring actions in their own name under the dramshop act, which provides a cause of action separate and distinct from a wrongful death action.

More importantly, the decision in *Brannstrom* is based on a footnote in *O'Dowd v General Motors Corp,* 419 Mich 597, 605, n 20; 358 NW2d 553 (1984), which in turn is based on the decision in *Genesee Merchants Bank & Trust Co v Bourrie,* 375 Mich 383; 134 NW2d 713 (1965). In *Bourrie,* the plaintiff's decedent was allegedly intoxicated when he was served alcoholic beverages by the defendant bar owners. He was killed later that evening when his car overturned while he was driving. The plaintiff claimed that the wrongful serving of alcoholic beverages was a proximate cause of the death. Under the facts of that case, the Supreme Court held that "the personal representative of the decedent is not a proper party plaintiff" to the dramshop action. *Id.* at 389. Although this statement in *Bourrie* could be read as holding that the personal representative of a decedent is never a proper party plaintiff to a dramshop action, we believe that the Supreme Court meant only to hold that the personal representative of the decedent in *Bourrie* was not a proper party plaintiff to that dramshop action. The decedent in *Bourrie* was not "an individual who suffers damage or is personally injured by a minor or visibly intoxicated person," but rather was himself

the visibly intoxicated person improperly furnished with alcohol. In this regard, we agree with the majority opinion in *Robertson v Devereaux,* 32 Mich App 85, 91-92; 188 NW2d 209 (1971), and the opinion of Judge BRENNAN in *Walling v Allstate Ins Co,* 183 Mich App 731, 738; 455 NW2d 736 (1990).

Accordingly, we reverse the circuit court's order granting partial summary disposition to defendant Biggies and dismissing the personal representative's wrongful death claim predicated on the dramshop act. We retain no further jurisdiction.

DEPARTMENT OF TRANSPORTATION v SCHULTZ

Docket No. 139261. Submitted April 13, 1993, at Grand Rapids. Decided September 21, 1993, at 9:05 A.M.

The Department of Transportation brought an action in the Eaton Circuit Court against Everett L. Schultz, Jr., and Lorna F. Schultz, seeking to acquire through eminent domain property belonging to the defendants. The parties stipulated the entry of a judgment regarding just compensation, interest on the judgment, and attorney fees. The defendants brought a motion seeking reimbursement for their expert witness' fee and interest on the fee. The court, Richard M. Shuster, J., granted the motion and ordered the plaintiff to pay the fee and interest thereon. The plaintiff appealed.

The Court of Appeals *held:*

1. Section 16 of the Uniform Condemnation Procedures Act, MCL 213.66; MSA 8.265(16), mandates an award of reasonably necessary expert witness fees for an owner's appraiser. The fact that the corporation whose licensed employee performed the appraisal for the defendants allegedly was not itself licensed as a real estate broker does not prevent the award of the expert witness fee in this case.

2. The circuit court did not abuse its discretion in determining that the appraisal fee was reasonably necessary.

3. The court erred in finding that MCL 213.65; MSA 8.265(15) provides for an award of interest on the appraisal fee. Because there is no specific statutory authorization for such interest, the portion of the order awarding interest on the expert witness fee must be reversed.

Affirmed in part and reversed in part.

1. EMINENT DOMAIN — UNIFORM CONDEMNATION PROCEDURES ACT — EXPERT WITNESS FEES — LICENSURE OF APPRAISERS.

The Uniform Condemnation Procedures Act mandates an award of reasonable expert witness fees in an eminent domain action;

REFERENCES

Am Jur 2d, Eminent Domain §§ 473, 477.

Eminent domain: condemnor's liability for costs of condemnee's expert witnesses. 68 ALR3d 546.

the requirement to pay a reasonable expert witness fee as applied to an owner's real estate appraiser is not contingent upon the appraiser's being licensed as a real estate broker (MCL 213.66; MSA 8.265[16]).

2. EMINENT DOMAIN — UNIFORM CONDEMNATION PROCEDURES ACT — EXPERT WITNESS FEES.

Expert witness fees for court time and time required to prepare for testimony as an expert are recoverable under the Uniform Condemnation Procedures Act by a condemnee where the services of the expert are reasonably necessary to allow the condemnee to prepare for trial; however, an expert is not automatically entitled to compensation for all services rendered and may not be compensated for services that go beyond the scope of the type of services that normally would be rendered by a person in that profession.

3. EMINENT DOMAIN — UNIFORM CONDEMNATION PROCEDURES ACT — INTEREST ON JUDGMENTS — INTEREST ON COSTS.

The Uniform Condemnation Procedures Act provides that interest is to be awarded on a judgment amount, but does not provide for an award of interest with regard to the reimbursement of costs (MCL 213.65; MSA 8.265[15]).

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Patrick F. Isom* and *Ronald F. Rose,* Assistant Attorneys General, and *Thomas J. O'Toole,* Special Assistant Attorney General, for the plaintiff.

*Ackerman & Ackerman, P.C.* (by *Alan T. Ackerman* and *Kenneth C. Harrison*), for the defendants.

Before: NEFF, P.J., and MCDONALD and MURPHY, JJ.

PER CURIAM. Plaintiff appeals from an order of the Eaton Circuit Court granting defendants' motion for reimbursement for their expert witness' fee and interest on the fee. We affirm in part and reverse in part.

The facts of this case are not in dispute. Plaintiff brought this eminent domain action to acquire from defendants 153.7 acres of vacant land in Eaton County for the further construction of highway I-69. Defendants did not contest the necessity of the taking, but did contest the $247,168 offer of just compensation. The parties ultimately stipulated the entry of a judgment ordering plaintiff to pay defendants $329,625 as just compensation. The parties then resolved issues regarding attorney fees and interest on the judgment of just compensation by further stipulation, but the issues regarding the expert witness fee for defendants' appraiser and interest on that fee was left unresolved.

Defendants moved for reimbursement of costs, including $15,256.25 as the expert witness fee for defendants' appraiser. Plaintiff responded that it was obligated to reimburse defendants only for a reasonable appraisal fee and that the fee charged by defendants' appraiser, Walsh & Associates, Inc. (Walsh), was unreasonable. Plaintiff further argued that it was not obligated to pay any portion of the appraisal fee because Walsh was not a licensed real estate broker. After hearing testimony and argument, the circuit court ordered plaintiff to pay defendants the appraisal fee of $15,256.25, as well as interest on the fee.

Plaintiff first contends that it is not required to reimburse defendants for their payment of the appraisal fee because Walsh & Associates, Inc., is an unlicensed real estate broker. We note that there is apparently no dispute that Walsh's employee who performed the appraisal was duly licensed; plaintiff only argues that the corporation was not licensed. Expert witness fees in an eminent domain action are governed by § 16 of the Uniform Condemnation Procedures Act, MCL

213.66; MSA 8.265(16). That section provides, in pertinent part:

> (1) A witness, either ordinary or expert, in a proceeding under this act shall receive from the agency the reasonable fees and compensation provided by law for similar services in ordinary civil actions in circuit court, including the reasonable expenses for preparation and trial.
>
> * * *
>
> (4) Expert witness fees provided for in subsection (1) shall be allowed with respect to an expert whose services were reasonably necessary to allow the owner to prepare for trial. The agency's liability for expert witness fees shall not be diminished or affected by the failure of the owner to call an expert as a witness if the failure is caused by settlement or other disposition of the case or issue with which the expert is concerned.

This Court has interpreted this section as mandating an award of reasonable expert witness fees. *Hartland Twp v Kucykowicz,* 189 Mich App 591, 599; 474 NW2d 306 (1991); *Macomb Co Rd Comm v Fisher,* 170 Mich App 697, 699-700; 428 NW2d 744 (1988). Section 16 does not state that the requirement to pay reasonable fees is contingent upon the real estate appraiser's being licensed as a real estate broker. Where the language of a statute is clear, courts may not speculate regarding its construction. *Lorencz v Ford Motor Co,* 439 Mich 370, 376; 483 NW2d 844 (1992). This Court must assume that the Legislature intended the meaning plainly expressed, and a statute must be enforced as written. *Macomb, supra,* 699. The mandatory payment of fees under § 16 is not qualified by the requirement that the appraiser be a licensed real estate broker, and we will not read this requirement into the statute.

Plaintiff next contends that the appraisal fee charged by Walsh is unreasonable and unsupported by the evidence. We review for an abuse of discretion the circuit court's determination regarding whether the expert witness fee was reasonably necessary. See *Hartland, supra,* 600. Experts properly are compensated for court time and the time required to prepare for their testimony. *Id.,* 599; *Detroit v Lufran Co,* 159 Mich App 62, 67; 406 NW2d 235 (1987). An expert is not automatically entitled to compensation for all services rendered, however. *Hartland, supra,* 599. Any appraisal service that goes beyond the scope of the type of services that would normally be rendered by a person in that profession are not compensable. *Lufran, supra.* In this case, evidence was presented to demonstrate that the appraisal fee was reasonable, and there was no showing that the appraisal service went beyond the scope of the normal services rendered by an appraiser. We therefore hold that the circuit court did not abuse its discretion in determining that the appraisal fee was reasonably necessary.

Plaintiff further contends that it is not obligated to pay interest on the expert witness fee. In awarding interest on the appraisal fee, the circuit court relied upon § 15 of the act, MCL 213.65; MSA 8.265(15), which provides:

> The court shall award interest on the judgment amount from the date of the filing of the complaint to the date of payment of the amount, or any part of the amount. Interest shall be computed at the interest rate applicable to a federal income tax deficiency or penalty. However, an owner remaining in possession after the date of filing shall be considered to have waived the interest for the period of the possession. If it is determined that a de facto acquisition occurred at a

> date earlier than the date of filing, interest awarded pursuant to this section shall be calculated from the earlier date.

Entitlement to interest on a judgment is purely statutory and must be specifically authorized by statute. *Dep't of Transportation v Joslyn Land Co,* 175 Mich App 551, 553; 438 NW2d 260 (1988). Statutes providing for interest on judgments are in derogation of the common law and therefore must be strictly construed. *Flint v Patel,* 198 Mich App 153, 161; 497 NW2d 542 (1993); *Joslyn Land Co, supra.* Section 15 provides that interest is to be awarded on the judgment amount, but does not specifically provide for interest to be awarded on the reimbursement of costs. We must therefore conclude that defendants were not entitled to interest on the appraisal fee. See *Patel, supra.*

The portion of the order of the circuit court regarding interest on the expert witness fee is reversed. The order is otherwise affirmed.

Affirmed in part and reversed in part.

PEOPLE v CHANDLER

Docket No. 135813. Submitted April 7, 1993, at Detroit. Decided July 26, 1993; approved for publication September 28, 1993, at 9:00 A.M.

Harold L. Chandler was convicted in a bench trial in the Detroit Recorder's Court, Michael J. Talbot, J., of assault with intent to rob while unarmed and was sentenced to 3½ to 15 years' imprisonment. He appealed, alleging that the evidence was insufficient to establish that he committed the crime.

The Court of Appeals *held:*

1. The evidence is insufficient to support the conviction of assault with intent to rob while unarmed. Although the defendant told the victim that he wanted the victim's car and threatened to shoot the victim, the defendant did not have the present ability to carry out the threat because he was not armed. Furthermore, there was no physical force or violence involved.

2. The evidence is sufficient to support a conviction of attempted unarmed robbery. The defendant clearly attempted to take the victim's car and did so by putting the victim in fear, but the defendant was unarmed and failed to accomplish the robbery.

3. The conviction of assault with intent to rob while unarmed must be vacated and the case remanded to the trial court for entry of a judgment of conviction of attempted unarmed robbery and for resentencing.

Vacated and remanded.

1. CRIMINAL LAW — ASSAULT WITH INTENT TO ROB WHILE UNARMED — ELEMENTS.

The essential elements of the offense of assault with intent to rob while unarmed are: an assault with force and violence, an intent to rob and steal, and the defendant being unarmed; the offense involves an attempt or offer to do corporal injury, with the present intention and present ability to carry out the offer, i.e., a criminally assaultive act (MCL 750.88; MSA 28.283).

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REFERENCES

Am Jur 2d, Assault and Battery §§ 3, 13, 32; Robbery §§ 85, 86.
See ALR Index under Assault and Battery; Robbery.

2. CRIMINAL LAW — ATTEMPTED UNARMED ROBBERY — ELEMENTS.

The essential elements of the offense of attempted unarmed robbery are: an attempted felonious taking of property from the person of another, by force and violence or by assault or by putting in fear, and the defendant being unarmed; the offense may or may not include a criminal assault and may be accomplished by force and violence or by putting the victim in fear; the defendant need not possess the present ability to carry out the threat of force or violence (MCL 750.92, 750.530; MSA 28.287, 28.798).

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Jeffrey Caminsky,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Charles J. Booker*), for the defendant on appeal.

Before: MARILYN KELLY, P.J., and SHEPHERD and CONNOR, JJ.

PER CURIAM. Following a bench trial on September 20, 1990, defendant was convicted of assault with intent to rob while unarmed, MCL 750.88; MSA 28.283. On October 11, 1990, he was sentenced to 3½ to 15 years' imprisonment. He appeals as of right.

Defendant argues that there was insufficient evidence to establish that he committed the crime of assault with intent to rob while unarmed. We agree.

When reviewing a claim of insufficient evidence following a bench trial, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.

*People v Petrella,* 424 Mich 221, 268-270; 380 NW2d 11 (1985). Circumstantial evidence, and reasonable inferences arising from the evidence, may constitute satisfactory proof of the elements of the offense. *People v Drayton,* 168 Mich App 174, 176; 423 NW2d 606 (1988).

MCL 750.88; MSA 28.283 provides:

> Any person, not being armed with a dangerous weapon, who shall assault another with force and violence, and with intent to rob and steal, shall be guilty of a felony, punishable by imprisonment in the state prison not more than fifteen years.

MCL 750.530; MSA 28.798 provides:

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than fifteen years.

MCL 750.92; MSA 28.287 provides, in pertinent part:

> Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:
>
> * * * .
>
> 2. If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for 5 years or more, the person convicted of

> such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or in the county jail not more than 1 year.

In *People v Sanford,* 402 Mich 460; 265 NW2d 1 (1978), the Court compared the offense of assault with intent to rob while unarmed, MCL 750.88; MSA 28.283, which carries a fifteen-year maximum sentence, with the offense of attempted unarmed robbery, MCL 750.92; MSA 28.287 and MCL 750.530; MSA 28.798, which carries a five-year maximum sentence. The Court found that the former is conjunctive and the latter is disjunctive:

> The assault with intent to rob unarmed statute is conjunctive; there must be an assault with force and violence. The attempted robbery unarmed statute is disjunctive; the offense can be accomplished either by force and violence, or by assault, or putting in fear. Attempted robbery unarmed may therefore be committed simply by putting someone in fear while assault with intent to rob unarmed requires an assault with force and violence. [*Sanford, supra,* pp 473-474.]

In a footnote, the Court gave the essential elements of the two offenses: the essential elements of assault with intent to rob while unarmed are (1) an assault with force and violence, (2) an intent to rob and steal, and (3) defendant being unarmed; the essential elements of attempted unarmed robbery are (1) an attempted felonious taking of property from the person of another, (2) by force and violence or by assault or by putting in fear, and (3) defendant being unarmed. *Id.,* p 474, n 1. The Court further explained in the footnote the difference between the two offenses:

> An assault with intent to rob being unarmed

> necessarily involves an attempt or offer to do corporal injury, with the present intention and *present ability* to carry out the offer. In other words, there *must* be a criminally assaultive act.
>
> Attempted unarmed robbery may or may not include a criminal assault. An attempted unarmed robbery may also be accomplished by force and violence or by putting in fear. Attempted unarmed robbery does not necessarily require an assault. Therefore, it is obvious that the defendant need not possess the *present* ability to carry out the offer. [*Id.*, emphasis in the original.]

Thus, to show an assault with intent to rob while unarmed requires an assault, i.e., an attempt or offer to do corporal injury with the present intention and present ability to carry out that offer, with force and violence, and with the intent to rob and steal, and the defendant being unarmed. Although the Court did not explain whether the force and violence must be physical, we note that CJI2d 17.14 defines force and violence to mean physical force:

> As used in these instructions, the words "force and violence" mean any use of physical force against another person so as to harm or embarrass him.

In light of the foregoing, we agree with defendant that the evidence was insufficient to support his conviction of assault with intent to rob while unarmed.

At trial, Detroit Police Officer Edgar Varney testified that on June 3, 1990, at approximately 3:20 A.M., he had just left work and was in plain clothes in his own private vehicle driving home alone on northbound St. Jean, when he stopped for a light at East Warren. Varney saw defendant and another man standing on the northeast corner of

Warren and St. Jean approximately fifteen feet apart. The other man started walking southwest across Warren, and defendant started walking across Warren directly toward Varney's vehicle. Defendant "had his hand down to his right leg, and behind his right leg his hand was out of sight."

Approximately fifteen feet from Varney's vehicle, defendant began yelling repeatedly that he wanted Varney's car. As defendant was approaching the driver's side of the vehicle, his hand was still down at his leg but behind and out of view. When defendant reached the vehicle, he told Varney to get out of the car or he would blow Varney's head off.

Varney stuck his hand out the window with his gun in it, told defendant that he was a police officer, got out of the vehicle, and then saw that defendant had nothing in his hand. No property was taken from Varney.

Although defendant made an offer to do corporal injury by stating "I'll blow your head off," he did not have the present ability to carry out that offer, nor was any physical force or violence involved. Therefore, the evidence is insufficient to support defendant's conviction of assault with intent to rob while unarmed.

However, the evidence is sufficient for the lesser crime of attempted unarmed robbery. MCL 750.92; MSA 28.287 and MCL 750.530; MSA 28.798. Defendant clearly attempted to take Varney's car. Defendant did so by putting Varney in fear. Defendant was unarmed, and he failed in the perpetration of the offense.

Therefore, we vacate defendant's conviction of assault with intent to rob while unarmed and remand for entry of a judgment of conviction of attempted unarmed robbery and for resentencing.

## LEGEL v AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY

Docket No. 138573. Submitted February 3, 1993, at Detroit. Decided March 31, 1993; approved for publication September 28, 1993, at 9:05 A.M.

Marianne and Jack Legel brought an action in the Wayne Circuit Court against American Community Mutual Insurance Company, their medical insurer, seeking a declaration that the defendant must pay the plaintiffs' claim for Jack Legel's hospitalization. The court, Claudia House Morcom, J., granted summary disposition for the defendant, ruling that the plaintiffs had made material misstatements on their application for insurance with respect to Jack Legel's history of alcoholism, thereby absolving the defendant from liability under the policy. The plaintiff appealed.

The Court of Appeals *held:*

1. An insurer need not prove fraudulent intent in order to cancel an insurance policy where, as in this case, an applicant makes a material misstatement concerning prior medical history.

2. The policy at issue here provided that after two years from its effective date the defendant could not deny coverage on the basis of a misstatement on the application for insurance or on the basis that a disease or physical condition had existed before the effective date of coverage. The hospitalization underlying the plaintiffs' claim occurred within two years of the effective date of the policy. Accordingly, the defendant properly could deny the claim on the basis of the material misstatements on the application.

Affirmed.

INSURANCE — MATERIAL MISREPRESENTATION — FRAUD.

An insurer need not prove fraudulent intent in order to cancel an insurance policy where an applicant makes a material misstatement concerning prior medical history.

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REFERENCES

Am Jur 2d, Insurance §§ 430, 431, 1011-1014.

See ALR Index under Alcoholics and Alcoholism; Health and Accident Insurance.

*Gerald S. Surowiec,* for the plaintiffs.

*Cummings, McClorey, Davis & Acho, P.C.* (by *Gail P. Massad*), for the defendant.

Before: DOCTOROFF, C.J., and BRENNAN and NEFF, JJ.

PER CURIAM. Plaintiffs appeal as of right from a February 27, 1991, order granting defendant summary disposition pursuant to MCR 2.116(C)(10) and dismissing plaintiffs' case. Plaintiffs filed a declaratory judgment action after defendant denied their claim for payment arising out of plaintiff Jack Legel's hospitalization and canceled their policy for making false statements on their application for insurance. We affirm.

Plaintiffs argue that the court erred in granting defendant summary disposition because a question of fact existed concerning whether the statement at issue in the application was made in good faith and without fraudulent intent. However, it is unnecessary for an insurer to show fraudulent intent in order to cancel an insurance policy where an applicant makes a material misstatement concerning prior medical history. *Wiedmayer v Midland Mutual Life Ins Co,* 108 Mich App 96, 100; 310 NW2d 285 (1981), rev'd on other grounds 414 Mich 369; 324 NW2d 752 (1982). The insurance application in the present case contained a question that asked whether the applicant(s) had "ever been advised to have or had treatment for, or been arrested for, the use of alcohol, narcotics, or hallucinogenic drugs." The response was no. The record reveals that before filling out the application, Jack Legel had been convicted of operating a vehicle while under the influence of alcohol and of possession of drug paraphernalia. Further, he had under-

gone substance abuse counseling as a condition of his sentence. Therefore, plaintiffs clearly made a material misrepresentation on their application. Marianne Legel argues that she believed that she was the primary insured and that the questions principally applied to her. However, the application listed Jack Legel as the proposed insured and listed Marianne as his spouse. Moreover, the insurance application stated that the questions applied to each person proposed for insurance. Therefore, we find that reversal is not warranted on this basis.

Plaintiffs further argue that the court erred in granting defendant summary disposition where the policy provided that it could not be canceled for misstatements after two years from the effective date of the policy. We again disagree. If the language of an insurance policy is clear, the construction is a question of law for the court. *Hafner v DAIIE,* 176 Mich App 151, 156; 438 NW2d 891 (1989). The policy in the instant case provided:

> Time Limit on Certain Defenses.
>
> (a) After two years from the Policy Date of this policy no misstatements, except fraudulent misstatements, made by the applicant in the original application for this policy shall be used to void the policy or deny a claim for loss incurred by or on behalf of any Family Member insured on the Policy Date commencing after the expiration of such two year period. No misstatements, except fraudulent misstatements, made by the applicant in any application required for the addition of one or more persons to the Family Members shall be used to void the policy or to deny a claim for loss incurred by or on behalf of such Family Member after this policy has been in force for two years following the effective date of coverage for such Family Member.
>
> (b) No claim for loss incurred by or on behalf of

> a Family Member after two years from the effective date of coverage for such Family Member shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy with respect to such Family Member.

In the present case, the effective date of the policy was June 4, 1984. Jack Legel was hospitalized in April and May 1986 for alcohol abuse problems. At that time it was discovered that he had a thirty-year history of alcohol abuse. Because the claim occurred within two years of the effective date of the policy, defendant could properly cancel plaintiffs' policy pursuant to either section cited above. Having found no genuine issue of fact, we find that the trial court properly granted defendant summary disposition. *Kreager v State Farm Mutual Automobile Ins Co,* 197 Mich App 577; 496 NW2d 346 (1992).

Affirmed.

PEOPLE v ROSEN

Docket No. 145987. Submitted September 13, 1993, at Lansing. Decided October 4, 1993, at 9:00 A.M.

Nikki Rosen filed a motion in the Lenawee Circuit Court seeking that the record of her 1986 conviction of possession of cocaine be expunged pursuant to MCL 780.621; MSA 28.1274(101). The court, Kenneth B. Glaser, J., denied the motion on the basis that the conviction involved a large quantity of cocaine and that employers and others should not be ignorant of the fact that Rosen had been involved with cocaine. Rosen appealed.

The Court of Appeals *held:*

It was an abuse of discretion requiring reversal for the trial court to deny Rosen's motion to set aside the conviction solely because of the nature of the offense. The statute clearly requires a balancing of the circumstances and behavior of the offender against the public welfare. Under these circumstances, the proceedings on remand should be before a different judge.

Reversed and remanded.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Irving C. Shaw, Jr.,* Prosecuting Attorney, and *Frank C. Riley,* Chief Assistant Prosecuting Attorney, for the people.

*Kenneth M. Mogill,* for the defendant.

Before: HOLBROOK, JR., P.J., and FITZGERALD and TAYLOR, JJ.

FITZGERALD, J. Defendant appeals as of right from a denial by the circuit court of a motion by defendant pursuant to MCL 780.621; MSA 28.1274(101) seeking that the record of her 1986 conviction of possession of cocaine be expunged. After defendant's original conviction of delivery of cocaine was reversed by this Court, defendant

pleaded guilty of possession of cocaine and was sentenced to five years' probation, with the first sixty days to be served in the county jail.

No testimony was taken at the hearing concerning defendant's motion, even though defense counsel offered to make defendant available for questioning. Because the trial prosecutor[1] had agreed at the time of defendant's plea not to object to a motion to expunge the record of the conviction if defendant successfully completed her probation period and otherwise complied with the terms of the statute, his successor did not take a position concerning defendant's motion.

In denying the motion, the court stated:

> I will deny the motion, particularly in substance abuse cases or cases involving illegal substances or the trafficing [sic] of substances. I generally feel that that matter should remain on the record and that the employers should know about it. And with some exceptions—there may be some exceptions. I don't always do the same thing.
>
> This was a fairly large case, quite a lot of cocaine involved. It was really a delivery but she was allowed to plead guilty to possession after the Court of Appeals reversed the conviction of delivery of cocaine.
>
> As I say, there was a large amount involved and I don't believe that employers and others should be ignorant of the fact that this person they are hiring has been deeply involved in illegal substances, particulary [sic] with cocaine. Marijuana looks different. But cocaine, that's the way I feel about it. And I will deny the motion.

Defendant asserts that the trial court erred in

[1] The trial prosecutor was deceased at the time of defendant's motion. The successor prosecutor indicated at the hearing that "the only position we will take out of Mr. Fairchild's [the trial prosecutor] memory is that we will take no position on this."

basing its decision solely on the nature of the offense involved. We agree.

MCL 780.621(9); MSA 28.1274(101)(9) provides:

> If the court determines that the circumstances and behavior of the applicant from the date of the applicant's conviction to the filing of the application warrant setting aside the conviction and that setting aside the conviction is consistent with the public welfare, the court may enter an order setting aside the conviction. The setting aside of a conviction under this act is a privilege and conditional and is not a right.

The nature of the offense itself does not preclude the setting aside of an offender's conviction. That reason, standing alone, is insufficient to warrant denial of an application to set aside a conviction. *People v Boulding,* 160 Mich App 156, 158; 407 NW2d 613 (1986). In *Boulding,* this Court stated:

> The statute by its plain language requires a balancing of factors, specifically a determination of the "circumstances and behavior" of a petitioner balanced against the "public welfare." In ruling on such matters, enough of a determination must be provided from which to analyze the manner in which the court's discretion was exercised and the basis for the court's determination.

The record is clear that the trial court denied the motion solely because of the nature of defendant's offense itself. Consequently, remand for a proper determination, after consideration of the circumstances and behavior of defendant since her conviction and the public welfare, is necessary.

In light of the trial judge's comments at the hearing, we conclude sua sponte that it is reasonable to expect that the original judge on remand would have substantial difficulty putting out of his

mind his previously expressed views regarding the expunging of the record of a drug offender's criminal conviction. Therefore, proceedings on remand should take place before a different judge.

Remanded.

GRUBOR ENTERPRISES, INC v KORTIDIS

Docket No. 137955. Submitted December 16, 1992, at Detroit. Decided October 4, 1993, at 9:05 A.M.

Grubor Enterprises, Inc., brought an action in the Wayne Circuit Court against Constantine Kortidis, alleging breach of a contract and fraud. The action was filed in August 1988, but the plaintiff did not file its witness list until November 6, 1990, and did not move to admit it until December 19, 1990. The court, James R. Chylinski, J., denied the motion on January 4, 1991, three days before the scheduled trial. On January 7, 1991, the court, Thomas J. Foley, J., ruled that Judge Chylinski's order barred the calling of any witnesses, including the parties, and entered an order dismissing the action with prejudice, citing the fact that the case had been pending since August 1988. The court then denied the plaintiff's motion to set aside the order of dismissal and to reinstate the claim. The plaintiff appealed.

The Court of Appeals *held:*

1. A trial court has discretion to allow parties to testify once a witness list is stricken or barred from being filed. In exercising its discretion, the court should determine whether a party can prove the elements of its position solely on the basis of the parties' testimony and any other documentary evidence. If not, the action should be dismissed.

2. The trial court did not abuse its discretion in refusing to allow the plaintiff's representatives to testify. To do so would have opened the door to circumvention of the discovery rule by corporate plaintiffs.

3. The trial court did not abuse its discretion in refusing to allow the defendant to testify. The plaintiff did not show that it would be able to prove its case solely on the basis of the defendant's testimony if the plaintiff's representatives and rebuttal witnesses were barred from testifying. Allowing undis-

REFERENCES

Am Jur 2d, Witnesses §§ 51-54, 60, 61.

See ALR Index under Disclosure; Discovery; Discretion of Court; Witnesses.

closed rebuttal witnesses to testify would have negated the discovery sanction imposed.

4. The court did not abuse its discretion in dismissing the action with prejudice.

Affirmed.

MURPHY, J., dissenting, stated that the trial court abused its discretion in barring the plaintiff from calling the parties as witnesses and dismissing the action. Although the court had the authority to sanction the plaintiff in the manner that it did, it inappropriately exercised its discretion by imposing the sanction without first considering factors relevant to the determination of an appropriate sanction other than the fact that the case had been pending since August 1988. The trial court's order dismissing the action should be reversed and the case remanded.

TRIAL — WITNESSES — WITNESS LISTS.

Trial courts have discretion to allow parties to testify once a witness list is stricken or barred from being filed; in exercising that discretion, a court should determine whether the party can prove the elements of its position solely on the basis of the parties' testimony and any other documentary evidence; if not, the action should be dismissed.

*Patricia M. Cooper,* for the plaintiff.

*Victor J. Martin, P.C.* (by *Victor J. Martin*), for the defendant.

Before: JANSEN, P.J., and MURPHY and MARILYN KELLY, JJ.

MARILYN KELLY, J. Plaintiff appeals as of right from an order of the Wayne Circuit Court dismissing with prejudice its action for breach of contract and fraud. On appeal, plaintiff argues that, notwithstanding its failure to file a witness list, it should have been allowed to testify on its own behalf and to call defendant as an adverse witness. It asserts, also, that the trial court erred in dismissing the action based solely on the fact that another circuit court judge refused to admit its witness list. We affirm.

The instant action was filed in August, 1988. The case was reassigned to different judges on several occasions. Judge James Chylinski held a settlement conference on September 24, 1990. The settlement conference worksheet contained notations in the judge's handwriting indicating the absence of a witness list. Plaintiff filed its first witness list on November 6, 1990. Plaintiff did not move to admit it until December 19, 1990.

Judge Chylinski denied plaintiff's motion to admit the witness list on Friday, January 4, 1991. His decision was based in part on the long delay in filing it and the fact that trial was scheduled for the following Monday. His only comment regarding the parties' ability to testify at trial absent a witness list was his question to plaintiff's counsel: "How could you call anyone except the defendant?"

Defendant subsequently filed a motion to dismiss with prejudice, arguing that plaintiff was unable to call any witnesses as a result of Judge Chylinski's order. At the January 7, 1991 hearing before Judge Thomas Foley, plaintiff argued that Judge Chylinski's order did not bar calling the parties. Judge Foley disagreed. He dismissed the case with prejudice; the case had been pending since August, 1988, and any problems plaintiff had resulted from its own doing.

Plaintiff moved to set aside the order of dismissal and to reinstate the claim. Plaintiff's original counsel appeared and described an in-chambers meeting he had had with Judge Chylinski and defense counsel after Judge Foley's dismissal. Allegedly, Judge Chylinski never intended to deny plaintiff a trial. Defense counsel admitted that, absent a witness list, Judge Chylinski probably would have allowed the parties to be called as witnesses. Judge Foley denied plaintiff's motion.

He recognized that plaintiff was a corporation. He reasoned that to permit this plaintiff to testify through its agents would allow any corporate plaintiff to "call a thousand witnesses" without ever filing a witness list.

I

Plaintiff argues that, even if it could not file a witness list, it should be allowed to call the parties as witnesses. By local court rule, an unlisted witness may not be called at trial, except as the court orders for good cause shown. Wayne Circuit LCR 2.301. In this case, the parties were named on plaintiff's witness list. However, they are considered "unlisted witnesses," because Judge Chylinski denied plaintiff's request to file its list belatedly.

Witness lists are an element of discovery. *Stepp v Dep't of Natural Resources,* 157 Mich App 774, 778; 404 NW2d 665 (1987). The ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts which might be admitted into evidence at trial. *Id.* The purpose of witness lists is to avoid "trial by surprise." *Id.,* 779.

We agree that legitimate reasons may exist permitting parties to testify at trial even if no witness list has been filed. First, the parties are the original adversaries and are generally known to each other from the outset. This should prevent the element of surprise occurring when unlisted witnesses are called to testify. See *Stepp, supra.* Second, disallowing the parties to testify when the witness list is stricken or prevented from being filed is the equivalent of a dismissal. Allowing a trial court to routinely dismiss an action whenever a witness list is stricken appears inconsistent with the various discretionary discovery sanction op-

tions available to it. See *Houston v Southwest Detroit Hosp,* 166 Mich App 623, 627-629; 420 NW2d 835 (1987). Refusing to allow witness lists to be filed and granting a dismissal are separate discovery sanction options. *Id.,* 629.

We hold that the trial court has discretion to allow parties to testify once the witness list is stricken or barred from being filed. In exercising its discretion, the trial court should determine whether the party can prove the elements of its position based solely on the parties' testimony and any other documentary evidence. If not, the action should be dismissed.

In this case, the trial court refused to allow any individual representing the corporation to testify. When the plaintiff is a corporation, any number of individuals could testify on its behalf. We conclude that the trial court did not abuse its discretion in refusing to allow plaintiff's representatives from testifying. To do so would have opened the door to circumvention of the discovery rule by corporate plaintiffs. When the plaintiff is an individual, the defendant knows from the face of the complaint the identity of the testifying plaintiff. This is not so when the plaintiff is a corporation.

Defendant asserts that, if defendant testified, plaintiff could call rebuttal witnesses to impeach the testimony. See *Pastrick v General Telephone Co,* 162 Mich App 243, 246; 412 NW2d 279 (1987). In *Pastrick,* a panel of this Court indicated that an undisclosed witness may testify on rebuttal if the opposing party is not prejudiced by it. However, *Pastrick* is distinguishable from this case. Here, the circuit court specifically barred the filing of the witness list as a discovery sanction. Allowing undisclosed rebuttal witnesses to testify under these facts would negate the sanction imposed.

We find that the trial court did not abuse its

discretion in disallowing defendant from testifying. Plaintiff has not shown that it would be able to prove its case based solely on defendant's testimony, if plaintiff's representatives and rebuttal witnesses were barred from testifying.

II

We also conclude that the trial court did not abuse its discretion in dismissing this action with prejudice. MCR 2.504(B)(3). The complaint was filed in August, 1988. Plaintiff did not move to file a late witness list until December 19, 1990. The hearing on that motion was held three days before the scheduled trial date. Due to the age of the case and plaintiff's extended failure to file a witness list, we find no error warranting reversal.

Affirmed.

JANSEN, P.J., concurred.

MURPHY, J. *(dissenting).* I would reverse the order of the circuit court dismissing plaintiff's action with prejudice and remand for a determination of the proper sanction considering the options available and considering the circumstances of this case. I therefore dissent.

Plaintiff filed this action in August 1988. Defendant filed his answer on October 5, 1988. The case was subsequently assigned to various judges. The record does not indicate that any pretrial scheduling order was issued. In July 1989, plaintiff moved to compel defendant's answers to plaintiff's interrogatories and request for document production. Defendant eventually answered plaintiff's interrogatories in September 1989, and the motion to compel was dismissed. The case was mediated in February 1990, and a settlement conference was held on September 24, 1990. The settlement con-

ference worksheet contains notations, apparently written by the presiding judge, indicating the absence of a witness list and that plaintiff's counsel had stated that she was trying to prepare a final pretrial order but that defendant was not cooperating.

Plaintiff filed its witness list on November 6, 1990, and moved to admit the witness list on December 19, 1990. Plaintiff also prepared and filed a "joint" pretrial statement, apparently without the assistance of defendant. The circuit court denied plaintiff's motion to admit the belatedly filed witness list. Defendant then moved to dismiss the action with prejudice, arguing that plaintiff was unable to call any witnesses as a result of the circuit court's order. After a hearing on the motion, the circuit court held that the previous ruling disallowing plaintiff's witness list barred plaintiff from calling any witnesses, including the parties. The circuit court then dismissed the action with prejudice, reasoning that the case had been pending since August 1988. The circuit court denied plaintiff's motion to set aside the order of dismissal.

I agree with plaintiff's contention that in this case, the circuit court abused its discretion by barring plaintiff from calling the parties and dismissing the action. At the time of this litigation, MCR 2.301(A) provided that absent a scheduling order, discovery ended one year after the filing of the defendant's answer.[1] In addition, Wayne Cir-

[1] MCR 2.301 has since been amended, effective October 1, 1991. In addition, although not in effect at the time relevant to this case, MCR 2.401, amended effective October 1, 1991, now provides, in pertinent part:

(I) Witness Lists.

(1) No later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists.

. . .

cuit LCR 2.301 applies in this case and provides, in pertinent part:

> Unless the court orders otherwise pursuant to a status conference or for good cause shown, counsel for all parties shall exchange lists of all witnesses to be called at the trial not later than two months before the date set for completion of discovery. This list shall include experts, who shall be so designated. An unlisted witness may not be called at trial, except as the court orders for good cause shown.

Generally, where a party fails to comply with discovery rules, the trial court has within its discretion the authority to dismiss the action. *Houston v Southwest Detroit Hosp,* 166 Mich App 623, 628; 420 NW2d 835 (1987). There is also some authority that an appropriate sanction for failure to name a defendant as a witness is precluding the plaintiff from calling the defendant, at least as an expert witness. *Moy v Detroit Receiving Hosp,* 169 Mich App 600, 607; 426 NW2d 722 (1988); *Beattie v Firnschild,* 152 Mich App 785, 793-794; 394 NW2d 107 (1986). Thus, the circuit court in this case had the authority to sanction plaintiff in the manner it did.

We review discovery sanctions to determine whether the trial court abused its discretion in exercising this authority. *Dean v Tucker,* 182 Mich App 27, 32; 451 NW2d 571 (1990). Although it is within the authority of the trial court to bar a witness or dismiss an action as a sanction for failure to file timely a witness list, this action is discretionary rather than mandatory and, there-

* * *

(2) The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown.

fore, necessitates the trial court's considering the circumstances of the case to determine the appropriate sanction. *In re Forfeiture of $1,159,420,* 194 Mich App 134, 144; 486 NW2d 326 (1992); *Dean, supra*; see also *Middleton v Margulis,* 162 Mich App 218, 223; 412 NW2d 268 (1987). When determining an appropriate sanction, the factors for consideration by the trial court include (1) whether the violation was wilful or accidental, (2) that party's history of refusing to comply with discovery requests or disclosure of witnesses, (3) prejudice to the defendant, (4) actual notice to the defendant and the length of that notice, (5) the party's history of intentional delay, if any, (6) the party's compliance with the orders of the court, (7) the party's attempt to cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. *Dean, supra,* 32-33.

In this case, the record reflects that the only factor considered by the trial court was that the case had been pending since August 1988. Reviewing the record, there is no evidence that plaintiff's delay was wilful, and plaintiff did attempt to cure the oversight by filing the witness list, albeit belatedly. By contrast, defendant apparently never provided plaintiff with a witness list. Further, there was no showing that defendant was prejudiced by plaintiff's late witness list, filed approximately two months before trial. These factors are considered valid reasons to not impose the severe sanction imposed in this case. See *In re Forfeiture of $1,159,420, supra.* In addition, although this case was pending since August 1988, the causes for the delay bear consideration. The record reflects that defendant failed to respond timely to plaintiff's interrogatories, necessitating plaintiff's motion to compel. Defendant also apparently failed to cooperate with plaintiff in the preparation of the

"joint" pretrial statement required by the circuit court. Thus, although we do not condone plaintiff's failure to file timely its witness list, the slow pace of the litigation cannot be attributed solely to this factor.

I would therefore hold that the circuit court inappropriately exercised its discretion when it imposed the sanction of barring plaintiff from calling the parties as witnesses and dismissing the case without first considering the relevant factors and without considering whether a less severe sanction would have been appropriate. I would further hold that after reviewing the record and considering the relevant factors, the sanction imposed was an abuse of the circuit court's discretion. I would therefore reverse and remand.

VERBISON v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 149786. Submitted August 3, 1993, at Detroit. Decided October 4, 1993, at 9:10 A.M. Leave to appeal sought.

Keith M. Verbison brought an action in the Wayne Circuit Court against Auto Club Insurance Association, his no-fault insurer, seeking a declaration that the defendant must defend and indemnify him in an action brought by a motorist injured by the named excluded driver on the plaintiff's policy, who was driving the plaintiff's automobile without the plaintiff's permission. The court, James A. Hathaway, J., granted summary disposition for the defendant, rejecting the plaintiff's contention that MCL 500.3009(2); MSA 24.13009(2), which allows an insurer, upon the request of the insured, to exclude liability coverage if the insured automobile is operated by a named excluded driver, violates constitutional guarantees of due process when applied to a policyholder whose automobile is used by the named excluded driver without the policyholder's permission. The plaintiff appealed.

The Court of Appeals *held:*

1. MCL 500.3009(2); MSA 24.13009(2) is not violative of due process. The statute, having a rational basis in competing considerations of insurance coverage versus lower costs of coverage, represents a valid exercise of the state's police powers by the Legislature. Also, the plaintiff's expectation of coverage despite the statute and the unambiguous policy language excluding coverage pursuant to the statute is his alone and does not give rise to a property interest that is subject to the protections of the Fifth or the Fourteenth Amendment.

2. The plaintiff's claim that he did not knowingly waive his rights to due process is without merit.

Affirmed.

*Thomas D. Kipietro Law Offices* (by *Thomas K. Dipietro* and *Ronald M. Haystead*), for the plaintiff.

*Brandt, Hanlon, Becker, Lanctot, McCutcheon,*

*Schoolmaster & Taylor* (by *Thomas A. Brandt*), and *John A. Lydick,* of Counsel, for the defendant.

Before: BRENNAN, P.J., and CORRIGAN and R. C. ANDERSON,* JJ.

CORRIGAN, J. In this action for declaratory judgment, plaintiff appeals as of right the grant of summary disposition to defendant and a declaration that defendant had no obligation to defend or indemnify plaintiff under an automobile insurance policy. We affirm.

The facts are undisputed. Plaintiff's automobile was insured with defendant pursuant to the no-fault act, MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.* The policy included an "Authorization for Excluded Driver (Named Excluded Person)" endorsement, pursuant to MCL 500.3009(2); MSA 24.13009(2), that named plaintiff's wife, Brenda Verbison, as an "excluded person." The endorsement included the following statutorily required language:

> WARNING—When a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

The same language was repeated in the body of the policy, together with an additional paragraph that read:

> If a vehicle is being operated by an individual named on the Declaration Certificate as an Excluded Driver, insurance under this policy is null and void for Bodily Injury Liability Insurance Coverage, Property Damage Liability Insurance

* Circuit judge, sitting on the Court of Appeals by assignment.

Coverage, Comprehensive Coverage, Collision Coverage, Car Rental Coverage and Sound Equipment Coverage.

Plaintiff did not permit his wife to operate the vehicle. On October 12, 1990, she found a hidden set of keys, took the car, and was involved in an automobile accident. The injured motorist sued plaintiff and his wife. Plaintiff's alleged liability was presumably based on the owner's liability statute, MCL 257.401; MSA 9.2101. Plaintiff tendered the defense of the suit to defendant, which denied coverage, citing the "excluded driver" endorsement. Plaintiff then sought a declaration that defendant was required to defend and indemnify him in the third-party suit.

Because both parties agree that there are no material factual issues and the question involved is one of law, we treat the motion as one granted pursuant to MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116 (C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *AFL-CIO v Civil Service Comm,* 191 Mich App 535, 546-547; 478 NW2d 722 (1991); *Panich v Iron Wood Products Corp,* 179 Mich App 136, 139; 445 NW2d 795 (1989).

Plaintiff principally argues that MCL 500.3009(2); MSA 24.13009(2) unconstitutionally authorizes the deprivation of a property right without due process of law. We disagree.

MCL 500.3009(2); MSA 24.13009(2) provides:

If authorized by the insured, automobile liability

> or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance: Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

Statutes are presumed constitutional. *Katt v Ins Bureau,* 200 Mich App 648, 651; 505 NW2d 37 (1993), citing *Beacon Club v Kalamazoo Co Sheriff,* 332 Mich 412, 425; 52 NW2d 165 (1952). The presumption of constitutionality is rebuttable. A party challenging a legislative judgment may attack its constitutionality in terms of purely legal arguments, if the legislative judgment is so arbitrary and irrational as to render the legislation unconstitutional on its face. *Shavers v Attorney General,* 402 Mich 554, 614; 267 NW2d 72 (1978). As long as the Legislature's judgment is supported by a rational basis, the choices made and the distinctions drawn are constitutional. *O'Donnell v State Farm Mutual Automobile Ins Co,* 404 Mich 524, 542; 273 NW2d 829 (1979). The test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective. *Shavers, supra* at 612.

The applicability of procedural due process guarantees depends initially on the presence of a "property" or "liberty" interest within the meaning of the Fifth or Fourteenth Amendment. *Williams v Hofley Mfg Co,* 430 Mich 603, 610; 424 NW2d 278 (1988), citing *Arnett v Kennedy,* 416 US

134, 165; 94 S Ct 1633; 40 L Ed 2d 15 (1974). To have a property interest in a benefit, a person must have more than a unilateral expectation of it. *Williams, supra* at 610, quoting *Bd of Regents of State Colleges v Roth,* 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source." *Williams, supra* at 610-611. Because insurance companies "are the instruments through which the Legislature carries out a scheme of general welfare," *Shavers, supra* at 597, due process protections under the state and federal constitution are operative. *Id.* at 599.

Although the issue presented has not been squarely addressed, a number of our decisions have concluded that the provisions of MCL 500.3009(2); MSA 24.13009(2) are a valid exercise of legislative power, i.e., that the "rational basis" test of *Shavers* and *O'Donnell, supra,* has been met. As the Court said in *Muxlow v Auto Club Ins Ass'n,* 152 Mich App 817, 820; 394 NW2d 121 (1986) (holding that the owner of a vehicle may be named as an excluded driver), "the choice by the Legislature among competing policy considerations is best left to its determination and is not for the courts to question." See also *Detroit Automobile Inter-Ins Exchange v Comm'r of Ins,* 86 Mich App 473, 480; 272 NW2d 689 (1978). "[T]he Legislature balanced the competing policy considerations of coverage versus lower costs by retaining within the broad coverage of no-fault the named driver exclusion provisions." This Court "will not question the wisdom of the Legislature's determination." *Id.*

Plaintiff has not overcome the presumption that MCL 500.3009(2); MSA 24.13009(2) is constitutional. First, a nontangible property interest in-

volves "reasonab[le] reli[ance] upon an existing practice." *Bundo v Walled Lake,* 395 Mich 679, 694; 238 NW2d 154 (1976) (process for renewal of liquor licenses). Plaintiff proposed to limit the excluded driver rule to only those instances when the named insured has consented to the excluded driver's use of the vehicle. No panel of this Court has construed the statute in this fashion. Indeed, the Court has explicitly held that § 3009(2) presents "no room for judicial construction or interpretation." *Allstate Ins Co v Detroit Automobile Inter-Ins Exchange,* 142 Mich App 436, 442; 369 NW2d 908 (1985). See also, e.g., *Allstate Ins Co v Detroit Automobile Inter-Ins Exchange,* 73 Mich App 112, 115-116; 251 NW2d 266 (1976). Plaintiff, therefore, cannot have "*reasonably* relied upon an *existing* practice" in believing that the excluded driver provision applies only when the insured consents to the use of his vehicle. Plaintiff has no more than a "*unilateral* expectation" of his interpretation of the statute, not a property interest "defined by existing rules or understandings that stem from an *independent* source." See *Roth, supra* at 577 (emphasis supplied).

Plaintiff's argument is really no more than a public policy argument in constitutional garb. This Court will not interpose a policy-driven interpretation on the plain language of a statute in which the Legislature has chosen among competing policy concerns. The situations that plaintiff presents as arising because of the application of § 3009(2) are simply inapposite. For example, plaintiff did not permit his car to be driven without insurance coverage. Thus, he cannot be subject to criminal sanctions under MCL 500.3102(2); MSA 24.13102(2).

Finally, even if the suggested right to procedural due process were recognized, the outcome of this

case would remain the same. According to *Bundo, supra,* rudimentary due process requires

> (i) timely written notice detailing the reasons for proposed administrative action; (ii) an effective opportunity to defend by confronting any adverse witnesses and by being allowed to present in person witnesses, evidence, and arguments; (iii) a hearing examiner other than the individual who made the decision or determination under review; and (iv) a written, although relatively informal, statement of findings. [395 Mich 696; citations omitted.]

Plaintiff had timely written notice of the action because the effect of the exclusion was explicitly described in plaintiff's policy and on the endorsement. Because plaintiff does not dispute that his wife drove the car or that the exclusion was part of the policy, an opportunity to confront adverse witnesses or to present witnesses, evidence, and arguments would have made no difference. No other hearing examiner could have reached a different conclusion. And a "written . . . statement of findings" would not change the undisputed facts.

Plaintiff also argues that he did not knowingly waive his right to due process because he was not fully informed of the consequences of executing the "named driver" exclusion.

This issue was not raised below. As a general rule, this Court declines to consider an issue that was not decided by the trial court. *American Nat'l Fire Ins Co v Frankenmuth Mut Ins Co,* 199 Mich App 202, 210; 501 NW2d 237 (1993). If the issue is one of law, however, and the record is factually sufficient, we may consider the question. *Id.* Waiver of a right or privilege consists of (1) specific knowledge of the constitutional right and (2)

an intentional decision to abandon the protection of the constitutional right. *People v Grimmett,* 388 Mich 590, 598; 202 NW2d 278 (1972), citing *Johnson v Zerbst,* 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938). Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. *Id.* The determination whether a waiver was intelligently and knowingly made depends upon the facts and circumstances of each particular case. *People v McKinley,* 383 Mich 529, 536; 176 NW2d 406 (1970).

Plaintiff's waiver argument is without merit. The "warning" on the policy plainly stated that "[w]hen a named excluded person operates a vehicle *all liability coverage is void—no one is insured. Owners of the vehicle* and others legally responsible for the acts of the named excluded person *remain fully personally liable"* (emphasis added). The policy went on to identify exactly which forms of coverage ("Bodily Injury Liability Insurance Coverage, Property Damage Liability Insurance Coverage," etc.) would be unavailable. The protection afforded under these forms of coverage were set out in the body of the policy. Plaintiff knew, or should have known, exactly what he would lose if his wife drove the vehicle. An insurer need not spell out the details of what is meant by full personal liability. The implications are clear enough.

Affirmed. Defendant may tax costs.

DEPARTMENT OF SOCIAL SERVICES v CARTER

Docket No. 154012. Submitted June 2, 1993, at Grand Rapids. Decided October 4, 1993, at 9:15 A.M.

The Department of Social Services and Debra Gates brought an action in the Isabella Circuit Court against Timothy Carter, seeking an order of filiation and support of a child born to Gates and alleging Gates was not married from the conception to the birth of the child. The defendant moved for summary disposition on the basis that the court lacked jurisdiction and the plaintiffs lacked standing under the Paternity Act, because the child had been conceived while Gates was married. After the plaintiffs amended their complaint to allege that although conceived during Gates' marriage, the child was not issue of the marriage, the court, Paul F. O'Connell, J., denied the defendant's motion, ordered a blood test of Gates' former husband, and, on the basis of the results of the blood test, found that the former husband was not the father of the child. Thereafter, the court found on the basis of the results of a blood test that the defendant was the father of the child and entered an order of filiation and support. The defendant appealed.

The Court of Appeals *held:*

There need be no adjudication of whether a child is an issue of a former marriage before the filing of a complaint for an order of filiation. A circuit court has subject-matter jurisdiction under the Paternity Act to determine during the proceedings for an order of filiation whether a child was born out of wedlock. Here, because Gates was not aware that she was pregnant at the time of her divorce, the proper forum to determine whether the child was an issue of the marriage was this action rather than the divorce action.

Affirmed.

*Larry J. Burdick,* Prosecuting Attorney, and *Robert A. Holmes, Jr.,* Assistant Prosecuting Attorney, for the Department of Social Services.

*Lynn R. Chamberlain,* for the defendant.

Before: SHEPHERD, P.J., and HOLBROOK, JR., and MACKENZIE, JJ.

SHEPHERD, P.J. Defendant appeals as of right the circuit court's order of filiation and support. We affirm.

I

The underlying facts of this case are as follows. On June 1, 1985, plaintiff Debra K. Gates married Michael D. John. In August or September, 1985, Gates and John were separated and ceased having sexual relations. When John filed for divorce on June 12, 1986, there was no mention of any minor children born of the marriage. On or about June 20, 1986, Gates and defendant, Timothy Carter, engaged in sexual relations.

John filed an amended complaint for divorce on June 24, 1986, specifically alleging that there were no minor children born of the marriage. On August 29, 1986, a judgment of divorce was entered following a hearing that Gates did not attend. At the hearing, John stated that there were no children born of the marriage and that Gates was not pregnant. After the divorce was entered, Gates learned that she was pregnant, giving birth to Detera Ann Gates on March 20, 1987.

On May 24, 1988, plaintiffs, the Isabella County Department of Social Services and Gates, filed a complaint for an order of filiation against defendant, alleging that plaintiff Gates was not married from the conception to the birth of the minor child and that defendant was the father of the minor child. In response, defendant filed a motion for summary disposition, alleging that the trial court did not have subject-matter jurisdiction under the Paternity Act, MCL 722.711 *et seq.*; MSA 25.491 *et*

*seq.*, because the minor child was not born out of wedlock, having been conceived while Gates was married to John. Defendant also alleged that plaintiffs did not have standing to pursue the claim against him.

On September 1, 1988, plaintiffs filed an amended complaint for an order of filiation, alleging that Debra Gates "was married to Michael David John at the time of conception, but not at the time of birth, and said child is not an issue of the marriage." After a hearing on November 2, 1988, the trial court denied defendant's motion for summary disposition, but ordered a hearing to determine whether the child was born out of wedlock within the meaning of the Paternity Act. The court ordered a blood test of John, but held in abeyance the question of a blood test of defendant pending the outcome of this evidentiary hearing.

On April 5, 1991, an evidentiary hearing was held to determine whether John was the father of the minor child. After reviewing John's blood test results, the trial court denied defendant's motion for summary disposition in an opinion entered on April 25, 1991, determining that the child was not the issue of the marriage between Gates and John. The trial court further granted plaintiffs' motion for a blood test of defendant.

On May 20, 1991, defendant filed a renewed motion for summary disposition, which the trial court denied on October 4, 1991. Following a May 26, 1992, nonjury paternity trial, the trial court concluded that even though Gates' child was conceived during the marriage, the child was not the issue of the marriage between her and John. The court further concluded that defendant was the father of the minor child, given that the probability of paternity was 99.9868 percent.

On appeal, defendant contends that the court

did not have jurisdiction over him and that plaintiffs did not have standing to sue under the Paternity Act, MCL 722.711 *et seq.*; MSA 25.491 *et seq.* Specifically, defendant argues that the child was conceived during the marriage between Gates and John and that at the time plaintiffs filed their paternity complaint there had been no prior court determination whether the child was "born out of wedlock," as required by *Girard v Wagenmaker,* 437 Mich 231; 470 NW2d 372 (1991).

II

We note that subject-matter jurisdiction and standing are not the same thing. *Altman v Nelson,* 197 Mich App 467, 472-474; 495 NW2d 826 (1992). Circuit courts have subject-matter jurisdiction of actions to identify the father of a child born out of wedlock. MCL 722.714(3); MSA 25.494(3); *Syrkowski v Appleyard,* 420 Mich 367, 375; 362 NW2d 211 (1985); *Morrison v Richerson,* 198 Mich App 202, 206; 497 NW2d 506 (1993). In the instant case, the circuit court had subject-matter jurisdiction, because the allegations in the amended complaint for an order of filiation and support state that the minor child was not an issue of Gates' marriage with Michael John.

In order to have standing to seek relief under the Paternity Act, a plaintiff must allege that a child was born out of wedlock. MCL 722.714(6); MSA 25.494(6); *Altman, supra,* pp 475-476. MCL 722.711(a); MSA 25.491(a) defines "child born out of wedlock" to be "a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child which the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." In the instant case, plaintiffs have

standing to seek relief under the Paternity Act, because they alleged that the child was born out of wedlock. Furthermore, we note that the trial court has already determined that the child was conceived during Gates' marriage with John, but was not the issue of that marriage.

Contrary to defendant's assertion, the trial court did not have to determine whether the child was an issue of a marriage before plaintiffs could file the complaint alleging that the child was born out of wedlock and that defendant was the father of the child. First, we note that in *Syrkowski,* a case involving a surrogate parenting agreement, the Supreme Court held that the circuit court had subject-matter jurisdiction under the Paternity Act to make a determination whether the child was born out of wedlock during the proceedings in the plaintiff's action for an order of filiation.

Second, we note that the statutory language does not expressly state that there must be a determination that a child was not an issue of a marriage before the filing of a paternity action. In the instant case, the question whether the child was born out of wedlock could not have been determined before the complaint requesting an order of filiation, because Gates did not know that she was pregnant at the time of the divorce judgment. Here, a prior determination that the child was born out of wedlock cannot be required, because the question could not have been determined previously in the context of the divorce action.

Furthermore, we agree with the trial court that *Girard* is limited by its facts and does not deprive the trial court of subject-matter jurisdiction or plaintiffs of standing to bring a claim under the Paternity Act. In *Girard,* the plaintiff filed a paternity complaint against the defendant, Mrs. Wagenmaker, claiming that he was the father of the

child she bore. *Id.,* p 235. At the time of conception and birth, the defendant was married to Mr. Wagenmaker, who "continuously accepted and supported the child as his own." *Id.* After reviewing the meaning of "child born out of wedlock" as defined by the statute, the Court stated:

> For a putative father to be able to file a proper complaint in a circuit court, MCL 722.711(a); MSA 25.491(a), a circuit court must have made a determination that the child was not the issue of the *marriage at the time of filing the complaint.* [*Id.,* pp 242-243; emphasis in original.]

Because the plaintiff in *Girard* could not show that the child was born out of wedlock, the Court concluded that he could not file a complaint and thus did not have standing to bring a claim under the Paternity Act.

In contrast to *Girard,* which involved the status of the plaintiff putative father in his attempt to gain parental rights to a child conceived and born during the Wagenmakers' marriage, the instant case involves a complaint brought by the DSS seeking support under the Paternity Act for a minor child born after the mother was divorced and where there already had been a judicial determination that the child was born out of wedlock. Unlike *Girard,* where the plaintiff needed to rebut the traditional presumption of legitimacy, the only issue in the instant case is whether defendant is the biological father and thus liable for the minor child's support and education. MCL 722.712; MSA 25.492; *Syrkowski, supra.*

Moreover, were we to agree with defendant that *Girard* controls this case, plaintiffs would have to refile the present paternity action. We concur with the trial court's observation that refiling the pres-

ent action would be burdensome and futile, given that there has already been a judicial determination that the minor child was born out of wedlock.

In addition, we note that in a refiled action defendant would have less protection than he has enjoyed in these proceedings. Plaintiff Gates first would have to seek modification of the divorce judgment on the basis of newly discovered evidence by filing a motion for relief from judgment under MCR 2.612(C). After obtaining an amended judgment of divorce that provided that the minor child was not the issue of the marriage, plaintiffs then could refile the paternity action against defendant. Because defendant would not be a party to the action to modify the judgment of divorce, he would have no opportunity to challenge the determination excluding John as the father of the child. This contrasts with the present case where defendant, as a party to the paternity action, was entitled to call witnesses and cross-examine plaintiffs' witnesses at the evidentiary hearing where the court determined that the child was not the issue of the marriage between Gates and John.

Affirmed.

PEOPLE v NEAL

Docket No. 147741. Submitted July 7, 1993, at Lansing. Decided October 4, 1993, at 9:20 A.M. Leave to appeal sought.

Jerome G. Neal was charged in the 42-1 District Court with second-degree murder, possession of a firearm during the commission of a felony, and carrying a concealed weapon. Following a preliminary examination, the court, Richard D. McLean, J., bound over the defendant on charges of voluntary manslaughter, felony-firearm, and carrying a concealed weapon. The people appealed, and the Macomb Circuit Court, Michael D. Schwartz, J., reversed the district court's decision to reduce the charge from second-degree murder to voluntary manslaughter, concluding that the district court abused its discretion because there was conflicting evidence whether the defendant had acted with malice. The defendant appealed by leave granted.

The Court of Appeals *held:*

The district court did not abuse its discretion in refusing to bind over the defendant on the charge of second-degree murder. The record supports the district court's conclusion that the defendant did not act with malice at the time of the shooting because the defendant was in mortal fear for his safety and well-being.

Reversed and remanded.

1. CRIMINAL LAW — HOMICIDE — SECOND-DEGREE MURDER — MANSLAUGHTER.

A death caused by a defendant with malice and without justification or excuse is second-degree murder; malice requires an intent to kill, an intent to do great bodily harm, or an intent to create a high risk of death or great bodily harm with knowledge that such is the probable result; malice must be established from facts or circumstances that do not mitigate the

REFERENCES

Am Jur 2d, Criminal Law §§ 134, 412; Homicide §§ 50, 53.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

degree of the offense to manslaughter or constitute an excuse or justification (MCL 750.317, 750.321; MSA 28.549, 28.553).

2. CRIMINAL LAW — PRELIMINARY EXAMINATION.

The inquiry of an examining magistrate is not limited to whether the prosecution has presented evidence regarding each element of an offense, but requires an examination of the whole matter; even where the prosecution has presented some evidence regarding each element, if upon examination of the whole matter the evidence is insufficient to satisfy the magistrate that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, the magistrate should not bind the defendant over for the offense charged, but may bind over on a lesser offense; in making this determination, mitigating evidence must be considered, and the magistrate should take into account the weight and competency of the evidence and the credibility of the witnesses; conflicting evidence or evidence that raises a reasonable doubt regarding guilt should be left to the trier of fact.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Carl J. Marlinga,* Prosecuting Attorney, *Robert J. Berlin,* Chief Appellate Lawyer, and *Steven Kaplan,* Assistant Prosecuting Attorney, for the people.

*Mark J. Swanson,* for the defendant.

Before: MACKENZIE, P.J., and GRIFFIN and W. L. CAHALAN,* JJ.

GRIFFIN, J. Defendant appeals by leave granted an order of the Macomb Circuit Court reversing the decision of the 42-1 District Court to bind over defendant on a charge of voluntary manslaughter rather than second-degree murder. We reverse and reinstate the voluntary manslaughter charge.

I

This case arises out of an ugly racial incident

* Circuit judge, sitting on the Court of Appeals by assignment.

that led to the tragic shooting death of Larry Heyd by defendant. Defendant was initially charged with second-degree murder, MCL 750.317; MSA 28.549, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon, MCL 750.227; MSA 28.424. At the conclusion of the preliminary examination, the district court bound over defendant on charges of felony-firearm, carrying a concealed weapon, and the lesser offense of voluntary manslaughter, MCL 750.321; MSA 28.553. The examining magistrate found that "this was [not] a conscious effort by [defendant] to cause the death of an individual." On appeal by the people, the circuit court reversed the district court's decision to reduce the charge from second-degree murder to voluntary manslaughter. The circuit court concluded that the district court abused its discretion in refusing to bind over defendant on the charge of second-degree murder because there was conflicting evidence whether defendant acted with malice. After thorough review, we disagree.

II

The testimony at the preliminary examination established that defendant and three companions attended the Richmond Good Old Days Fair in Macomb County on the evening of September 8, 1991. While at the fair, the group engaged in a conversation with a school friend, Kevin Kazmierczak. During the conversation, they were joined by Kazmierczak's cousin, Robert Kazmierczak. Robert demanded to know from Kevin whether defendant and his companions had been involved in a fight the previous night in which Robert had been beaten up by a black male. Although Robert was informed of their noninvolvement, he became en-

raged when one of the youths started laughing and invited them to leave the fairgrounds, apparently to fight. Defendant then allegedly lifted his shirt to reveal a silver handgun lodged in the front of his pants. Robert and two friends and defendant and his companions left the fairgrounds. Once outside, the decedent, Larry Heyd, attacked one of defendant's friends. The altercation attracted a large group of white youths. There is also testimony that defendant then waved a handgun at the gathering crowd and ordered them to stay back before he turned and fled with his companions. One person in the crowd began yelling "Run, nigger, run." Apparently, at this point the crowd began to give chase.

After the group ran approximately three hundred yards to the top of a hill, defendant fired two warning shots into the air. One of the pursuers yelled that defendant's gun was a "fake." The crowd then resumed chasing defendant for approximately one-quarter to one-half mile until they reached a trailer park. The decedent caught up to defendant in the trailer park and was thereafter shot by defendant. Apparently, only a small number of pursuers had reached the trailer park at the time of the shooting. Although the witnesses agreed that defendant shot the decedent only after warning him that he did not want to shoot, there was conflicting testimony regarding whether the decedent was advancing or turning slightly away from defendant at the time the actual shot was fired.

## III

Defendant's sole claim on appeal is that the circuit court erred in reversing the district court's dismissal of the second-degree murder charge

when the evidence presented at the preliminary examination failed to establish that defendant acted with malice. We agree.

Generally, we apply the same standard on review as applied by the circuit court in reviewing a district court's decision to bind over a defendant. *People v Thomas,* 438 Mich 448, 452; 475 NW2d 288 (1991); *People v Etheridge,* 196 Mich App 43, 54; 492 NW2d 490 (1992). In assessing the circuit court's decision to reverse the district court's decision, we must determine whether the district court abused its discretion in concluding that there was not probable cause to believe defendant committed second-degree murder. *People v Fiedler,* 194 Mich App 682, 692-693; 487 NW2d 831 (1992); *People v Flowers,* 191 Mich App 169, 174; 477 NW2d 473 (1991).

A death caused by a defendant with malice and without justification or excuse is second-degree murder. *People v Spearman,* 195 Mich App 434, 438; 491 NW2d 606 (1992). Malice requires an intent to kill, an intent to do great bodily harm, or an intent to create a high risk of death or great bodily harm with knowledge that such is the probable result. *People v Wofford,* 196 Mich App 275, 278; 492 NW2d 747 (1992). Further, malice must be established from facts or circumstances that do not mitigate the degree of the offense to manslaughter or constitute an excuse or justification. *People v Porter,* 169 Mich App 190, 193; 425 NW2d 514 (1988).

The examining magistrate must bind over a defendant for trial if it appears that "a felony has been committed and there is probable cause for charging the defendant therewith." MCL 766.13; MSA 28.931; *People v Hill,* 433 Mich 464, 469; 446 NW2d 140 (1989). Our Supreme Court in *People v King,* 412 Mich 145, 154; 312 NW2d 629 (1981),

addressed the relevant scope of inquiry by the magistrate in making the probable cause determination:

> The inquiry is not limited to whether the prosecution has presented evidence on each element of the offense. The magistrate is required to make his determination "after an examination of the whole matter." Although the prosecution has presented some evidence on each element, if upon an examination of the whole matter the evidence is insufficient to satisfy the magistrate that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, then he should not bind the defendant over on the offense charged but may bind him over on a lesser offense as to which he is so satisfied.

See also *People* v *Stafford,* 434 Mich 125, 133; 450 NW2d 559 (1990).

Accordingly, in making this determination, mitigating evidence, including evidence of provocation, must be considered by the magistrate. *King, supra* at 154; *Stafford, supra* at 133-135. Moreover, the magistrate should take into account the weight and competency of the evidence as well as the credibility of the witnesses. *King, supra* at 153. However, conflicting evidence or evidence that raises a reasonable doubt regarding the defendant's guilt should be resolved by the trier of fact. *King, supra; Fiedler, supra* at 693. Therefore, where there is credible evidence presented to both support and negate the existence of malice, a factual question exists that should be left to the jury. *Wayne Co Prosecutor v Recorder's Court Judge,* 92 Mich App 119, 123; 284 NW2d 507 (1979).

IV

After reviewing the record in the present case,

we find no abuse of discretion in the district court's refusal to bind over defendant on the charge of second-degree murder. Although the circuit court, in reversing the district court's decision noted that there was conflicting evidence regarding whether the decedent was slightly moving away from defendant at the time of the shooting, we believe that the circuit court too narrowly construed the magistrate's scope of inquiry in making the probable cause determination. *King, supra.* Upon "examination of the whole matter," the district court found that defendant did not act with malice at the time of the shooting because "[defendant] did feel from all the totality of the evidence as presented on the record that he was in mortal fear for his safety and well-being." We conclude that the entire record supports the district court's conclusion.

Uncontroverted evidence presented at the preliminary examination established that defendant and his companions were approached by a hostile Robert Kazmierczak, who invited them to leave the fairgrounds, apparently to fight. Once outside, one of defendant's companions was attacked by the decedent, attracting a large crowd of white youths who began chasing defendant and his friends. There was also testimony that during the chase racial epithets were shouted at defendant and his companions. After chasing defendant approximately one-quarter to one-half mile, several of the pursuers, including the decedent, caught up with defendant at a trailer park. The decedent was shot at close range only after being warned by defendant that he did not want to shoot. At the time of the shooting, several of the other pursuers were approaching defendant and the decedent. Even in light of the conflicting evidence that the decedent

may have turned slightly away from defendant at the time of the shooting, we conclude that the district court did not abuse its discretion in finding that defendant acted without malice under these circumstances.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

ACKERMAN v GENERAL MOTORS CORPORATION

Docket No. 142067. Submitted August 4, 1993, at Grand Rapids. Decided October 4, 1993, at 9:25 A.M. Leave to appeal sought.

Frederick A. Ackerman was awarded workers' compensation benefits from General Motors Corporation on August 24, 1984, by the Workers' Compensation Appeal Board for a continuing disability that began on August 21, 1978. The Court of Appeals denied General Motors leave to appeal on January 7, 1985. The Supreme Court denied General Motors leave to appeal on June 25, 1985, and reconsideration of that denial on September 23, 1985. 422 Mich 934 (1985). On October 17, 1985, General Motors paid benefits accrued through that date in a lump sum. On December 16, 1985, General Motors petitioned the Bureau of Workers' Disability Compensation for recoupment of an overpayment in benefits. The plaintiff acknowledged the overpayment, but argued that recoupment was limited by MCL 418.833(2); MSA 17.237(933)(2) to overpayment of benefits that accrued in the year before recoupment was sought. A hearing referee and the appeal board ruled in favor the plaintiff. General Motors appealed.

The Court of Appeals *held:*

MCL 418.833(2); MSA 17.237(833)(2) provides that when an employer or carrier takes action to recover overpayment of benefits, no recoupment of money shall be allowed for a period that is more than one year before the date of taking such action. Section 833(2) clearly relates to overpayments, not accrued benefits, and it does not prevent General Motors from recouping the full amount of its overpayment. The overpayment was made within one year of the petition for recoupment. General Motors may recoup the entire overpayment by offset against future benefits it owes the plaintiff.

Reversed.

WORKERS' COMPENSATION — RECOUPMENT OF BENEFIT OVERPAYMENTS — ONE-YEAR-BACK RULE.

An employer who makes a lump sum payment of workers'

REFERENCES

Am Jur 2d, Workers' Compensation § 417.

See ALR Index under Workers' Compensation.

compensation benefits for a past period extending more than one year and who subsequently discovers that it made an overpayment of benefits may seek full recoupment of its overpayment until one year after the lump sum payment (MCL 418.833[2]; MSA 17.237[833][2]).

*Vigiletti & McCrandall, P.C.* (by *Susan A. McCrandall*), for the plaintiff.

*Munroe & Nobach, P.C.* (by *Cameron C. McComb*), for the defendant.

Before: FITZGERALD, P.J., and CONNOR and TAYLOR, JJ.

TAYLOR, J. General Motors Corporation appeals by leave granted an opinion and order of the Workers' Compensation Appeal Board, which affirmed a hearing referee's determination that pursuant to MCL 418.833(2); MSA 17.237(833)(2) the corporation's recoupment of overpaid benefits was limited to overpayment of benefits due during the year before it sought recoupment.

On August 24, 1984, the appeal board awarded plaintiff continuing disability compensation benefits beginning August 21, 1978. On September 24, 1984, General Motors sought leave to appeal that decision, but on January 7, 1985, we denied leave for lack of merit in the grounds presented. The Supreme Court denied leave to appeal on June 25, 1985, and reconsideration on September 23, 1985. 422 Mich 934.

On October 17, 1985, General Motors paid plaintiff $74,204.02 for compensation benefits that had accrued through October 17, 1985. General Motors then discovered that it had overpaid plaintiff $13,013.68, and petitioned the bureau for recoupment of the overpayment on December 16, 1985. Plain-

tiff acknowledged the overpayment, but raised the bar of § 833(2).

The parties submitted the controversy to the bureau on briefs. The hearing referee ruled that § 833(2) limited the corporation's recoupment to the amount of overpayment of benefits that had accrued in the year before it sought recoupment. The board, in a 2 to 1 decision, affirmed the decision of the referee.

The statute provides:

> When an employer or carrier takes action to recover overpayment of benefits, no recoupment of money shall be allowed for a period which is more than 1 year prior to the date of taking such action. [MCL 418.833(2); MSA 17.237(833)(2).]

Defendant asserts that it should be allowed to recoup the entire overpayment in order to avoid giving plaintiff a double recovery and that it should be allowed to recoup the overpayment as credit against the supplemental benefits it owes him pursuant to § 352 of the act. MCL 418.352; MSA 17.237(352).

Plaintiff answers that the one-year limitation is equitable because employee applications for further compensation are limited by a like provision in § 833(1). MCL 418.833(1); MSA 17.237(833)(1). Besides, defendant made the error. Plaintiff opposes recovery from supplemental benefits in any event because the compensation supplement fund reimburses employers for supplemental benefits they pay.

General Motors may recoup the entire overpayment. Section 833(2) is a statute of limitations. It was designed to allow for recoupment in just these circumstances, as the Supreme Court explained in *McAvoy v H B Sherman Co,* 401 Mich 419; 258

NW2d 414 (1977), in distinguishing this section from § 862, which provides for reimbursement of seventy percent benefits paid during appeal.

> We do not read the foregoing statute as broadly as the Court of Appeals, First, this provision is obviously intended to be a statute of limitations.
>
> Secondly, and more importantly, this statute originally was designed and passed in 1969 (some six years before 1975 PA 34) to provide for the *recoupment* of benefits overpaid after an award was finalized, i.e., after all stays were ended, appeals completed and the payment of benefits commenced. The exclusive *reimbursement* procedures outlined in 1975 PA 34 apply only to the new 70% benefits paid during the appellate process. Therefore, there can be no overlap between the 1969 recoupment provision and the 1975 reimbursement amendment. [Emphasis in original. *Id.* at 449-450, n 11.]

Here, the award became final on September 23, 1985; the corporation overpaid benefits on October 17, 1985, and within one year petitioned for recovery of benefits overpaid within that same period.

The fallacy in the analyses of the referee and the appeal board majority is that they applied the statute to benefits that had accrued but had not been paid before the award became final. "We . . . find that the defendant should only be allowed to recoup benefits that *became due* during that one year period." (Emphasis added.) However, the statute deals with benefits that were *overpaid*; it says nothing about accrued benefits. Accrued benefits cannot, by definition, be overpaid; they are benefits that have not been paid. MCL 418.801(2); MSA 17.237(801)(2); *Townsend v M-R Products, Inc,* 436 Mich 496, 501; 461 NW2d 696 (1990).

Further, fairness requires complete recoupment under the facts of this case. Plaintiff acknowledged

that he was overpaid. The overpayment was a windfall for him. Double recovery by an employee "is repugnant to the very principles of workers' compensation." *Hiltz v Phil's Quality Market,* 417 Mich 335, 350; 337 NW2d 237 (1983).

The same principle prevents the corporation from recovering the overpayment from supplemental benefits owed plaintiff. An employer pays supplemental benefits to an injured employee but is reimbursed for those payments from general funds either by the compensation supplement fund or through tax credits. MCL 418.352(8); MSA 17.237(352)(8), MCL 418.391(7); MSA 17.237(391)(7); *Lulgjuraj v Chrysler Corp,* 185 Mich App 539, 542; 463 NW2d 152 (1990). The employer cannot have a double recovery by withholding the overpayments from supplemental benefits it owes the employee and also by being reimbursed by the state, directly or indirectly.

This case involves timely recoupment of money paid in a lump sum. We make no suggestion concerning how the statute should be interpreted if recovery is sought for week-by-week overpayments because that issue was not raised.

The board's decision is reversed. General Motors may recoup the entire overpayment by offset against future benefits it owes plaintiff.

Reversed.

PHILLIPS V BUTTERBALL FARMS COMPANY, INC (ON SECOND REMAND)

Docket No. 165049. Submitted June 4, 1993, at Lansing. Decided October 4, 1993, at 9:30 A.M. Leave to appeal sought.

Teresa Phillips brought an action in the Kent Circuit Court against Butterball Farms Company, Inc., alleging that she had been discharged from her employment with the defendant in retaliation for exercising her rights under the Workers' Disability Compensation Act. The plaintiff sought not only lost income but also damages for mental and emotional distress and anguish. The trial court, Robert A. Benson, J., dismissed the claim for damages for mental and emotional distress, finding that the plaintiff's claim sounded in contract rather than tort, and dismissed a breach of contract claim, finding that the plaintiff was an at-will employee. Thereafter, the court, George S. Buth, J., approved a jury instruction proposed by the defendant that would have limited the plaintiff to nominal damages. The plaintiff appealed by leave granted. The Court of Appeals, MAHER, P.J., and SULLIVAN and REILLY, JJ., affirmed, basing the determination in part on the plaintiff's failure to request a transcript of one of the hearings. Unpublished opinion per curiam, decided February 21, 1991 (Docket No. 118024). The Supreme Court, in lieu of granting leave to appeal, remanded for consideration on the merits. 439 Mich 895 (1991). On remand, the Court of Appeals, SULLIVAN, P.J., and REILLY and JANSEN, JJ., again affirmed. Unpublished opinion per curiam, decided May 14, 1992 (Docket No. 147051). The Supreme Court, in lieu of granting leave to appeal, vacated the judgment of the Court of Appeals and remanded for reconsideration in light of *Dunbar v Dep't of Mental Health,* 197 Mich App 1 (1992). 442 Mich 909 (1993).

On second remand, the Court of Appeals *held:*

1. The *Dunbar* holding that an action brought under the

REFERENCES

Am Jur 2d, Damages §§ 251-259; Master and Servant §§ 60-63; Wrongful Discharge §§ 25-29.

Recovery for discharge from employment in retaliation for filing workers' compensation claim. 32 ALR4th 1221.

retaliatory discharge provision of the Workers' Disability Compensation Act sounds in tort rather than contract and that damages for mental distress and anguish may be awarded is binding precedent and must be followed. Accordingly, it was error for the trial court to limit the plaintiff's damages to nominal damages for lost wages.

2. Because the plaintiff was an at-will employee, damages for mental distress and anguish are limited to only those damages attributable to the distress resulting from the retaliatory nature of the discharge and not from the distress of her subsequent unemployment, because she could have had no reasonable expectation of continued employment. The fact that the result may be only nominal damages that might do little to deter retaliatory discharges is a problem that must be addressed by the Legislature.

Reversed and remanded.

1. MASTER AND SERVANT — WRONGFUL DISCHARGE — RETALIATORY DISCHARGE — DAMAGES — MENTAL ANGUISH.

An action for wrongful discharge alleging retaliation for the filing of a claim for workers' compensation benefits sounds in tort, not contract; damages for mental anguish may be awarded in such an action.

2. MASTER AND SERVANT — AT-WILL EMPLOYMENT — RETALIATORY DISCHARGE — DAMAGES — MENTAL ANGUISH.

Intrinsic in the concept of an at-will employment contract is the mutual understanding between employer and employee that neither party to the agreement has an expectation of continued employment; consequently, damages for mental or emotional distress in an action alleging discharge in retaliation for the filing of a claim of workers' compensation benefits are limited to those damages that arise solely from the retaliatory nature of the discharge.

*Williams, Klukowski, Drew & Fotieo* (by *Stephen R. Drew*), for the plaintiff.

*Miller, Johnson, Snell & Cummiskey* (by *Craig H. Lubben* and *Nancy S. Rubino*), for the defendant.

ON SECOND REMAND

Before: MCDONALD, P.J., and REILLY and JANSEN, JJ.

REILLY, J. This case has been remanded again, this time for reconsideration in light of *Dunbar v Dep't of Mental Health,* 197 Mich App 1; 495 NW2d 152 (1992), a case decided after our last opinion was released.[1] Our previous opinions in this matter have been vacated and, therefore, we are bound by Administrative Order No. 1990-6, as extended, to follow *Dunbar.* Accordingly, we reverse.

I

In our original opinion on remand, we considered whether the trial court properly dismissed plaintiff's claim for damages for mental anguish, anxiety, humiliation, and pain and suffering arising out of her alleged retaliatory discharge for exercising her rights under the workers' compensation statute. Unpublished opinion per curiam of the Court of Appeals, decided May 14, 1992 (Docket No. 147501). We noted that a conflict among panels of this Court with regard to the recovery of exemplary damages in retaliatory discharge actions had been resolved in *Mourad v Automobile Club Ins Ass'n,* 186 Mich App 715, 728; 465 NW2d 395 (1991). In *Mourad,* this Court, following *Watassek v Dep't of Mental Health,* 143 Mich App 556; 372 NW2d 617 (1985), and *Lopus v L & L Shop-Rite, Inc,* 171 Mich App 486; 430 NW2d 757 (1988), determined that an action for retaliatory discharge is an action asserting a specific type of wrongful discharge and is, therefore, a contract action. Accordingly, a plaintiff in a retaliatory discharge case is not entitled to recover exemplary damages. *Mourad, supra* at 728.

In *Dunbar,* a panel of this Court held that an

[1] *Phillips v Butterball Farms Company, Inc,* 442 Mich 909 (1993).

action for retaliatory discharge for filing a workers' compensation claim sounds in tort, not in contract. The majority acknowledged that a retaliatory discharge is a type of wrongful discharge. *Dunbar, supra,* at 6. However, the majority distinguished *Mourad* (retaliatory demotion for failing to follow company's unethical practice), *Watassek* (retaliatory discharge for interference with treatment of patients), and *Lopus* (retaliatory discharge in anticipation of plaintiff's filing a workers' compensation claim) and held that the allegedly wrongful conduct was a breach of the statutory duty not to discharge an employee in retaliation for filing a workers' compensation claim and, therefore, sounds in tort. *Id.* at 10; MCL 418.301(11); MSA 17.237(301)(11).[2]

This case is factually on point with *Dunbar,* because plaintiff in this case also alleges that she was discharged from her employment in retaliation for exercising her rights under the Workers' Disability Compensation Act, in violation of § 301(11) of the statute.[3] Therefore, we believe that we are bound to follow *Dunbar.* However, we do so reluctantly because we do not believe that the *Dunbar* majority sufficiently justified its departure from the rule of law stated in *Mourad.*

The cause of action for retaliatory discharge in contravention of the public policy indicated in the

[2] A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under the act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

[3] In this case, the plaintiff was a ninety-day probationary employee, whose employment was terminable at will. In *Dunbar,* the plaintiff was a registered nurse employed by the Michigan Department of Mental Health at the Northville Regional Psychiatric Hospital for approximately two years.

Workers' Disability Compensation Act was judicially established in *Sventko v Kroger,* 69 Mich App 644, 647; 245 NW2d 151 (1976), as an exception to the doctrine of at-will employment. However, *Sventko* failed to define the nature of the action, i.e., contract or tort, and failed to provide a remedy. Subsequently, in 1981, the Legislature codified that public policy and enacted a prohibition against the discharge of an employee for filing a claim for workers' compensation benefits. 1981 PA 200, § 301(11), MCL 418.301(11); MSA 17.237(301)(11). However, the legislation failed to codify the judicially created cause of action, define its nature, or provide any penalty or remedy for the violation of the public policy. Later decisions of this Court, which dealt with the nature of retaliatory discharge actions in other factual contexts, were in conflict concerning whether the cause of action was one sounding in tort or contract. We believe that conflict was appropriately resolved in *Mourad.*

Nevertheless, the majority in *Dunbar* has concluded that the cause of action in that case sounded in tort because the employer allegedly violated a duty imposed by § 301(11) of the Workers' Disability Compensation Act. However, we emphasize, as did the dissent in *Dunbar,* that § 301(11) does not create a cause of action or set forth a remedy. Compare the Civil Rights Act, MCL 37.2701; MSA 3.548(701) and MCL 37.2801; MSA 3.548(801) and the Handicappers' Civil Rights Act, MCL 37.1602; MSA 3.550(602) and MCL 37.1606; MSA 3.550(606). Rather, the statute is merely a codification of the judicially recognized public policy against retaliatory discharge in the specific situation where an employee files a workers' compensation claim. *Dunbar, supra* at 14-15, n 4; see also *Suchodolski v Michigan Consolidated*

*Gas Co,* 412 Mich 692, 695; 316 NW2d 710 (1982); *Sventko, supra.*

Furthermore, the *Dunbar* majority has presented no rationale for distinguishing between retaliatory discharge for filing a workers' compensation claim and other types of retaliatory discharge that are equally offensive to public policy. The mere fact that the Workers' Disability Compensation Act has codified the public policy against retaliatory discharge for filing a workers' compensation claim is not a sufficient basis for ignoring the underlying basis for the cause of action, i.e., that some grounds for discharge are so contrary to public policy as to give rise to an action for wrongful discharge, even though the employer-employee relationship is "at will." *Sventko, supra.* The action is based on the breach of an implied provision that the employer will not discharge an employee for a reason that is contrary to public policy. See *Brockmeyer v Dunn & Bradstreet,* 131 Wis 2d 561; 335 NW2d 834 (1983); *Sterling Drugs, Inc v Oxford,* 294 Ark 239; 743 SW2d 380 (1988). The cause of action for wrongful discharge exists even where there is no explicit legislative statement prohibiting such a discharge. See *Mourad, supra, Suchodolski, supra,* and *Sventko, supra.* See also *Trombetta v Detroit, T & I R Co,* 81 Mich App 489, 496; 265 NW2d 385 (1978) (employee discharged for refusing to violate a law). The majority in *Dunbar* acknowledged that a retaliatory discharge is a type of wrongful discharge, but did not explain how the explicit statutory codification of a public policy against retaliatory discharge in workers' compensation cases transforms such activity into a tort action while other types of retaliatory discharge apparently give rise to contract actions.

We recognize that the majority's conclusion in

*Dunbar* that a claim of discharge in retaliation for filing a workers' compensation claim sounds in tort is consistent with recent rulings of several other state courts. 32 ALR4th 1221, § 4, pp 1231-1238. However, we remain convinced that plaintiff's claim for retaliatory discharge is one sounding in contract.

The rights and obligations of employers and employees under the Workers' Disability Compensation Act arise out of and are incidental to the contract of employment and, therefore, are contractual in nature. *Boshaw v J J Newberry Co,* 259 Mich 333, 341; 243 NW 46 (1932), overruled on other grounds *Halfacre v Paragon Bridge & Steel Co,* 368 Mich 366, 376; 118 NW2d 455 (1962); *Erickson v Goodell Oil Co, Inc,* 384 Mich 207, 211; 180 NW2d 798 (1970); *Lee v J H Lee & Son,* 72 Mich App 257, 265; 249 NW2d 380 (1976). Furthermore, the liability imposed upon employers for their employees' work-related injuries is not based on tort theory. Rather, employees who receive an injury "arising out of and in the course of employment" are entitled to benefits without regard to whether the employer was negligent or at fault. See MCL 418.301(1); MSA 17.237(301)(1).

In spite of that, because we are bound to follow *Dunbar,* we are compelled to conclude that plaintiff's cause of action sounds in tort, and, therefore, plaintiff may claim all the damages allowed for that cause of action, including damages for mental or emotional distress. In view of our holding, the trial court's ruling accepting defendant's proposed instruction limiting plaintiff's damages solely to nominal damages for lost wages, was error.

Intrinsic in the concept of an at-will employment contract is the mutual understanding between employer and employee that neither party to the agreement has an expectation of continued

employment. Consequently, an "at-will" employee who seeks to enforce an action for retaliatory discharge, whether the action sounds in tort or contract, will be limited in the damages that can be obtained. Having ruled that the plaintiff's action is to be treated as one sounding in tort, the measure of damages for her mental or emotional distress necessarily will be confined to proof of distress arising solely from the retaliatory nature of the discharge, because an at-will employee has no reasonable expectation of being continued in employment. Similarly, whether the action be in tort or contract, damages for lost wages will be nominal because an at-will employee cannot show a reasonable expectation of continued employment. *Sepanske v Bendix Corp,* 147 Mich App 819; 384 NW2d 54 (1985).

We realize that at-will employees may only be able to recover minimal damages for their mental and emotional distress, and nominal damages for lost wages in an action sounding in tort. Nonetheless, while we do not condone acts of retaliatory discharge, we should not disregard basic concepts of the common law in order to deter retaliatory discharges. We should not judicially convert "at-will" employment contracts into "just cause" contracts for the purpose of deterring such conduct. Any other remedy for the at-will employee, or penalty against the employer, must be provided by the Legislature.

Accordingly, we reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

PEOPLE v HUNTER

Docket Nos. 147049, 147474. Submitted July 7, 1993, at Lansing. Decided October 4, 1993, at 9:35 A.M. Leave to appeal sought.

Lymon C. Hunter, III, was convicted following a bench trial in the Oakland Circuit Court, Gene Schnelz, J., of manufacturing 50 grams or more, but less than 225 grams, of cocaine, delivery of less than 50 grams of cocaine, and possession of marijuana. He was sentenced to concurrent prison terms of 5 to 20 years' imprisonment for the manufacturing conviction, 180 days to 20 years for the delivery conviction, and 16 days for the marijuana conviction. Both parties appealed, and the appeals were consolidated.

The Court of Appeals *held:*

1. There was insufficient evidence that the defendant manufactured 50 grams or more, but less than 225 grams, of a mixture containing cocaine. The evidence established that a jar found in the defendant's home that was filled with 61.5 grams of an opaque liquid actually contained two separate items, water and particles of cocaine weighing 10.05 grams, rather than a mixture containing cocaine. The cocaine found in the jar was an insoluble solid material that was easily separated from the water.

2. Because the testimony established that the defendant was converting powered cocaine into crack cocaine at the time of his arrest, he properly may be convicted of manufacturing cocaine by converting or processing a controlled substance by means of chemical synthesis. The definition of "manufacture" in MCL 333.7106(2); MSA 14.15(7106)(2) includes the conversion or processing of a controlled substance by chemical synthesis.

3. The evaporation of the liquid in the jar by a forensic chemist at the state police crime laboratory was not done in bad faith and did not deny the defendant a fair trial. In addition, the defendant failed to object to the admission of the

REFERENCES

Am Jur 2d, Criminal Law § 830; Drugs, Narcotics, and Poisons §§ 19, 27.6.

See ALR Index under Cocaine; Destruction or Demolition; Drugs and Narcotics.

10.05 grams of cocaine recovered from the jar, and failure to object to the admission of evidence precludes appellate review absent manifest injustice. In light of the uncontroverted evidence that the defendant was manufacturing crack cocaine at the time of his arrest, no manifest injustice will result from lack of appellate review of the issue.

4. Because the evidence establishes that the defendant manufactured less than fifty grams of cocaine, the defendant's manufacturing conviction is reduced to one appropriate for an amount of less than fifty grams of cocaine. The case must be remanded for entry of a modified judgment of sentence and resentencing.

Modified and remanded.

1. CONTROLLED SUBSTANCES — WORDS AND PHRASES — MIXTURES CONTAINING COCAINE.

To constitute a mixture containing cocaine, a mixture must be reasonably homogeneous or uniform and it should be reasonably difficult to separate the cocaine from the filler material because of a mixing or blending of the substances; where cocaine and water are in a container and the cocaine is an insoluble solid material that is easily separated from the water, the contents of the container are two separate items, water and particles of cocaine, rather than a mixture containing cocaine (MCL 333.7401[2][a][iii]; MSA 14.15[7401][2][a][iii]).

2. CONTROLLED SUBSTANCES — WORDS AND PHRASES — MANUFACTURING COCAINE.

The conversion of powdered cocaine into crack cocaine qualifies as the "manufacturing" of cocaine by chemical synthesis (MCL 333.7106[2], 333.7401[2][a][iv]; MSA 14.15[7106][2], 14.15[7401][2][a][iv]).

3. CONSTITUTIONAL LAW — EVIDENCE — FAILURE TO PRESERVE — DUE PROCESS.

Failure of the police to preserve evidentiary material that may have exonerated a defendant constitutes a denial of due process only where bad faith on the part of the police can be shown.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Richard Thompson,* Prosecuting Attorney, *Michael J. Modelski,* Chief, Appellate Division, and *Robert C. Williams,* Assistant Prosecuting Attorney, for the people.

*John D. Lazar,* for the defendant on appeal.

Before: MACKENZIE, P.J., and GRIFFIN and W. L. CAHALAN,* JJ.

GRIFFIN, J. Following a bench trial, defendant was convicted of manufacturing 50 grams or more, but less than 225 grams, of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). Defendant was sentenced to concurrent prison terms of 5 to 20 years for the manufacturing conviction, 180 days to 20 years for the delivery conviction, and 16 days for the possession of marijuana conviction. Both parties appeal as of right. We reduce defendant's manufacturing conviction to one appropriate for an amount of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and remand for modification of the judgment of sentence and resentencing. Our resolution of this matter renders the prosecutor's consolidated appeal moot.

I

This case arises out of the execution of a search warrant at defendant's home on November 2, 1990. Defendant was observed dropping a glass jar into a wastebasket in the kitchen area. The jar, retrieved from the wastebasket, was warm and contained a milky white substance. In addition, two rocks of crack cocaine and a small amount of marijuana were seized. The jar, along with the other seized contraband, was sent to the state police crime laboratory for an analysis of its contents.

The forensic chemist who examined the jar testi-

* Circuit judge, sitting on the Court of Appeals by assignment.

fied that it was filled with 61.5 grams of an opaque liquid containing insoluble particles in a "non-homogeneous mixture." The particles were dispersed throughout the liquid in the jar and on the bottom of the jar. The chemist concluded that the liquid was water. After the testing of a portion of the solid material on the bottom of the jar indicated the presence of cocaine, the water was evaporated, leaving 10.05 grams of an "off-white powder." The powder tested positive for cocaine. The water was never tested for the presence of cocaine. The chemist further testified that the cocaine was in the "wet phase" stage of being manufactured into crack cocaine.

II

Defendant's argument challenging the sufficiency of the evidence underlying his conviction of manufacturing cocaine is dispositive. Defendant contends that there was insufficient evidence that he "manufactured" 50 grams or more, but less than 225 grams, of a mixture containing cocaine. We agree. In determining whether the prosecution has presented sufficient evidence to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Miller,* 198 Mich App 494, 498; 499 NW2d 373 (1993).

MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii) prohibits the manufacturing of "50 grams or more, but less than 225 grams, of any mixture containing" cocaine. Recently, this Court in *People v Barajas,* 198 Mich App 551, 556; 499 NW2d 396

(1993), construed the term "mixture" for purposes of a controlled substance violation and held that the weight of the controlled substance and filler material cannot be aggregated to punish a defendant more severely unless both are mixed together to form a homogeneous or reasonably uniform mass. In *Barajas,* a rock of cocaine weighing 26.01 grams was taped to the inside of a package also containing over one kilogram of baking soda. *Id.* at 553. In concluding that the weight of the two substances could not be aggregated as a "mixture," this Court found that the cocaine and baking soda were easily separated. *Id.* at 556. Moreover, this Court also noted that the concentration of cocaine was not reasonably uniform or homogeneous throughout the baking soda in the package. The baking soda contained no trace of cocaine. *Id.* at 556-557.

Similarly, in the present case, we conclude that the evidence does not establish that the cocaine and water in the jar was a "mixture." *Barajas, supra.* The cocaine found in the jar was an insoluble solid material that was easily separated from the water. The chemist testified that one of the particles he removed from the bottom of the jar tested positive for the presence of cocaine. Moreover, because the cocaine did not dissolve into the water, the concentration of cocaine was not reasonably uniform or homogeneous. Accordingly, the jar contained two separate items, water and particles of cocaine weighing 10.05 grams, rather than a mixture containing cocaine.

III

Defendant also argues that the prosecutor failed to prove that he manufactured cocaine. MCL 333.7106(2); MSA 14.15(7106)(2) defines "manufacture":

> "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. It includes the packaging or repackaging of the substance or labeling or relabeling of its container, except that it does not include:
>
> (a) The preparation or compounding of a controlled substance by an individual for his or her own use.
>
> (b) The preparation, compounding packaging, or labeling of a controlled substance:
>
> (i) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of his or her professional practice.
>
> (ii) By a practitioner, or by the practitioner's authorized agent under his or her supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

Because the testimony at trial established that defendant was converting powdered cocaine into crack cocaine at the time of his arrest, we find that defendant was "manufacturing" cocaine within the meaning of the statute. In reaching this result, we note that the definition of "manufacture" includes the conversion or processing of a controlled substance by chemical synthesis. In the instant case, the forensic chemist who analyzed the contents of the jar testified that the cocaine was in the "wet phase" stage of being converted into crack cocaine. He further testified that powder cocaine is converted into crack cocaine by means of a chemical process in which the powder cocaine is mixed with sodium bicarbonate or ammonia hydroxide in a container of water and

heated. The heating process chemically alters the composition of the powder cocaine and transforms it into free-base cocaine that is essentially one hundred percent pure cocaine. Accordingly, we find that this testimony established that defendant converted or processed a controlled substance by means of chemical synthesis.

IV

Defendant also contends that the destruction of the liquid in the jar denied him a fair trial and that the trial court abused its discretion in allowing into evidence the 10.05 grams of cocaine recovered from the jar because the prosecutor did not establish that the condition of the cocaine was substantially unchanged. We disagree. Failure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown. *Arizona v Youngblood,* 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988), reh den 488 US 1051 (1989); *People v Johnson,* 197 Mich App 362, 365; 494 NW2d 873 (1992); *People v Leo,* 188 Mich App 417, 424; 470 NW2d 423 (1991). Because he has made no such showing, defendant was not denied a fair trial. *Youngblood, supra.*

Moreover, we note that defendant failed to object to the admission of evidence regarding the 10.05 grams of cocaine recovered from the jar. The failure to object to the admission of evidence precludes appellate review absent manifest injustice. *People v Spearman,* 195 Mich App 434, 446; 491 NW2d 606 (1992); *People v Potra,* 191 Mich App 503; 479 NW2d 707 (1991). In light of the uncontroverted evidence that defendant was manufacturing crack cocaine at the time of his arrest, we find no manifest injustice. *Spearman, supra.*

V

Because the evidence at trial established that defendant manufactured less than fifty grams of cocaine, we reduce defendant's manufacturing conviction to one appropriate for an amount of less than fifty grams of cocaine and remand for entry of a modified judgment of sentence and resentencing.

Remanded for entry of a judgment of sentence appropriate for a conviction of manufacturing less than fifty grams of cocaine and resentencing. We do not retain jurisdiction.

PEOPLE v LAVEARN

Docket No. 150480. Submitted June 3, 1993, at Detroit. Decided October 4, 1993, at 9:40 A.M.

Joseph L. Lavearn was convicted by a jury in the Detroit Recorder's Court, George A. Best, II, J., of first-degree murder and possession of a firearm during the commission of a felony. He appealed and moved for an evidentiary hearing in the trial court with respect to a claim of ineffective assistance of trial counsel based on counsel's failure to present a defense of intoxication to the charge of premeditated murder. The Court of Appeals, WAHLS, P.J., and SULLIVAN and BRENNAN, JJ., while retaining jurisdiction, granted the motion. On remand, the trial court, Bruce U. Morrow, J., denied a motion for a new trial, rejecting the claim of ineffective assistance of counsel.

The Court of Appeals *held:*

Trial counsel's failure to present evidence of the defendant's intoxication at the time of the shooting of the decedent deprived the defendant of a defense that might have made a difference in the outcome of the trial. Such evidence could have negated the element of premeditation and deliberation necessary to convict the defendant of first-degree murder.

Reversed and remanded for a new trial.

1. CRIMINAL LAW — ASSISTANCE OF COUNSEL.

Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence if the failure deprives the defendant of a substantial defense, i.e., one that might have made a difference in the outcome of the trial.

2. CRIMINAL LAW — ASSISTANCE OF COUNSEL.

Decisions by counsel concerning which witnesses to call, what evidence to present, or the questioning of witnesses are consid-

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REFERENCES

Am Jur 2d, Criminal Law § 985; Homicide §§ 127-129.

Modern status of the rules as to voluntary intoxication as defense to criminal charge. 8 ALR3d 1236.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.

ered part of trial strategy; a defendant may overcome the presumption of sound trial strategy by showing that counsel's failure to prepare for trial resulted in counsel's ignorance of, and failure to present, valuable evidence by which the accused might have benefited substantially.

3. HOMICIDE — PREMEDITATED MURDER — DEFENSES — VOLUNTARY INTOXICATION.

Voluntary intoxication is a defense to premeditated murder if it can be shown that the intoxication prevented the defendant from engaging in premeditation and deliberation with respect to the killing.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Carolyn M. Breen,* Assistant Prosecuting Attorney, for the people.

*Bell & Gardner, P.C.* (by *Athina T. Sivingas*), for the defendant.

Before: FITZGERALD, P.J., and MICHAEL J. KELLY and W. J. CAPRATHE,* JJ.

MICHAEL J. KELLY, J. Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment and two years' imprisonment, respectively. Defendant appeals as of right. We reverse and remand for a new trial.

Defendant's convictions stem from the June 20, 1991, shooting death of Steven Walker in the City of Detroit. The decedent and six other men were gathered in front of a house on Hasse Street around 1:50 A.M. The house was in the middle of

* Circuit judge, sitting on the Court of Appeals by assignment.

the block about three hundred feet west of Nancy,[1] the cross street to the east. Witnesses testified at trial that this area was known for drug trafficking.[2] A car drove past the group to the end of the street and turned north so that it was positioned with its driver's side perpendicular to and facing the group. Five seconds after the car stopped, the driver, allegedly defendant, commenced shooting out of the driver's side window. Three or four shots rang out and after a pause, two more, following which the car sped off. One of the shots killed Steven Walker.[3] One of the men jumped in a vehicle and gave chase. He caught up with defendant's vehicle and shot at it, wounding the defendant in the leg. Defendant's fourteen-year-old brother, Jason, was a passenger in the car and was also wounded. Defendant and his brother were apprehended by police, who found $192 and two grams of cocaine in defendant's sock. Several spent nine-millimeter casings were retrieved from the car and matched with three found on the street near the home where the shots were fired.

At trial, the defense presented no witnesses and the jury reached its verdicts in less than thirty minutes. While retaining jurisdiction on appeal, this Court remanded the case for a *Ginther*[4] hearing, at which it was learned that defense counsel's

[1] One witness said the house was ten or eleven houses from the corner. No estimate of lot width was adduced.

[2] In fact, after this incident, an evidence technician removed from the house on Hasse narcotics paraphernalia, a chemist's scale, bags of drugs that usually sell for $10 each, and a number of handguns and rifles, which would indicate that the occupants were involved in drug trafficking.

[3] Testimony at trial revealed that the car was located three hundred or so feet from the site where the victim and the other men were grouped. The autopsy of Steven Walker revealed that the cause of death was a single gunshot wound to the chest. A security guard for a nearby manufacturing plant testified that the driver of the vehicle was the shooter.

[4] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

strategy was to attack the identification of defendant as the shooter and that, on the second day of trial, defendant told defense counsel that he wanted to testify and present a defense of intoxication, but counsel indicated that doing so would jeopardize defendant's case. In closing argument defense counsel stated:

> And can anybody equate that because Mr. Lavearn is behind [sic] the driver's seat of the car that stopped in the City of Hazel Park some 15 to 16 minutes later, is the driver of the car in the same car in the City of Detroit on Nancy and Hasse only 15 minutes earlier? No one knows what happened 15 or 16 minutes earlier because there is no eyewitness to this crime. Mr. Lavearn might know, God might know, but there certainly wasn't anybody else that took this witness stand on behalf of the prosecution and said it was Mr. Lavearn.

Of course there were many eyewitnesses, but only two who knew who did the shooting, defendant and his brother. When the police apprehended defendant, he said, "The cocaine is mine. Jason had nothing to do with any of this. I threw the gun out the window in Detroit near where Dequindre splits."

Two witnesses at the *Ginther* hearing testified that defendant was visiting a house several blocks from the scene, drinking beer and tequila for four to five hours and that he was drunk before he got into his car. Defendant testified that he had consumed a fifth of whiskey and a twelve-pack of beer that day. The medical records from the hospital where defendant was treated contained no blood alcohol content results. The trial in this case was conducted by a Recorder's Court judge who was unavailable for the later *Ginther* hearing on remand. The successor judge at the *Ginther* hearing,

after hearing the testimony of the witnesses who testified about intoxication and that of the defendant, commented as follows:

> If the defense in this court's opinion had been intoxication as opposed to misidentification then this court can clearly see that based on the testimony that was provided that it believes that the verdict was against the great weight of the evidence.

I

We first address defendant's claim that he was denied his right to effective assistance of counsel because defense counsel failed to present an intoxication defense. Defendant claims that defense counsel should have called certain witnesses at trial who would have testified that defendant was heavily intoxicated just before the incident in question.

In order to establish a denial of the effective assistance of counsel guaranteed under the state and federal constitutions, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. Moreover, the defendant must overcome the presumption that the action was sound trial strategy, and the deficiency must be prejudicial to the defendant. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991).

Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense. *People v Hoyt,* 185 Mich

App 531, 537-538; 462 NW2d 793 (1990); *People v Julian,* 171 Mich App 153, 158-159; 429 NW2d 615 (1988); *People v Wilson,* 159 Mich App 345, 354; 406 NW2d 294 (1987). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly,* 186 Mich App 524, 526; 465 NW2d 569 (1990). Decisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy. *Julian, supra.* In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the accused. *People v Caballero,* 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

Voluntary intoxication is a defense to first-degree premeditated murder if a showing is made that the intoxication prevented the defendant from premeditating and deliberating. See *People v Garcia,* 398 Mich 250, 259-262; 247 NW2d 547 (1976).

Testimony presented at the evidentiary hearing held with regard to defendant's claim of ineffective assistance of counsel revealed that before trial defense counsel was aware of defendant's claim of intoxication and aware that defendant had witnesses who could corroborate the fact that he was intoxicated on the night of the shooting. Defense counsel testified that defendant told him that he was "quite drunk" at the time of the shooting. Furthermore, at least two people who were with defendant just before the shooting told defense counsel that defendant had been drinking that night. Additionally, defense counsel, who had previously represented defendant in connection with two or more drunken driving charges, was well

aware of defendant's longstanding drinking problem.

Witnesses who testified at the evidentiary hearing indicated that just before the shooting, defendant was "really drunk." Defendant testified that he had been drinking heavily the day of the shooting and that he had a longstanding drinking problem. Defendant also indicated that he wanted to testify in his own behalf at trial to explain why he was in the neighborhood where the shooting occurred and that he was drunk when the shooting occurred.

After reviewing the record, we believe defense counsel's failure to present an intoxication defense deprived defendant of a defense that might have made a difference in the outcome of the trial. If defendant had been able to show through his witnesses and through his own testimony that he was intoxicated at the time of the shooting, such evidence would have justified acquittal of first-degree murder. Defendant's voluntary intoxication would have negated the element of premeditation and deliberation necessary to convict him of first-degree murder. Counsel's failure to present the witnesses and to put defendant on the stand to testify in his own behalf deprived defendant of a substantial defense. Defendant has successfully established his claim of ineffective assistance of counsel.

II

Defendant also argues that trial counsel was ineffective because he failed to move for a directed verdict. Because a motion for a directed verdict would have been unsuccessful, defense counsel was not obligated to argue this meritless motion. *People v Gist,* 188 Mich App 610, 613; 470 NW2d 475 (1991).

In light of our disposition of defendant's claim of ineffective assistance of counsel, we need not address the other claims raised by defendant.

Reversed and remanded for a new trial.

PEOPLE v STEVE JONES

Docket No. 142402. Submitted June 3, 1993, at Detroit. Decided October 4, 1993, at 9:45 A.M.

Steve Jones was convicted following a bench trial in the Recorder's Court for the City of Detroit, James E. Roberts, J., of aiding and abetting possession with the intent to deliver less than fifty grams of cocaine. He appealed, contending that the evidence was insufficient to support his conviction. The evidence indicated that the defendant accepted money from a third party, to whom a codefendant then handed a package that appeared to contain narcotics. When the defendant and the codefendant were apprehended minutes later, the defendant had a large sum of money, primarily in small denominations, and the codefendant was in possession of eighteen clear plastic bags containing suspected rock cocaine. The defendant stipulated at trial that one of the bags later was determined to contain cocaine.

The Court of Appeals *held:*

1. The evidence was sufficient to support the inference that the defendant knew that his codefendant possessed cocaine. It was reasonable for the court to conclude that the essential elements of the crime had been proven beyond a reasonable doubt. The trial court's findings were sufficient.

2. The court's off-the-record comments, which were not objected to by the defendant at trial, were not shown to have been improper.

Affirmed.

W. J. CAPRATHE, J., dissenting in part, stated that the defendant's conviction should be reversed because the evidence is not sufficient to support the conviction. The conclusions upon which the conviction was based are nothing more than inferences built upon other inferences that are not independently supported by established facts.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Jeffrey Ca-*

*minsky,* Assistant Prosecuting Attorney, for the people.

*Robert M. Morgan,* for the defendant on appeal.

Before: FITZGERALD, P.J., and MICHAEL J. KELLY and W. J. CAPRATHE,* JJ.

FITZGERALD, P.J. Following a bench trial, defendant was convicted of aiding and abetting possession with the intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and was sentenced to 1½ to 20 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant contends that the evidence was insufficient to support his conviction of aiding and abetting his codefendant, Melvin Metzler. Evidence was presented that a police officer saw defendant accept money from a third person, to whom Metzler then handed a package that appeared to contain narcotics. When defendant and Metzler were apprehended minutes later, defendant had a large sum of money—primarily in small denominations—and Metzler was in possession of eighteen clear plastic bags containing suspected rock cocaine. Defendant stipulated at trial that one of these bags was later determined to contain cocaine.

Defendant did not have to actually possess the cocaine to be convicted. *People v Wolfe,* 440 Mich 508, 519-521, 524; 489 NW2d 748 (1992); *People v Sammons,* 191 Mich App 351, 370-372; 478 NW2d 901 (1991). The evidence was sufficient to support the inference that defendant knew Metzler possessed cocaine. Our review of the evidence indicates that it was reasonable for the trier of fact to

* Circuit judge, sitting on the Court of Appeals by assignment.

conclude that the essential elements of the crime had been proven beyond a reasonable doubt. *People v Petrella,* 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Vaughn,* 186 Mich App 376, 379; 465 NW2d 365 (1990).

Defendant also challenges the fact that the trial court made off-the-record comments during its findings. These comments do not mean that the trial court's findings were insufficient. MCR 6.403; see *People v Legg,* 197 Mich App 131, 134-135; 494 NW2d 797 (1992); *People v Armstrong,* 175 Mich App 181, 185; 437 NW2d 343 (1989). There was no objection made at the time and no subsequent record was made concerning the comments for our review. We will not speculate regarding what the trial court may have said. There is nothing on the record that would lead us to assume that there was anything improper in the trial court's digressions.

Affirmed.

MICHAEL J. KELLY, J., concurred.

W. J. CAPRATHE, J. *(concurring in part and dissenting in part).* I do not believe that the evidence presented at defendant's trial was sufficient to support his conviction of aiding and abetting his codefendant, Melvin Metzler, in committing the offense of possession with the intent to deliver less than fifty grams of cocaine.

The record of the trial indicates that a police officer observed defendant taking part in what the officer believed to be a drug transaction. The officer testified that he was about one hundred feet away and he observed, through binoculars, defendant talking to an unidentified man. The unidentified man gave defendant what the officer identified as United States currency, by its color, and defen-

dant then motioned or nodded to Metzler. Defendant stepped back and talked to Metzler and then Metzler walked over to the third person, produced a clear plastic bag, took something out of it, and handed it to the third person. The officer admitted that he could not see what was handed to the third person or what was in the bag. Metzler put the bag back in his right front pocket. The third person walked away, and within minutes defendant and Metzler were detained and searched. The police removed from Metzler's right front pocket a bag containing eighteen clear plastic bags, each containing an off-white lumpy material. It was stipulated at trial that the contents of only one of the bags was tested and that it yielded 0.16 grams of cocaine. Metzler also possessed $520, but no drug paraphernalia. Defendant possessed $617, but did not possess any drugs or drug paraphernalia.

There is no evidence that defendant actually possessed cocaine himself. However, as the majority points out, defendant did not have to actually possess the cocaine to be convicted. In support of this principle, the majority cites *People v Wolfe,* 440 Mich 508; 489 NW2d 748 (1992), and *People v Sammons,* 191 Mich App 351; 478 NW2d 901 (1991), both of which I believe are distinguishable.

In *Wolfe, supra* at 520-521, the Court stated:

> In this case, there was no direct evidence that defendant Wolfe actually possessed the cocaine. Rather, the evidence produced at trial showed that he constructively possessed the cocaine, i.e., that he "had the right to exercise control of the cocaine and knew that it was present." The courts have frequently addressed the concept of constructive possession and the link between a defendant and narcotics that must be shown to establish constructive possession. It is well established that a person's presence, by itself, at a location where

drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown.

Any one of various factors may be sufficient under given circumstances to establish this connection. For example, constructive possession of cocaine was shown in [*United States v Rackley,* 742 F2d 1266 (CA 11, 1984)], where, in addition to the defendant's presence at the location where the cocaine was found, traces of cocaine were discovered on shirts stored in his pickup truck. In *Thompson v United States,* 567 A2d 907, 908-909 (DC App, 1989), constructive possession was shown where the defendant was found in a sparsely furnished apartment that contained cocaine packets and large sums of money lying about in plain view. In *United States v Perez-Paredes,* 678 F Supp 259, 263 (SD Fla, 1988), constructive possession of cocaine was established when the defendant drove a codefendant to a location where cocaine was being processed and then remained at that location despite the obvious and nauseating smell of ether, which is an integral component in the processing of cocaine. As these cases suggest, constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. [Citations omitted.]

In *Wolfe,* the Court found at least three factors linking Wolfe to the cocaine. First, Wolfe was in control of the apartment where the cocaine was found. Second, as the police entered the apartment, Wolfe fled with others to a back bedroom where attempts were made to conceal the cocaine. Third, there was substantial evidence that Wolfe was working with the others in a concerted effort to sell crack cocaine. For example, Wolfe was present at the apartment when a sale of cocaine had occurred earlier in the evening. He possessed

a beeper whose number was known by men who had traveled together from Detroit, at least one of whom unquestionably sold cocaine from the apartment, and Wolfe admitted he knew cocaine was in the apartment.

In the present case, the circumstances do not support the conclusions that defendant knew that Metzler possessed the 0.16 grams of cocaine or that defendant had the right to exercise control of this cocaine.

In *Sammons, supra* at 371, this Court upheld the defendant's conviction of possession with intent to deliver cocaine because it found that there was sufficient evidence to find that the defendant had both knowledge and control of the cocaine:

> The evidence presented at trial showed that defendant provided Officer Buczek with a sample of cocaine, participated in discussions regarding future sales, expressed interest in the denomination of the bills used to purchase the drugs, and told Officer Buczek that "we" do not like to keep the drugs and money in the room at the same time. When viewed in a light most favorable to the prosecution, there was sufficient evidence of both knowledge and indicia of control to enable the jury to find that defendant directly committed the crime of possession with intent to deliver 225 grams or more, but less than 650 grams, of cocaine.

Similarly, in *People v Mumford,* 60 Mich App 279; 230 NW2d 395 (1975), which was cited in *Wolfe, supra,* the defendant was convicted of possession of a controlled substance with the intent to deliver. We held that there was sufficient evidence to find that the defendant had control of the heroin found in the apartment:

> The circumstantial evidence bearing on posses-

> sion in this case consists of defendant's exclusive presence in the apartment under circumstances indicating that he was an inhabitant, not a mere visitor. Additionally, defendant was near the coffee table on which, in plain view, were what appeared to be narcotics and narcotics paraphernalia. Finally, the jury could reasonably infer from the fact that defendant brandished a gun, that he was exercising control over the heroin with knowledge of its character. [*Mumford, supra* at 283.]

The circumstances in the present case are not sufficient to support the conclusions reached in *Wolfe, supra,* the federal cases cited in *Wolfe, supra, Sammons, supra,* or *Mumford, supra.*

The case against Metzler is also distinguishable. Metzler not only participated in the transaction involving the unknown item, he also possessed the 0.16 grams of cocaine, possessed the seventeen similar clear plastic bags, and did not possess any use paraphernalia. See *People v Metzler,* 193 Mich App 541; 484 NW2d 695 (1992). It can be inferred that Metzler possessed cocaine with the intent to deliver it.

This is not so with respect to defendant. The fact that he took money from an unidentified third person and then nodded at Metzler, who then handed something from a clear plastic bag to this unidentified third person, does not indicate that defendant knew that Metzler possessed the cocaine. We do not know what Metzler handed the unidentified third person, who was never apprehended. This was acknowledged by the trial court when it said:

> Well, your objection's noted. What he's saying is there's no—he can't say what was in it. It might have been sugar, it could have been empty, it could have been anything. All he's saying, as I

understand it, is that he saw a clear plastic bag and he presumed it to be. That's speculation, that's true, but he's got the right to move on.

The only logical way to infer, from this, that defendant knew Metzler possessed the 0.16 grams of cocaine with the intent to deliver it is by impermissibly building one inference on another. In *People v Atley,* 392 Mich 298, 315; 220 NW2d 465 (1974), the Court adopted and applied *People v Petro,* 342 Mich 299, 307-308; 70 NW2d 69 (1955), which stated that it is improper to prove an element by building an inference upon another inference:

> In other words, you would have to infer from finding Eaton in the car with Atley and the marijuana, first, that Eaton or Atley intended to sell marijuana and, second, that in connection with such intention to sell, there was an agreement between Atley and Eaton to accomplish the same. Therefore, to find conspiracy, you would have to pile one inference, agreement to sell, on top of another, intent to sell, based on identical evidence, *i.e.,* that Eaton was in the car with Atley and the marijuana. Inferences may be drawn from established facts; but inferences may not be built upon inference. [*Atley, supra,* at 315.]

In the present case, the established facts are that the defendant and Metzler were involved in a transaction regarding an unknown item and thereafter they were searched. The police found on Metzler eighteen similar clear plastic bags, the contents of one of which was tested and yielded 0.16 grams of cocaine. In order to find defendant guilty of aiding Metzler in committing the offense of possession of cocaine with intent to deliver it, from these facts, the following inferences would have to be piled on each other: (1) that the defen-

dant knew about the 0.16 grams of cocaine and the seventeen similar bags possessed by Metzler, on the basis of defendant's participation in the transaction involving the unknown item; (2) that the untested seventeen bags contained cocaine, and not some other controlled or counterfeit substances, because they were similar to the bag with 0.16 grams of cocaine; (3) that Metzler intended to deliver cocaine, on the basis of the circumstances surrounding the transaction involving the unknown item and his possession of eighteen bags of cocaine; and (4) that defendant is guilty on the basis of the three previous inferences.

In the case of *People v McWilson,* 104 Mich App 550, 555; 305 NW2d 536 (1981), this Court held that there is nothing wrong with multiple inferences as long as each inference is independently supported by the facts:

> Whatever is meant by the phrase "inference upon inference," the law in Michigan is that guilt may not be based upon such a foundation. However, the fact-finder is not prevented from making more than one inference in reaching its decision. That is, if each inference is independently supported by established fact, any number of inferences may be combined to decide the ultimate question.

In the present case, the conclusion that defendant aided Metzler's possession of the cocaine with the intent to deliver it is not independently supported by established facts. It is not an established fact that the item handed to the third person contained cocaine. It is not an established fact that the 0.16 grams of cocaine was possessed by Metzler with the intent to deliver it. It is also not an established fact that the other seventeen bags contained cocaine or that defendant knew about

the eighteen bags possessed by Metzler. These are conclusions based upon inferences that cannot be stacked upon each other to establish defendant's guilt.

Although cocaine is a terrible problem in the streets of this state, I feel compelled to reverse the verdict because of the lack of sufficient evidence.

However, I agree with the majority regarding the alleged off-the-record comments of the judge.

GARCIA v McCORD GASKET CORPORATION

Docket No. 145091. Submitted November 17, 1992, at Lansing. Decided October 4, 1993, at 9:50 A.M. Leave to appeal sought.

Plaintiff, Mary Garcia, was awarded workers' compensation benefits from defendants, McCord Gasket Corporation and its insurer, Union Fire Insurance Company, when a magistrate found her to be totally disabled. The order provided that the benefits were to be paid until further order of the bureau and that the defendants "shall be responsible for medical expenses pursuant to [MCL 418.315; MSA 17.237(315)] as follows: Any and all reasonable and necessary medical expenses related to plaintiff's back et sequelae." The defendants filed an application for review of the claim by the Workers' Compensation Appellate Commission, and the plaintiff filed a cross appeal. Numerous disputes relating to the reasonableness and necessity of various medical treatments followed. The defendants filed a petition to stop benefits and an application for mediation or a hearing. The plaintiff filed a motion to dismiss the appeal of the defendants, alleging that they had refused and denied payment of medical benefits required by the terms of the award of the magistrate and that such refusal was contrary to the provisions of MCL 418.862; MSA 17.237(862). The defendants responded that they had paid for reasonable and necessary medical benefits but had denied payment of requests for medical benefits that were not reasonable or necessary. The commission denied the plaintiff's motion to dismiss on the basis that the defendants erroneously may have believed that the notice of dispute filed after the magistrate's decision relieved them of their obligation under MCL 418.862(2); MSA 17.237(862)(2). The commission gave the defendants thirty days within which to provide an affirmation of the bills that had been received, the date the medical services were provided, and a showing that the bills had been paid pursuant to the magistrate's order awarding reasonable and necessary medical expenses related to plaintiff's back. Failure to provide timely compliance with MCL

REFERENCES

Am Jur 2d, Workers' Compensation §§ 686, 687.

See ALR Index under Workers' Compensation.

418.862(2); MSA 17.237(862)(2) would subject defendants' appeal to dismissal. The defendants filed a motion to remand and consolidate the proceedings or hold them in abeyance, noting that a hearing regarding their objections to the reasonableness and necessity of the medical expenses was scheduled to occur in less than two weeks. The commission denied the defendants' motion and granted the plaintiff's motion to dismiss. The defendants appealed by leave granted.

The Court of Appeals *held:*

The Workers' Compensation Appellate Commission has the implied authority to dismiss appeals for noncompliance with MCL 418.862(2); MSA 17.237(862)(2). The defendants' filing of a claim for review did not operate as a stay with regard to their obligation to provide the medical benefits required by the terms of the magistrate's award. The defendants should have paid the disputed bills, or the maximum amount allowed under the Workers' Compensation Health Care Services Rules, 1989 AACS, R 418.1901 *et seq.*, if that amount was less, and then proceeded with an expedited hearing as provided in R 418.1904(3) and (6).

Affirmed.

TAYLOR, P.J., dissenting, stated that for dismissal to be appropriate, there must be prerequisite noncompliance with the requirements of MCL 418.862(2); MSA 17.237(862)(2). The magistrate's order in this case is not sufficiently clear to make apparent what medical expenses are required to be paid pursuant to the requirements of § 862(2). The decision of the appellate commission should be reversed and the matter remanded to the commission for determination of the appeal on the merits, or to permit further remand to the magistrate for clarification of the order, for joinder with the defendants' timely demanded hearing under MCL 418.847; MSA 17.237(847) concerning the propriety of the challenged health care services, for consolidation with any appeal from the magistrate's decision following that hearing, or for decision in light of any unappealed findings made at such hearing.

WORKERS' COMPENSATION — APPELLATE COMMISSION — CLAIMS FOR REVIEW — MEDICAL BENEFITS.

The Workers' Compensation Appellate Commission may dismiss an employer's appeal from a magistrate's award of medical benefits where the employer has filed a claim for review regarding the award and has paid some of the benefits, but has disputed and not paid others; the filing of a claim for review does not operate as a stay with regard to the obligation to

provide the medical benefits required by the terms of the award (MCL 418.862[2]; MSA 17.237[862][2]).

*Richard B. Jenks* (*Daryl Royal,* of Counsel), for the plaintiff.

*Evans, Pletkovic, Hays & Rhodes, P.C.* (by *John J. Hays*), for the defendants.

Before: TAYLOR, P.J., and SHEPHERD and MARILYN KELLY, JJ.

SHEPHERD, J. The plaintiff's employer, McCord Gasket Corporation, and its insurance carrier, National Union Fire Insurance Company, appeal by leave granted from an August 30, 1991, order of the Workers' Compensation Appellate Commission, which, in a divided decision, granted plaintiff's renewed motion to dismiss appellants' appeal "for failure to comply with MCL 418.862(2) [MSA 17.237(862)(2)] and the June 20, 1991 order of this Commission." That order also denied appellants' motion for remand and consolidation, or to hold proceedings in abeyance.

At issue is whether the appellate commission can dismiss an appeal for failure to provide medical benefits pursuant to MCL 418.862(2); MSA 17.237(862)(2), as amended effective July 30, 1985, where the appellants have answered and shown payment of some bills during the appeal period, but have disputed others. It was the appellate commission's position that failure to provide timely compliance with § 862(2), even though a notice of dispute had been filed, subjected appellants' appeal to dismissal.

In a corrected decision mailed on January 25, 1990, the magistrate found plaintiff totally disabled and entitled to workers' compensation benefits until further order of the bureau. It was fur-

ther ordered that the appellants "shall be responsible for medical expenses pursuant to [MCL 418.315; MSA 17.237(315)] as follows: Any and all reasonable and necessary medical expenses related to plaintiff's back et sequelae."

On February 9, 1990, an application for review of the claim was filed by defendant employer and its carrier. Later, a cross appeal was filed by plaintiff.

Numerous disputes relating to the reasonableness and necessity of various medical treatments followed. On January 9, 1991, appellants filed a petition to stop benefits and an application for mediation or hearing (Form C). The petition stated a March 18, 1987, date of injury.

On February 6, 1991, plaintiff filed a motion to dismiss the appellants' appeal, alleging that appellants had refused and denied payment of medical benefits required by the terms of the award of the magistrate and contrary to the provisions of § 862. The motion conceded that appellants had made their seventy percent payments as required by MCL 418.862(1); MSA 17.237(862)(1).

On February 26, 1991, appellants filed their answer to the motion to dismiss their appeal. In it they asked to have the motion denied, contending that they had considered

> all requests for payment of medical benefits and have paid those which were reasonable and necessary in accordance with Magistrate Godfrey's decision and have denied payment on other requests which are not reasonable or necessary in accordance with the Act. Magistrate Godfrey gave no guidance in his decision as to which medical providers and care and treatment was necessary or which amount was reasonable. Defendants-appellants have consulted with the State of Michigan Workers' Compensation Health Care Service Rules

where applicable as well as independent medical evaluations and opinions as to the necessity of ongoing medical treatment.

Later, appellants filed a second application for mediation or hearing that specifically objected to any further treatment by Dr. Velez-Ruiz.

On June 20, 1991, the appellate commission issued its order denying plaintiff's initial motion to dismiss appellants' appeal, and stated that it was "concerned that defendants may erroneously believe that the Notice of Dispute filed subsequent to the magistrate's decision relieves them of their obligation under MCL 418.862(2) [MSA 17.237(862)(2)]." The order specifically gave appellants thirty days within which to provide the commission "an affirmation of the bills that had been received, the date the medical services were provided, and a showing that the bills had been paid pursuant to the magistrate's order of January 22, 1989, awarding reasonable and necessary medical expenses related to plaintiff's back. Failure to provide timely compliance with MCL 418.862(2) [MSA 17.237(862)(2)] shall subject defendants' appeal to dismissal."

On July 18, 1991, appellants filed a motion to remand and consolidate or hold in abeyance, because trial on appellants' application for hearing filed in February 1991, objecting to the reasonableness and necessity of the medical expenses being claimed by plaintiff under the magistrate's award, was scheduled for July 31, 1991, less than two weeks from that date. It was appellants' position that they were following the Workers' Compensation Health Care Services Rules that became effective in 1989, and that specifically covered the process for resolving disputes between carriers and health care providers, and that, therefore, their

appeal was not subject to dismissal by the appellate commission. Appellants noted that their application would be treated the same as a sixty-day case under the expedited treatment provided for under the rules. Further, appellants said that it would be more economical and efficient if the appellate commission would either remand or hold in abeyance while the parties fully developed the record relating to the dispute.

Plaintiff filed an answer on July 25, 1991, contending that appellants were in violation of the Workers' Disability Compensation Act as a result of their refusal to pay plaintiff's medical bills.

As indicated above, on August 30, 1991, the commission granted plaintiff's renewed motion to dismiss and denied appellants' motion for remand and consolidation or to hold the proceedings in abeyance. The dissenting commissioner voted to deny appellants' motion for remand and consolidation or to hold the proceedings in abeyance, and also voted to deny plaintiff's renewed motion for dismissal of appellants' appeal.

While MCL 418.862(2); MSA 17.237(862)(2) states that medical benefits shall be provided from the date of the award and shall continue until final determination of the appeal or for a shorter period if specified in the award, it does not contain any penalty provision. Further, the monetary penalties provided in MCL 418.801(3); MSA 17.237(801)(3) for failure to provide medical benefits do not apply in this case where there is an ongoing dispute. Nevertheless, this Court holds that the appellate commission does have the implied authority to dismiss appeals for noncompliance with MCL 418.862(2); MSA 17.237(862)(2). See *McAvoy v H B Sherman Co,* 401 Mich 419; 258 NW2d 414 (1977). Moreover, to the extent that *Perry v Sturdevant Mfg Co,* 124 Mich App 11; 333 NW2d 366 (1983),

may be read as inconsistent with this decision, we decline to follow it.

MCL 418.862(2); MSA 17.237(862)(2) states that the filing of a claim for review shall not operate as a stay with regard to the providing of medical benefits required by the terms of the award, and that, if the benefit amount is reduced or rescinded by a final determination, the carrier shall be reimbursed from the general fund of the state for the amount of the expenses incurred in providing the medical benefits pending the appeal in excess of the amount finally determined.

1989 AACS, R 408.32a, (Rule 2a), effective November 4, 1989, provides that reimbursements for payments made in accordance with the provisions of § 862(2) shall be made from the medical benefit fund. To be reimbursed from that fund, medical benefits must have been required by the terms of an award and paid in accordance with MCL 418.315; MSA 17.237(315) and the rules published pursuant to that section.

Rule 2a (4) and (5) requires applications for reimbursement from the medical benefit fund to be made not less than thirty days after the benefit amount is reduced or rescinded by a final determination, and that reimbursement from the medical benefit fund shall be consistent with benefits awarded in the magistrate's decision. Further, reimbursement will only be made for medical benefits that were provided between the bureau's mailing date of the magistrate's award and the date of the final determination of the appeal, or for a shorter period as specified in the award.

Rule 2a(9) authorizes the medical benefit fund to determine if all or part of the request for reimbursement is not proper, and to so notify the carrier in writing. If the carrier disputes that

determination, it may file an application for mediation or a hearing.

The rules adopted pursuant to § 315, *supra,* are known as the Workers' Compensation Health Care Services Rules, and they became effective June 28, 1989. Part 19 thereof, being 1989 AACS, R 418.1901 (Rule 1901) *et seq.,* sets forth the process for resolving differences between carriers and providers regarding medical bills.

R 418.1904 (Rule 1904) specifically addresses "Disputes" and reads in pertinent part:

> Rule 1904. (1) When a carrier disputes a bill or portion thereof pursuant to these rules, *a notice given pursuant to R 418.1901(1) creates an ongoing dispute for the purpose of section 801 of the act.* The time for making payment of a bill under section 801 of the act shall not run unless the bill is properly submitted according to applicable rules and statutes.
>
> (2) Any dispute concerning the medical appropriateness of health care or a health care service, utilization of health care or a health care service, the need for health care or a health care service, and any dispute over the cost of health care or a health care service shall be resolved as if it were an application for mediation or hearing filed under section 847 of the act [MCL 418.847; MSA 17.237(847)].
>
> (3) Where the dispute results in the denial of medical treatment for a worker, or where there is a petition by an employer to stop its liability for medical benefits previously ordered, including proceedings under subrule (6) of this rule, it shall receive the same expedited treatment accorded to 60-day cases under section 205 of the act [MCL 418.205; MSA 17.237(205)], except the bureau may refer the matter to mediation under section 223 of the act [MCL 418.223; MSA 17.237(223)].
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> * * *
>
> (6) *If a carrier is required by the terms of an*

> *award to provide medical benefits, the carrier shall continue to provide those benefits, until there is a different order by a magistrate, the appellate commission, the court of appeals, or the supreme court. This subrule shall not preclude the use of the maximum allowable payments provided by these rules for the payment of bills by carriers.* When a carrier files an application to stop or limit its liability under this subrule, it shall receive the expedited treatment provided for under subrule (3) of this rule. [Emphasis added.]

It is apparent that appellants did not comply with the applicable law. When they refused to pay the medical bills as required, both by the magistrate's order and the appellate commission's order, they subjected themselves to the possibility of a dismissal as stated in the commission's order. What appellants should have done with the disputed medical bills was to pay them, or the maximum allowed under the rules if that amount was less, and then proceed with an expedited hearing as provided in Rule 1904(3) and (6), *supra.*

Affirmed. Costs to plaintiff.

MARILYN KELLY, J., concurred.

TAYLOR, P.J. *(dissenting).* Appellants, employer McCord Gasket Corporation and insurance carrier National Union Fire Insurance Company, appeal by leave granted an August 30, 1991, order of the Workers' Compensation Appellate Commission dismissing their appeal

> for failure to comply with MCL 418.862(2) [MSA 17.237(862)(2)] and the June 20, 1991 order of this Commission.

The referenced June 20, 1991, order of the appellate commission was issued in response to plain-

tiff's first motion to dismiss. That motion had been brought because of appellants' failure to pay medical bills. The defense to the motion was that the magistrate's earlier opinion directing the payment of "[a]ny and all reasonable and necessary medical expenses related to plaintiff's back et sequelae" gave appellants cause to believe that the presented bills should be challenged with regard to reasonableness and necessity. In any event, the June 20, 1991, WCAC order gave appellants thirty days within which to provide the commission

> an affirmation of the [medical] bills that have been received, the date the medical services were provided, and a showing that the bills have been paid pursuant to the magistrate's order of January 22, 1989, awarding reasonable and necessary medical expenses related to plaintiff's back. Failure to provide [evidence of] timely compliance with MCL 418.862(2) [MSA 17.237(862)(2)] shall subject defendants' appeal to dismissal.

The June 20, 1991, order, being interlocutory, was not appealable at the time. *East Jordan Iron Works v Workers' Compensation Appeal Bd,* 124 Mich App 324; 335 NW2d 23 (1983).

My colleagues take the view that appellants, although timely challenging the reasonableness and necessity of the medical bills, failed to do so in accordance with 1989 AACS, R 418.1904 Rule 1904. They conclude that dismissal is an appropriate administrative sanction.

If the only question properly before us were whether the appellate commission, under its implied power to enforce § 862(2) of the Workers' Disability Compensation Act regarding payment of magistrate-ordered medical benefits for injured workers, could properly dismiss appeals by employers or insurance carriers who ignore these obliga-

tions, I would join in my colleagues' opinion. I share the view that merely because the Legislature has authorized penalties does not preclude dismissal in lieu of or in addition to a penalty in the discretion of the appellate commission. *Perry v Sturdevant Mfg Co,* 124 Mich App 11; 333 NW2d 366 (1983).

I believe that under *Perry* for dismissal to be appropriate, there must be prerequisite noncompliance with the requirements of § 862(2). To be noted is that this provision was added to the Workers' Disability Compensation Act by 1985 PA 103. We are called upon, in this case, to construe and apply the section for the first time. Section 862(2) provides:

> A claim for review filed pursuant to section 859a or 864(11) of a case for which an application under section 847 is filed after March 31, 1986 shall not operate as a stay of providing medical benefits required by the terms of the award. Medical benefits shall be provided as of the date of the award and shall continue until final determination of the appeal or for a shorter period if specified in the award. Benefits accruing prior to the award shall be withheld until final determination of the appeal. If the benefit amount is reduced or rescinded by a final determination, the carrier shall be reimbursed for [the] amount of the expenses incurred in providing the medical benefits pending the appeal in excess of the amount finally determined. Reimbursement shall be paid upon audit and proper voucher from the general fund of the state. If the award is affirmed by a final determination, the carrier shall provide all medical benefits which have become due under the provisions of the award, less any benefits already provided for. Interest shall not be paid on amounts paid pending final determination.

This statute is striking because for the first time

it puts the general fund of the state in the position of guaranteeing to insurance carriers and self-insureds reimbursement for medical benefits that, by final determination of the appellate commission (subject to judicial review), are found to be excessive ("reduced"), or wholly unwarranted ("rescinded"). Such a remarkable opportunity for invasion of the treasury, not suprisingly, was surrounded by statutory safeguards to prevent abuse. These guardian provisions can be found in MCL 418.315; MSA 17.237(315). Section 315, which was amended by 1985 PA 103, provides:

> (1) The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. . . .
>
> (2) All fees and other charges for any treatment or attendance, service, devices, apparatus, or medicine under subsection (1), shall be subject to rules promulgated by the department of management and budget pursuant to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.328 of the Michigan Compiled Laws. The rules promulgated shall establish schedules of maximum charges for such treatment or attendance, service, devices, apparatus, or medicine, which schedule shall be annually revised. A health facility or health care provider shall be paid either its usual and customary charge for any of the above, or the maximum charge established under the rules, whichever is less. . . .
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> * * *
>
> (4) If a carrier determines that a health facility or health care provider has made any excessive charges or required unjustified treatment, hospitalization, or visits, the health facility or health care provider shall not receive payment under this

chapter from the carrier for the excessive fees or unjustified treatment, hospitalization, or visits, and shall be liable to return to the carrier any such fees or charges already collected. The department of management and budget may review the records and medical bills of any health facility or health care provider determined by a carrier to not be in compliance with the schedule of charges or to be requiring unjustified treatment, hospitalization, or office visits.

(5) As used in this section, "utilization review" means the initial evaluation by a carrier of the appropriateness in terms of both the level and the quality of health care and health services provided an injured employee, based on medically accepted standards. This review shall be accomplished by a carrier pursuant to a system established by the department of management and budget which identifies the utilization of health care and health services above the usual range of utilization for such services based on medically accepted standards and provides for acquiring necessary records, medical bills, and other information concerning any health care or health services.

* * *

(7) If it is determined by a carrier that a health facility or health care provider improperly overutilized or otherwise rendered or ordered inappropriate health care or health services, or that the cost of the care or services was inappropriate, the health facility or health care provider may appeal to the department of management and budget regarding that determination pursuant to procedures provided for under the system of utilization review.

(8) The criteria or standards established for the utilization review shall be established by rules promulgated by the department of management and budget. A carrier that complies with the criteria or standards as determined by the department of management and budget shall be certified by the department.

(9) If the health facility or health care provider

provides health care or a health service that is not usually associated with, is longer in duration in time than, is more frequent than, or extends over a greater number of days than that health care or service usually does with the diagnosis or condition for which the patient is being treated, the health facility or health care provider may be required by the carrier to explain the necessity or indication for the reasons why in writing.

References in the above statute to the Department of Management and Budget should now be construed to refer to the Department of Labor, Bureau of Workers' Disability Compensation, pursuant to Executive Reorganization Orders Nos 1986-3 and 1990-1, MCL 418.1, 418.2; MSA 17.237(1).

The important point that emerges from a reading of § 315 is that workers' compensation insurance carriers, including self-insureds, are mandated to monitor closely medical treatment for injured workers with an eye to detecting both charges in excess of the schedules of maximum fees promulgated by the agency and any overutilization. The carriers serve the policing function. This becomes important to more than the carriers when the state treasury, pursuant to the abovecited § 862(2), is brought forward as the guarantor of last resort when, despite a carrier's best efforts, medical benefits that are unnecessary or overpriced have been provided in accordance with a magistrate's order that is later overturned.

Undergirding this whole process, however, is the requirement that the magistrate's order be clear enough to make apparent what medical expenses are required. This is the problem in this case. The magistrate's order is tautological and defies intelligent implementation.

As the Supreme Court once described a similar unclear and ill-defined order:

> This so-called award means nothing to any of the parties. It finds that the plaintiff is still partially disabled and is entitled to compensation, but does not fix the amount that he is to receive or that defendants are to pay. It is not enforceable. It is not an award upon which a judgment could be entered in the circuit court. [*Thayer v Britz,* 234 Mich 645, 647; 209 NW 50 (1926).]

A like sentiment must be expressed about the magistrate's order in this case with regard to reimbursement of medical expenses. The magistrate's order means nothing to any of the parties; it merely recapitulates the statutory language that obligates the employer, in the case of a work-related injury, to pay reasonable and necessary medical expenses under § 315, albeit confining that obligation to plaintiff's back condition. The award does not indicate what particular medical treatment ought to be included, nor does it provide criteria from which it could reliably be determined by the appellants, either in advance or in retrospect, that a particular prognosticated treatment, prosthetic, or prophylactic is within the magistrate's concept of "reasonable and necessary" medical treatment related to plaintiff's back. No circuit court could enter judgment on the award under MCL 418.863; MSA 17.237(863), which ought to be the touchstone, pursuant to *Thayer, supra,* for evaluating a magistrate's award of medical benefits.

A workers' compensation award inherently determines the rights of the parties only with regard to the date the award is rendered, and cannot properly include speculative or predictive matters. *Sanford v Ryerson & Haynes, Inc,* 396 Mich 630,

634-635; 242 NW2d 393 (1976). It is thus always appropriate, as MCL 418.847; MSA 17.237(847), which is specifically incorporated in § 862(2), provides, for a carrier to file a petition to stop benefits on grounds that the employee's disability has terminated or ameliorated, whether or not an appeal of the award is pending. *Barham v Workers' Compensation Appeal Bd,* 184 Mich App 121; 457 NW2d 349 (1990).

If in this case the magistrate had awarded medical benefits in a properly specific form, enforceable by judgment, I would have no cause to disagree with my colleagues. But the majority opinion herein ignores this administrative obligation. The upshot is that, under the majority opinion, the insurance carrier must pay all medical bills that are facially related to any kind of treatment for plaintiff's back or arguably related conditions, which obligation is limited only by the maximum fee set by administrative regulation for any individual treatment, attendance, service, device, apparatus, or medicine. The question whether such treatment is necessary and reasonable, in duration or frequency, or whether it is truly related to plaintiff's compensable disability, is, according to the majority, at best an issue that arises, not between the employee and the insurance carrier, but among the insurance carrier, the medical service provider, and the general fund.

By this reasoning the carefully circumscribed occasions, with all the built-in preliminary carrier-policed protections, on which the general fund can be invaded under § 862(2) have been read out of the statute. This will then predictably create a situation, unless reversed, in which neither employees as a class, nor insurance carriers as a group, have any particular incentive under this construction of the act to challenge the necessity

for or charge—within limits fixed by regulation—made for any medical service, because reimbursement from the general fund is guaranteed. This cannot have been the intent of the Legislature if it were fiscally responsible and, in fact, that it wasn't the legislative intent is made clear by the fact that carriers are given the previously mentioned policing duties—duties which will now be abandoned.

The majority finds support for its position in Rule 1904(6), but the obligation imposed by the rule is in turn derivative, once again, being based on the requirement imposed "by the terms of an award to provide medical benefits." The rule, like the statute, is written in general terms, but can only be properly understood to apply to terms of a magistrate's award to provide medical benefits that are definite, where the requisite certainty is measured by whether the award can be made judicially enforceable under § 863. In short, the rule was drafted with an understanding that it would be interpreted in accord with *Thayer, supra,* and *Sanford, supra,* and, indeed, seventy years of unbroken workers' compensation jurisprudence. Such limitations are not unique to Michigan workers' compensation, but common to administrative procedure generally. *Federal Trade Comm v Morton Salt Co,* 334 US 37; 68 S Ct 822; 92 L Ed 1196; 1 ALR2d 260 (1948).

To give the majority their due, had the magistrate's award in this case been sufficiently specific, this regulation would no doubt warrant the sanction of dismissal of an appeal to the WCAC from the magistrate's award, based on a determination that appellants had failed to comply with the award pending review. But, in the absence of such an enforceable magistrate's award, there can be no noncompliance, unless one is prepared to say that the duly appointed administrative agency may

enter orders that direct employers and insurance carriers to "comply with the provisions of the statute" and, on penalty of failing to divine the parameters of such an award, the employer or carrier can be prevented from obtaining meaningful appellate review of the substance of the decision. This I am not willing to do. *Federal Trade Comm v Colgate-Palmolive Co,* 380 US 374, 394; 85 S Ct 1035; 13 L Ed 2d 904 (1965).

This also seems a proper occasion to put to rest the apparent assumption, of which the parties and perhaps the appellate commission have indulged, that, where the general fund has made reimbursement to the carrier under § 862(2), the matter ends. Michigan jurisprudence recognizes, within the common-law action of assumpsit, more modernly called "implied contract," the action for money paid. Such an action is a suit for obligations implied or imposed by law to repay money paid or expended by one person for the use or benefit of another who ought to have paid it to a third person, independent of any instrument in writing requesting such payment or promising repayment. *Curtis v Flint & P M R Co,* 32 Mich 291 (1875); *Stevens v Jackson,* 180 Mich 131; 146 NW 636 (1914). In many of these situations, an ordinary health insurer will be primarily obligated for medical coverage where workers' compensation coverage has been adjudicated as not being applicable. See *Gilroy v General Motors Corp (After Remand),* 438 Mich 330; 475 NW2d 271 (1991).

When health insurers have paid medical expenses that are properly reimbursable by workers' compensation insurance carriers, the health insurers have been allowed to piggyback as intervening plaintiffs onto pending workers' compensation claims, over which the bureau has jurisdiction to award the requisite repayment. *Aetna Life Ins Co*

v *Roose,* 413 Mich 85; 318 NW2d 468 (1982); *Ptak v Pennwalt Corp,* 112 Mich App 490; 316 NW2d 251 (1982). In the reverse situation, the workers' compensation carrier or the state treasurer, as representative of the general fund, will probably have to initiate an ordinary civil action for reimbursement in the absence of voluntary repayment. Such suit can be predicated either on implied contract or, in the alternative, on the basis of equitable or legal subrogation, which, in its legal consequences, is almost indistinguishable from the common-law action for money paid. *Commercial Union Ins Co v Medical Protective Co,* 426 Mich 109; 393 NW2d 479 (1986); *Tel-Twelve Shopping Center v Sterling Garrett Construction Co,* 34 Mich App 434; 191 NW2d 484 (1971); *Detroit v Bridgeport Brass Co,* 28 Mich App 54; 184 NW2d 278 (1970).

Such reimbursement actions, however, would inherently be limited to situations in which the magistrate has rendered an award that specifically requires certain medical benefits, which have been duly provided by the carrier, and later reduced or rescinded by the WCAC or on judicial review. When carriers have properly determined that specifically approved magistrate-ordered benefits are unwarranted, or that charges were excessive, this information will be conveniently at hand for the state treasurer so as to facilitate reimbursement efforts, thereby minimizing the drain on the general fund. In other respects, the carriers are not eligible for reimbursement of their out-of-pocket losses, and so the marketplace, at both ends, provides the requisite inducement for carriers to preserve the economic viability of the workers' compensation system.

I would reverse the decision of the appellate commission, dismissing appellants' appeal for non-

compliance with the magistrate's award, and remand to the appellate commission for determination of the appeal on the merits, or, in the appellate commission's discretion, to permit further remand to the magistrate for clarification of the magistrate's order, or for joinder with appellants' timely demanded hearing under § 847 concerning the propriety of challenged health care services, or, recognizing that such hearing has probably long since been concluded by the magistrate, for consolidation with any appeal from that later decision, or for decision in light of any unappealed findings made at such hearing. For the foregoing reasons, I respectfully dissent.

PEOPLE v LUCAS (AFTER REMAND)

Docket No. 142068. Submitted July 19, 1993, at Lansing. Decided October 4, 1993, at 9:55 A.M. Leave to appeal sought.

Nolan K. Lucas was convicted following a bench trial in the Wayne Circuit Court, Charles S. Farmer, J., of two counts of third-degree criminal sexual conduct. At trial, the defendant sought to introduce evidence of alleged prior sexual activity between himself and the complainant, but the court denied the request on the ground that the defendant did not comply with the notice requirement of the rape-shield statute. MCL 750.520j; MSA 28.788(10). The defendant appealed, and the Court of Appeals, SHEPHERD, P.J., and GRIBBS and R.R. LAMB, JJ., reversed. 160 Mich App 692 (1987). The Michigan Supreme Court, in lieu of granting leave to appeal, remanded to the Court of Appeals for a determination whether the trial court's denial of the defendant's motion was harmless beyond a reasonable doubt. 433 Mich 878 (1989). On remand, the Court of Appeals, SHEPHERD, P.J., and GRIBBS and MAHER, JJ., reversed, finding that the exclusion of the evidence was not harmless beyond a reasonable doubt. Unpublished opinion per curiam of the Court of Appeals, decided March 7, 1990 (Docket No. 122171). The Michigan Supreme Court denied leave to appeal. 434 Mich 925 (1990). The United States Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded to the Court of Appeals for consideration of whether the rape-shield statute authorizes preclusion of evidence and whether the preclusion in this case violated the defendant's Sixth Amendment rights. *Michigan v Lucas,* 500 US —; 111 S Ct 1743 (1991). The Court of Appeals, SHEPHERD, P.J., and GRIBBS and DOCTOROFF, JJ., determined that the rape-shield statute authorizes preclusion of evidence of prior sexual activity between a defendant and a complainant and that the determination whether application of the notice requirement of the rape-shield statute violated a defendant's Sixth Amendment right of confrontation must be made case by case. The Court of Appeals remanded the case to the trial court for an evidentiary hearing with regard to whether preclusion of evidence was appropriate in this case. On remand, the trial court, Edward M. Thomas, J., decided that it was.

After remand, the Court of Appeals *held:*

The trial court correctly concluded at the evidentiary hearing that the evidence of a prior sexual relationship between the defendant and the complainant offered at trial was irrelevant and immaterial, that any error that might have resulted from the failure to admit the evidence was harmless, and that counsel's failure to give the notice required by statute was a tactical decision.

Affirmed.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Don W. Atkins,* Principal Attorney, Appeals, for the people.

*Mark H. Magidson,* for the defendant on appeal.

AFTER REMAND

Before: DOCTOROFF, C.J., and GRIBBS and SHEPHERD, JJ.

GRIBBS, J. The underlying facts and procedural history of this case are set forth in our prior opinion. *People v Lucas (On Remand),* 193 Mich App 298; 484 NW2d 685 (1992). We have reviewed the findings and conclusions of the trial court and now affirm.

In our previous decision we concluded that the rape-shield statute, MCL 750.520j; MSA 28.788(10), authorizes preclusion of evidence of prior sexual activity between a defendant and a complainant. We also found that the decision whether the statutory notice requirement violates a defendant's right to confrontation must be made case by case. We retained jurisdiction and remanded this matter

for an evidentiary hearing regarding whether preclusion of evidence in this case was appropriate.

Following the issuance of our opinion, an evidentiary hearing was held below and the trial court ruled, in a written opinion, that the proffered evidence of a prior sexual relationship between defendant and complainant was irrelevant and immaterial in this case, and that counsel's failure to give the required notice was a tactical decision. The trial court concluded that admission of the evidence was properly denied in this case. The trial court noted that this matter was tried with a judge as factfinder and found that there was sufficient evidence presented of the parties' prior relationship to support the defendant's defense claim. The trial court also found that the parties' prior relationship had been explored in detail during the preliminary examination. In addition to finding that the evidence was immaterial and that failure to file the required notice was a tactical decision, the trial court concluded that exclusion of the evidence, even if error, was harmless.

We believe the trial court properly applied the balancing test in determining that the evidence of the parties' prior relationship should not have been admitted in this case. We note that the record of the evidentiary hearing shows that defense counsel was aware of the procedural requirements for admission of the evidence. As we suggested in our prior opinion, defense counsel's decision to raise this issue on the day of trial suggests a tactical decision and weighs in favor of exclusion. 193 Mich App 303. In addition, it is clear in this case that preclusion of the evidence did not prevent defense counsel from presenting defendant's claim of consent and that any error was harmless. We find no abuse of discretion.

Affirmed.

PEOPLE v CUNNINGHAM

Docket No. 147927. Submitted September 8, 1993, at Grand Rapids. Decided October 4, 1993, at 10:00 A.M.

Curtis J. Cunningham and Timothy L. Sequin were charged in the Bay Circuit Court with being accessories after the fact of the statutory felony of leaving the scene of an accident that involved a serious personal injury. The court, Eugene C. Penzien, J., quashed the informations, holding that MCL 750.505; MSA 28.773, which provides that all common-law felonies for which there is not a specific statutory punishment shall be deemed felonies and provides for punishment for such felonies, requires that both the charge of being an accessory after the fact and the underlying felony upon which the accessory charge rests must be common-law felonies. The court dismissed the accessory charge on the basis that, while it was a common-law offense, the underlying charge was not recognized at common law. The people appealed.

The Court of Appeals *held:*

The statute requires only that a charged offense be a common-law offense. It is unnecessary that the underlying offense upon which an accessory charge is based also be a common-law offense. The charged offense in this case, accessory after the fact, is a common-law offense. Accordingly, it was error for the circuit court to dismiss the charges and quash the informations.

Reversed and remanded.

CRIMINAL LAW — COMMON LAW — ACCESSORY AFTER THE FACT.

The offense of accessory after the fact, being a common-law felony for which there is no express statutory provision for punishment, is a felony punishable under the provision of the Criminal Code relating to offenses indictable at common law for which there is no other express statutory punishment; the statute does not require that the underlying felony upon which the accessory charge is based also be an offense indictable at common law (MCL 750.505; MSA 28.773).

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REFERENCES

Am Jur 2d, Criminal Law §§ 7, 174.

See ALR Index under Aiding and Abetting; Common Law.

*Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *George B. Mullison,* Prosecuting Attorney, and *Martha G. Mettee,* Assistant Prosecuting Attorney, for the people.

*Patricia Pirnie,* for Curtis J. Cunningham.

*Randy D. Johnson,* for Timothy L. Sequin.

Before: MURPHY, P.J., and MACKENZIE and GRIFFIN, JJ.

GRIFFIN, J. The people appeal as of right an order of the circuit court dismissing the charges against defendants of being accessories after the fact, MCL 750.505; MSA 28.773. We reverse and reinstate the charges.

I

This case arises out of a hit-and-run automobile accident. At the time of the accident, Preston Badgerow, III, was driving his automobile with defendant Timothy Lee Sequin as his passenger. They were following a vehicle driven by Charles Cunningham, in which Joe Cunningham and defendant Curtis Jay Cunningham were passengers. As Badgerow drove out of a service station driveway, his vehicle struck a pickup truck, which spun and collided with a Buick automobile. As a result of the multivehicle accident, the driver of the pickup truck was killed and the driver of the Buick was seriously injured.

Following the collisions, Badgerow hesitated for a moment and then fled. Badgerow drove his vehicle to Joe Cunningham's house. The next morning, Badgerow, Charles Cunningham, defendant Sequin, and defendant Cunningham allegedly began dismantling Badgerow's automobile in an effort to

prevent its detection. Despite defendants' alleged efforts, the police discovered the automobile and traced it to the accident. Badgerow thereafter was charged with negligent homicide, MCL 750.324; MSA 28.556, and failure to stop at the scene of a serious personal injury accident, MCL 257.617; MSA 9.2317. Defendants Sequin and Curtis Jay Cunningham were charged with being accessories after the fact to Badgerow's failure to stop at the scene of a serious personal injury accident.

In the circuit court, defendants successfully moved to quash the informations. Defendants argued that MCL 750.505; MSA 28.773 requires that both the charged offense (accessory after the fact) and the preceding related felony (leaving the scene of a serious personal injury accident) be offenses indictable at common law. The circuit court agreed and dismissed the accessory charges on the basis that the crime of leaving the scene of a serious personal injury accident was not a felony recognized at common law. The people now appeal, and we reverse.

II

The crime of accessory after the fact is a common-law felony punishable under the catch-all provision of MCL 750.505; MSA 28.773. *People v Lucas,* 402 Mich 302; 262 NW2d 662 (1978); *People v Mitchell,* 138 Mich App 163, 168; 360 NW2d 158 (1984); *People v Williams,* 117 Mich App 505, 511-514; 324 NW2d 70 (1982).

MCL 750.505; MSA 28.773 provides:

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punish-

> able by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.

It is well settled that a common-law definition of a crime prevails unless it has been changed by statute. *People v Schmitt,* 275 Mich 575, 577; 267 NW 741 (1936). Moreover, legislative amendment of the common law is not easily presumed nor will established rules of the common law be abrogated by implication. *Hasty v Broughton,* 133 Mich App 107, 113; 348 NW2d 299 (1984).

In *Lucas, supra* at 304, the Supreme Court adopted the following common-law definition for the crime of accessory after the fact:

> An "accessory after the fact," at common law, according to Professor Perkins, is "one who, with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment."

The circuit court construed MCL 750.505; MSA 28.773 as requiring both the charged offense (accessory after the fact) and the preceding related felony (leaving the scene of a serious personal injury accident) to be crimes recognized at common law. We disagree.

III

We review for error a lower court decision to grant a motion to quash on legal grounds. *People v Thomas,* 438 Mich 448, 452; 475 NW2d 288 (1991). An "abuse of discretion" standard of review is not employed for appeals of issues of law. *Id.*

In construing penal statutes, all provisions are to be "construed according to the fair import of their terms, to promote justice and to effect the

objects of the law." MCL 750.2; MSA 28.192; *People v Sherman,* 188 Mich App 91, 93; 469 NW2d 19 (1991). When a statute is clear and unambiguous, judicial construction at variance with the plain meaning is precluded. *People v Walker,* 166 Mich App 299, 301; 420 NW2d 194 (1988).

We find no language in the statute at issue that supports the construction adopted by the lower court. On the contrary, the terms of the statute plainly provide for punishment for crimes that were indictable at common law. The offense of accessory after the fact is such a crime. Because the statute makes no reference to preceding related felonies, the common-law definition of accessory after the fact remains unaffected.

Defendants ask us to differentiate between an accessory after the fact to a common-law felony and an accessory after the fact to a statutorily created felony. In their view, only the former is punishable under the Criminal Code. We disagree and find no reason in law or logic to make such a distinction. In light of the statutory language at issue, defendants' position as accepted by the lower court is untenable.

Accordingly, we reverse the decision of the circuit court and hold that pursuant to MCL 750.505; MSA 28.773 the charged crime alone must be an offense indictable at common law.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

# INDEX-DIGEST

ACCEPTANCE—*See*
GIFTS 1

ACCESSORY AFTER THE FACT—*See*
CRIMINAL LAW 6

ACCRUAL OF ACTIONS—*See*
LIMITATION OF ACTIONS 2

ACCRUAL OF CLAIMS—*See*
LIMITATION OF ACTIONS 1

ACTIONS.

*See, also,* INSURANCE 1.

LEGAL MALPRACTICE.

1. An attorney has no duty to do more for a client than that which is legally adequate to vindicate fully the client's interests. *Simko v Blake,* 201 Mich App 191.

PATERNITY PROCEEDINGS.

2. Paternity proceedings are civil in nature, not quasi-criminal, and are governed by the rules applicable to other civil actions, except as modified by MCR 3.212 and the Paternity Act (MCL 722.711 *et seq.*; MSA 25.491 *et seq.*). *Larrabee v Sachs,* 201 Mich App 107.

ACTIVE EMPLOYMENT—*See*
WORKERS' COMPENSATION 10, 11

ADMINISTRATIVE LAW.

AGENCY DECISIONS.

1. A person who, upon judicial review pursuant to the Administrative Procedures Act, prevails against a state agency with respect to a decision by the agency that is determined to have violated a constitutional right of the person is not entitled to an award of attorney fees under 42 USC 1988; such judicial review is not a proceeding for the enforcement of a constitutional right within the meaning of 42 USC 1983 for which attorney fees are allowed under 42 USC 1988 (MCL 24.301 *et seq.*; MSA 3.560[201] *et seq.*). *Hardges v DSS,* 201 Mich App 24.

EMPLOYMENT RELATIONS COMMISSION.

2. Findings of the Michigan Employment Relations Commission

ADMINISTRATIVE LAW—Cont'd

are conclusive if supported by competent, material, and substantial evidence on the record considered as a whole (MCL 423.216[e]; MSA 17.455[16][e]). *Knoke v E Jackson Sch Dist,* 201 Mich App 480.

3. The Michigan Employment Relations Commission may reopen the record in a case and receive further evidence after the close of a hearing where the evidence is newly discovered and was unavailable through reasonably diligent discovery at the time of the earlier hearing (1979 AC, R 423.468[2]). *Knoke v E Jackson Sch Dist,* 201 Mich App 480.

SEARCHES AND SEIZURES.

4. In determining whether a search and seizure without a warrant falls within the pervasively regulated industry exception to the requirement that a warrant is required for regulatory and administrative searches, a court should balance: the existence of express statutory authorization of such searches and seizures; the importance of the governmental interest; the pervasiveness and longevity of regulation; the inclusion in statutes and regulations of reasonable limitations on searches; the government's need for flexibility in the time, scope, and frequency of inspections to achieve reasonable levels of compliance; the degree of intrusion occasioned by the search; and the degree to which implied consent to such searches is given as a condition of doing business. *People v Thomas,* 201 Mich App 111.

ADVERSE POSSESSION.

LAND OWNED BY STATE.

1. Title to real property belonging to the state may not be acquired through adverse possession. *Gerrish Twp v Esber,* 201 Mich App 532.

AGENCY DECISIONS—*See*
ADMINISTRATIVE LAW 1

AGRICULTURE.

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT.

1. The Federal Insecticide, Fungicide, and Rodenticide Act preempts state regulation of pesticide labeling and packaging and may preempt common-law actions based on inadequate warnings where the warnings for which a duty is claimed would constitute a requirement for labeling or packaging that is in addition to or different from the warnings required under the act (7 USC 136v[b]). *Moody v Chevron Chemical Co,* 201 Mich App 232.

AIDING AND ABETTING—*See*
CONTROLLED SUBSTANCES 2

ALTERING VEHICLE IDENTIFICATION NUMBERS—*See*
CRIMINAL LAW 9

ANNULMENT—*See*
HUSBAND AND WIFE 1

APPEAL—*See*
ADMINISTRATIVE LAW 2
VENUE 1
WORKERS' COMPENSATION 1

APPELLATE COMMISSION—*See*
WORKERS' COMPENSATION 2, 3

APPLICANT'S FALSE REPRESENTATION—*See*
INSURANCE 6

APPOINTMENT OF APPELLATE COUNSEL—*See*
CRIMINAL LAW 1

ARGUMENTS BY COUNSEL—*See*
TRIAL 1

ASSAULT WITH INTENT TO ROB WHILE UNARMED—*See*
CRIMINAL LAW 2

ASSISTANCE OF COUNSEL—*See*
CRIMINAL LAW 3, 4

ATTEMPTED UNARMED ROBBERY—*See*
CRIMINAL LAW 5

ATTORNEY AND CLIENT.

ATTORNEYS' CHARGING LIENS.

1. An attorney may not place a special or charging lien against a client's realty for fees and costs due for services, even if the attorney successfully has prosecuted a suit to establish the client's title to or possession of the realty, unless the attorney and the client have an express agreement providing for such a lien, the attorney obtains a judgment for the fees and costs and follows the proper procedure for enforcing a judgment, or special equitable circumstances warrant imposition of a lien. *George v Gelman,* 201 Mich App 474.

MALPRACTICE.

2. An attorney may be liable in a malpractice action for a loss incurred by a former client after termination of the attorney-client relationship where the loss is a manifestation of an injury caused by the attorney's negligence during the attorney-client relationship. *Teodorescu v B, G, R & B (On Rem),* 201 Mich App 260.

3. The defendant in a legal malpractice action bears the burden of proving that the client failed to mitigate damages by failing to seek alternative means of avoiding the losses that allegedly resulted from the defendant's malpractice. *Teodorescu v B, G, R & B (On Rem),* 201 Mich App 260.

ATTORNEY AND CLIENT—Cont'd

4. A plaintiff in order to establish a prima facie case of legal malpractice need not show collectibility of a judgment against the defendant in the underlying action that gave rise to the malpractice action; the fact that a judgment against the underlying defendant may be uncollectible is an affirmative defense that must be pleaded and proved by the defendant in the malpractice action. *Teodorescu v B, G, R & B (On Rem),* 201 Mich App 260.

ATTORNEY FEES—*See*
ADMINISTRATIVE LAW 1
JUDGMENTS 2

ATTORNEYS' CHARGING LIENS—*See*
ATTORNEY AND CLIENT 1

AT-WILL EMPLOYMENT—*See*
MASTER AND SERVANT 1

AUTOMOBILES.

RESTRICTED DRIVER'S LICENSES.

1. A circuit court may not grant a restricted license to a person convicted of operating a motor vehicle while under the influence of liquor, third offense, until five years after the conviction if it occurred within seven years of one or both of the prior convictions (MCL 257.303[1][d], now [4][a], 257.323[56], 257.625[6]; MSA 9.2003[1][d], now [4][a], 9.2023[5], 9.2325[6]). *Dabrowski v Sec of State,* 201 Mich App 218.

BIGAMY—*See*
HUSBAND AND WIFE 1

BURDEN OF PROOF—*See*
ATTORNEY AND CLIENT 3
CIVIL RIGHTS 2

CHARTER TOWNSHIP ACT—*See*
TOWNSHIPS 1

CHEMICAL TESTS—*See*
CONSTITUTIONAL LAW 3

CHILD PROTECTION LAW—*See*
EVIDENCE 3

CHILDREN BORN OUT OF WEDLOCK—*See*
PARENT AND CHILD 1

CHILD SUPPORT—*See*
DIVORCE 1

CHILD SUPPORT AGREEMENTS—*See*
PARENT AND CHILD 2

CHOP SHOPS—*See*
CRIMINAL LAW 8, 9

CIVIL PROCEEDINGS—*See*
PRETRIAL PROCEDURE 1

CIVIL RIGHTS.
*See, also,* ADMINISTRATIVE LAW 1.
REAL ESTATE TRANSACTIONS.
1. With respect to an officer of a corporation selling its own realty, the provision of the Civil Rights Act that prohibits a person from refusing to engage in a real estate transaction with another on the basis of religion, race, color, national origin, age, sex, or marital status is not restricted in application to those with an ownership interest in the property or actual authority to approve a sale (MCL 37.2502[1]; MSA 3.548[502][1]). *Reed v Girl Scout Council,* 201 Mich App 10.
SEX DISCRIMINATION.
2. A prima facie case of sex discrimination is established where it is proven by a preponderance of the evidence that the plaintiff applied and was qualified for an available position but was rejected under circumstances giving rise to an inference of unlawful discrimination; the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its action; if the defendant meets this burden, the plaintiff then has the burden of proving by a preponderance of the evidence that the reason offered by the defendant was a pretext. *Ginther v Ovid-Elsie Schools,* 201 Mich App 30.
VIOLATIONS BY POLICE AGENCIES.
3. Liability under 42 USC 1983 may be imposed on a police agency or its director for an officer's off-duty conduct that results in death or bodily injury to citizenry only where that conduct is directly related to a policy adopted, or not adopted, with deliberate indifference to the rights of citizens; no liability may be imposed where the agency's policy, or lack of policy, merely reflects a negligent failure to train or supervise its officers. *Davis v Wayne Sheriff,* 201 Mich App 572.

CLAIMS—*See*
PLEADING 1

CLAIMS FOR REVIEW—*See*
WORKERS' COMPENSATION 3

CODEFENDANTS' REDACTED CONFESSIONS—*See*
CRIMINAL LAW 17

COLLECTIBILITY—*See*
ATTORNEY AND CLIENT 4

COMMON AREAS—*See*
LANDLORD AND TENANT 1

COMMON LAW—*See*
CRIMINAL LAW 6

COMPOUND INTEREST—*See*
INTEREST 2

CONDITIONS PRECEDENT—*See*
INSURANCE 1

CONSTITUTIONAL LAW.

DOUBLE JEOPARDY.

1. Conviction of felony murder and the underlying felony violates the state constitution's guarantee against double jeopardy (Const 1963, art 1, § 15). *People v Allen,* 201 Mich App 98.

DUE PROCESS.

2. The Due Process Clause of the Fourteenth Amendment prohibits the use of postarrest, post-*Miranda* warnings silence to impeach a defendant's exculpatory story at trial; however, where the defendant claims at trial that the trial was the defendant's first opportunity to offer an exculpatory version of the events leading up to the arrest, the prosecution, in attempting to impeach the defendant's version of postarrest activity, may attempt to rebut the impression that the defendant had no opportunity before the trial to tell what happened (US Const, Am XIV). *People v Allen,* 201 Mich App 98.

EVIDENCE.

3. The section of the Vehicle Code that provides that evidence of a defendant's refusal to submit to a chemical test is admissible in a criminal prosecution for certain violations of the Vehicle Code only for the purpose of showing that the test was offered, but not as evidence in determining the guilt of the defendant, and that requires that the jury be instructed accordingly, is not unconstitutional and does not violate the Supreme Court's rule-making powers (Const 1963, art 6, § 5; MCL 257.625a[7]; MSA 9.2325[1][7], now MCL 257.625a[10]; MSA 9.2325[1][10]). *People v McDonald,* 201 Mich App 270.

4. Failure of the police to preserve evidentiary material that may have exonerated a defendant constitutes a denial of due process only where bad faith on the part of the police can be shown. *People v Hunter,* 201 Mich App 671.

INTOXICATING LIQUORS.

5. The statute authorizing police officers to inspect without a warrant premises licensed under the authority of the Liquor Control Commission is constitutional (MCL 436.7a[2]; MSA 18.977[1][2]). *People v Thomas,* 201 Mich App 111.

SELF-INCRIMINATION.

6. The protection against compulsory self-incrimination does not entitle a defendant in a paternity action to refuse to give any

CONSTITUTIONAL LAW—Cont'd
testimony, including depositions, and may be invoked only when the testimony sought to be elicited will in fact tend to incriminate the witness (US Const, Ams V and XIV; Const 1963, art 1, § 17; MCL 600.2154; MSA 27A.2154). *Larrabee v Sachs,* 201 Mich App 107.

CONTINUOUS TRANSACTION—*See* HOMICIDE 2

CONTRACTS.
*See, also,* INSURANCE 3.
INTERPRETATION OF CONTRACTS.
1. Construction of unambiguous and unequivocal contracts is a question of law; however, contractual language that, standing alone, is not inherently ambiguous may become susceptible to interpretation when examined in connection with the past practices of the parties. *In re Loose,* 201 Mich App 361.
PROMISSORY ESTOPPEL.
2. Promissory estoppel requires an actual, clear, and definite promise that the promisor reasonably should expect to induce action or forbearance by the promisee or a third party; reliance by the promisee or a third party is reasonable only if it is induced by an actual promise. *Ypsilanti Twp v GMC,* 201 Mich App 128.
3. Hyperbole and puffery by an employer relative to job and work retention and expectations made in conjunction with an application for a tax abatement does not necessarily constitute a promise of future employment levels that may be enforced as a matter of contract by the taxing authority under the doctrine of promissory estoppel. *Ypsilanti Twp v GMC,* 201 Mich App 128.

CONTRIBUTIONS TO PENSION PROGRAMS—*See* WORKERS' COMPENSATION 12

CONTROLLED SUBSTANCES.
EVIDENCE.
1. *People v Steve Jones,* 201 Mich App 687.
POSSESSION WITH INTENT TO DELIVER.
2. *People v Steve Jones,* 201 Mich App 687.
WORDS AND PHRASES.
3. To constitute a mixture containing cocaine, a mixture must be reasonably homogeneous or uniform and it should be reasonably difficult to separate the cocaine from the filler material because of a mixing or blending of the substances; where cocaine and water are in a container and the cocaine is an insoluble solid material that is easily separated from the water, the contents of the container are two separate items, water and particles of cocaine, rather than a mixture containing cocaine (MCL 333.7401[2][a][iii]; MSA 14.15[7401][2][a][iii]). *People v Hunter,* 201 Mich App 671.

CONTROLLED SUBSTANCES—Cont'd

4. The conversion of powdered cocaine into crack cocaine qualifies as the "manufacturing" of cocaine by chemical synthesis (MCL 333.7106[2], 333.7401[2][a][iv]; MSA 14.15[7106][2], 14.15[7401][2][a][iv]). *People v Hunter,* 201 Mich App 671.

CONVICTIONS—*See*
CRIMINAL LAW 7

CORPORATE AGENTS—*See*
TORTS 2

CORPORATE OFFICERS—*See*
CIVIL RIGHTS 1

CORPORATIONS—*See*
INTEREST 1

COURTS.

PROCEDURE.

1. The Supreme Court's rule-making power in matters of court practice and procedure is superior to that of the Legislature; however, the Legislature may enact statutory rules of evidence that do not conflict with the Michigan Rules of Evidence, and those statutory rules are enforceable until superseded by the Supreme Court (Const 1963, art 6, § 5; MRE 101). *People v McDonald,* 201 Mich App 270.

WAIVER OR SUSPENSION OF FEES AND COSTS.

2. A waiver or suspension of court fees and costs previously granted on the basis of indigency may not be revoked by a trial court unless the court first determines that there has been a change in status with respect to indigency (MCR 2.002[G]). *Martin v Corr Dep't (On Rem),* 201 Mich App 331.

CRIMINAL LAW.

*See, also,* CONSTITUTIONAL LAW 3.

APPOINTMENT OF APPELLATE COUNSEL.

1. A trial court may not deny a request for the appointment of appellate counsel solely on the basis that the request was not made within forty-two days after sentencing if the request is made within eighteen months after the entry of the judgment of conviction and sentence (MCR 6.425[E][3], [F][1][b], 7.205[F][3]). *People v Cottrell,* 201 Mich App 256.

ASSAULT WITH INTENT TO ROB WHILE UNARMED.

2. The essential elements of the offense of assault with intent to rob while unarmed are: an assault with force and violence, an intent to rob and steal, and the defendant being unarmed; the offense involves an attempt or offer to do corporal injury, with the present intention and present ability to carry out the offer, i.e., a criminally assaultive act (MCL 750.88; MSA 28.283). *People v Chandler,* 201 Mich App 611.

CRIMINAL LAW—Cont'd

ASSISTANCE OF COUNSEL.

3. Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence if the failure deprives the defendant of a substantial defense, i.e., one that might have made a difference in the outcome of the trial. *People v Lavearn,* 201 Mich App 679.

4. Decisions by counsel concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy; a defendant may overcome the presumption of sound trial strategy by showing that counsel's failure to prepare for trial resulted in counsel's ignorance of, and failure to present, valuable evidence by which the accused might have benefited substantially. *People v Lavearn,* 201 Mich App 679.

ATTEMPTED UNARMED ROBBERY.

5. The essential elements of the offense of attempted unarmed robbery are: an attempted felonious taking of property from the person of another, by force and violence or by assault or by putting in fear, and the defendant being unarmed; the offense may or may not include a criminal assault and may be accomplished by force and violence or by putting the victim in fear; the defendant need not possess the present ability to carry out the threat of force or violence (MCL 750.92, 750.530; MSA 28.287, 28.798). *People v Chandler,* 201 Mich App 611.

COMMON LAW.

6. The offense of accessory after the fact, being a common-law felony for which there is no express statutory provision for punishment, is a felony punishable under the provision of the Criminal Code relating to offenses indictable at common law for which there is no other express statutory punishment; the statute does not require that the underlying felony upon which the accessory charge is based also be an offense indictable at common law (MCL 750.505; MSA 28.773). *People v Cunningham,* 201 Mich App 720.

CONVICTIONS.

7. *People v Rosen,* 201 Mich App 621.

DOUBLE JEOPARDY.

8. Convictions of receiving and concealing stolen property and of owning or operating a chop shop violate a defendant's protection against double jeopardy where they arise from the same criminal transaction (MCL 750.535, 750.535a[2]; MSA 28.803, 28.803[1][2]). *People v Oxendine,* 201 Mich App 372.

9. Convictions of altering a motor vehicle identification number and of owning or operating a chop shop violate a defendant's protection against double jeopardy where they arise from the same criminal transaction (MCL 750.535a[2], 750.415[1]; MSA 28.803[1][2], 28.647[1]). *People v Oxendine,* 201 Mich App 372.

EVIDENCE.

10. *People v Perry,* 201 Mich App 347.

CRIMINAL LAW—Cont'd

GUILTY PLEAS.

11. A claim of ineffective assistance of counsel in the context of a guilty plea requires a determination whether the plea was tendered voluntarily and understandingly by the defendant after sufficient advice from counsel regarding the nature of the charges, possible defenses, the consequences of pleading guilty, and the applicability of lesser included offenses. *People v Thew,* 201 Mich App 78.

12. There is no requirement that the same judge who accepts a defendant's plea of guilty must preside and hear postconviction motions by the defendant. *People v Montrose (Aft Rem),* 201 Mich App 378.

13. There is no absolute right to withdraw a guilty plea once it has been accepted by the trial court; where a motion to withdraw a guilty plea is brought after sentencing, a trial court's decision will not be reversed absent a clear abuse of discretion resulting in a miscarriage of justice. *People v Montrose (Aft Rem),* 201 Mich App 378.

HOMICIDE.

14. A death caused by a defendant with malice and without justification or excuse is second-degree murder; malice requires an intent to kill, an intent to do great bodily harm, or an intent to create a high risk of death or great bodily harm with knowledge that such is the probable result; malice must be established from facts or circumstances that do not mitigate the degree of the offense to manslaughter or constitute an excuse or justification (MCL 750.317, 750.321; MSA 28.549, 28.553). *People v Neal,* 201 Mich App 650.

INEFFECTIVE ASSISTANCE OF COUNSEL.

15. A defendant establishes ineffective assistance of counsel by showing that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment (US Const, Am VI). *People v Harris,* 201 Mich App 147.

INSANITY.

16. The failure of a court in a trial in which the defense of insanity is raised to give to the jury the statutorily mandated preliminary instructions concerning mental illness and legal insanity before expert testimony is taken is harmless error where there is no defense objection, the jury is given proper instructions at the end of the trial, and the jury returns a verdict of guilty rather than guilty but mentally ill (MCL 768.29a[1]; MSA 28.1052[1][1]). *People v Cramer,* 201 Mich App 590.

JOINT JURY TRIALS.

17. In a joint jury trial, the admission of a nontestifying codefendant's confession does not violate a defendant's right of confrontation where the confession is redacted to eliminate all references to the defendant. *People v Harris,* 201 Mich App 147.

CRIMINAL LAW—Cont'd

JOINT TRIALS.

18. A request for severance of joint trials should be granted by a trial court where the defenses or the confessions of the codefendants are antagonistic (MCL 768.5; MSA 28.1028). *People v Harris,* 201 Mich App 147.

JURY TRIALS.

19. The Court of Appeals reviews only for an abuse of discretion a trial court's decision to grant or deny a recess to allow a defendant to obtain civilian clothing before appearing for a jury trial if the trial court has observed the defendant's attire and has concluded that it is not prison garb. *People v Harris,* 201 Mich App 147.

MISTRIAL.

20. If a mistrial is declared after jeopardy has attached, the state is precluded from bringing the defendant to trial a second time unless the defendant consented to the mistrial or the mistrial was of manifest necessity; a mistrial is not of manifest necessity and a retrial would be barred by double jeopardy where the mistrial is granted, over the defendant's objection, after a trial judge's own recusal based on a potential perception of bias or appearance of impropriety, as opposed to actual bias or partiality, resulting from the judge's friendship with a sibling of the defendant. *People v Hicks,* 201 Mich App 197.

PLEAS.

21. Error in the plea-taking proceeding must be shown in order to set aside a plea after sentencing (MCR 6.311). *People v Montrose (Aft Rem),* 201 Mich App 378.

PRELIMINARY EXAMINATION.

22. The inquiry of an examining magistrate is not limited to whether the prosecution has presented evidence regarding each element of an offense, but requires an examination of the whole matter; even where the prosecution has presented some evidence regarding each element, if upon examination of the whole matter the evidence is insufficient to satisfy the magistrate that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, the magistrate should not bind the defendant over for the offense charged, but may bind over on a lesser offense; in making this determination, mitigating evidence must be considered, and the magistrate should take into account the weight and competency of the evidence and the credibility of the witnesses; conflicting evidence or evidence that raises a reasonable doubt regarding guilt should be left to the trier of fact. *People v Neal,* 201 Mich App 650.

SECOND-DEGREE CHILD ABUSE.

23. *People v Todd,* 201 Mich App 216.

SENTENCING.

24. The prosecution is entitled to withdraw from a guilty plea agreement and reimpose the original charges where the plea agreement includes a sentencing agreement and the sentencing

CRIMINAL LAW—Cont'd

court, in the exercise of its sentencing discretion, declines to impose the sentence agreed upon by the parties. *People v Siebert,* 201 Mich App 402.

TRIAL.

25. It is error for a trial court to permit the prosecution to introduce a rebuttal witness after the parties have rested and completed their closing arguments; such an error is so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless. *People v Rhinehardt,* 201 Mich App 1.

CRIMINAL SEXUAL CONDUCT—*See*
RAPE 1

DAMAGES.

*See, also,* ATTORNEY AND CLIENT 3; JUDGMENTS 1; LIBEL AND SLANDER 1; MASTER AND SERVANT 1, 2; PRETRIAL PROCEDURE 2.

WRONGFUL DEATH.

1. Exemplary damages are not recoverable in a wrongful death action (MCL 600.2922; MSA 27A.2922). *Fellows v Superior Products,* 201 Mich App 155.

DANGEROUS OR DEFECTIVE STEPS—*See*
GOVERNMENTAL IMMUNITY 1

DEATH BENEFITS—*See*
WORKERS' COMPENSATION 4, 5

DEFENDANTS' ATTIRE—*See*
CRIMINAL LAW 19

DEFENSES—*See*
HOMICIDE 3

DELIBERATE INDIFFERENCE—*See*
CIVIL RIGHTS 3

DELIVERY—*See*
GIFTS 1

DEPENDENTS—*See*
WORKERS' COMPENSATION 4, 5

DISCOVERY—*See*
PRETRIAL PROCEDURE 1

DISCOVERY OF CLAIMS—*See*
LIMITATION OF ACTIONS 1

DIVORCE.

CHILD SUPPORT.

1. Since December 26, 1989, trial courts in divorce actions have

DIVORCE—Cont'd
been obligated to base child support awards on the applicable child support formula adopted by the friend of the court bureau or, if they determine that deviation is warranted, to specify in writing or on the record the manner of deviation and the reasons for doing so (1989 PA 274, MCL 552.16[2]; MSA 25.96[2]). *Eddie v Eddie,* 201 Mich App 509.

EQUITY.
2. *Pernick v Brandt,* 201 Mich App 293.

JUDGMENTS.
3. The usury statute provides that the highest rate of interest that may be authorized in a written instrument is, with certain exceptions, seven percent per annum; the seven percent limitation applies to debts from one spouse to another established pursuant to a judgment of divorce (MCL 438.31; MSA 19.15[1]). *Norman v Norman,* 201 Mich App 182.
4. Modifications of property settlements in divorce judgments are disfavored and, generally, cannot be ordered except under limited circumstances. *Norman v Norman,* 201 Mich App 182.

PROPERTY SETTLEMENTS.
5. *Roth v Roth,* 201 Mich App 563.

DOUBLE JEOPARDY—*See*
CONSTITUTIONAL LAW 1
CRIMINAL LAW 8, 9, 20

DRAMSHOP ACT—*See*
INTOXICATING LIQUORS 1

DRIVING WHILE INTOXICATED, THIRD OFFENSE—*See*
AUTOMOBILES 1

DUAL CAUSATION—*See*
INSURANCE 2

DUAL EMPLOYMENT PROVISION—*See*
WORKERS' COMPENSATION 6

DUE PROCESS—*See*
CONSTITUTIONAL LAW 2, 4

DUTY—*See*
ACTIONS 1
LANDLORD AND TENANT 1

DUTY OF FAIR REPRESENTATION—*See*
LABOR RELATIONS 1, 2

DUTY TO WARN—*See*
NEGLIGENCE 1

ELEMENTS—*See*
CRIMINAL LAW 2, 5

EMINENT DOMAIN.

INVERSE CONDEMNATION.

1. A decrease in the volume of business experienced by the owner of a business and the land on which the business is located resulting from the acquisition and demolition of an adjacent residential neighborhood by a municipality exercising its power of eminent domain does not constitute a taking of the business owner's property for which the municipality must pay compensation (US Const Am V; Const 1963, art 10, § 2). *C Murphy, MD, PC v Detroit,* 201 Mich App 54.

UNIFORM CONDEMNATION PROCEDURES ACT.

2. A government agency may enter private property before filing an action for condemnation for the purpose of determining whether the property is suitable for public purposes; the government agency is not required to state a public purpose when seeking entry onto the property for such an inspection (MCL 213.54; MSA 8.265[4]). *Melvindale v Trenton Co,* 201 Mich App 497.
3. The Uniform Condemnation Procedures Act mandates an award of reasonable expert witness fees in an eminent domain action; the requirement to pay a reasonable expert witness fee as applied to an owner's real estate appraiser is not contingent upon the appraiser's being licensed as a real estate broker (MCL 213.66; MSA 8.265[16]). *Trans Dep't v Schultz,* 201 Mich App 605.
4. Expert witness fees for court time and time required to prepare for testimony as an expert are recoverable under the Uniform Condemnation Procedures Act by a condemnee where the services of the expert are reasonably necessary to allow the condemnee to prepare for trial; however, an expert is not automatically entitled to compensation for all services rendered and may not be compensated for services that go beyond the scope of the type of services that normally would be rendered by a person in that profession. *Trans Dep't v Schultz,* 201 Mich App 605.
5. The Uniform Condemnation Procedures Act provides that interest is to be awarded on a judgment amount, but does not provide for an award of interest with regard to the reimbursement of costs (MCL 213.65; MSA 8.265[15]). *Trans Dep't v Schultz,* 201 Mich App 605.

EMPLOYMENT RELATIONS COMMISSION—*See*
ADMINISTRATIVE LAW 2, 3

EQUITY—*See*
DIVORCE 2

ERROR REQUIRING REVERSAL—*See*
CRIMINAL LAW 25

EVIDENCE.

*See, also,* ADMINISTRATIVE LAW 3; CONSTITUTIONAL LAW 3, 4; CONTROLLED SUBSTANCES 1; CRIMINAL LAW 10; SENTENCES 8.

EVIDENCE—Cont'd

HABITS OF A PERSON.

1. Evidence of a habit of a person is relevant to prove that the conduct of the person on a particular occasion was in conformity with the habit (MRE 406). *Petraszewsky v Keeth (On Rem),* 201 Mich App 535.

HEARSAY.

2. Where a witness testifies that an out-of-court statement was made, rather than about the truth of the statement, the testimony is not hearsay (MRE 801[c]). *People v Harris,* 201 Mich App 147.

PRIVILEGED COMMUNICATIONS.

3. The Child Protection Law abrogates legally recognized privileges, except that between attorney and client, only where a report is required under the act or where the communication subject to a privilege is offered as evidence of neglect or abuse in a child protective proceeding (MCL 722.631; MSA 25.248[11]). *People v Wood,* 201 Mich App 58.

EXCLUSIONARY RULE—*See*
CRIMINAL LAW 10

EXECUTORS AND ADMINISTRATORS.

GUARDIAN AND WARD.

1. A claimant whose claim against the estate of a protected person is not paid may petition the probate court for a determination of the claim at any time before it is barred by the applicable statute of limitation (MCL 700.488[3]; MSA 27.5488[3]). *In re Halbeck,* 201 Mich App 387.

EXEMPLARY DAMAGES—*See*
DAMAGES 1

EXPERT WITNESS FEES—*See*
EMINENT DOMAIN 3, 4

FAILURE TO PRESERVE—*See*
CONSTITUTIONAL LAW 4

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT—*See*
AGRICULTURE 1

FELONY MURDER—*See*
CONSTITUTIONAL LAW 1
HOMICIDE 1, 2

FRAUD—*See*
INSURANCE 4

FRIEND OF THE COURT SUPPORT FORMULA—*See*
DIVORCE 1

GARNISHMENT.

OBLIGATIONS.

1. An obligation of a garnishee defendant to the principal defendant must be owed or payable at the time the writ of garnishment is served on the garnishee defendant in order to be subject to garnishment under that writ; because real estate commissions are one-time payments to a broker or agent that only become due once a sale has been consummated, real estate commissions on sales consummated after the service of a writ of garnishment are not obligations owed or debts owing at the time the writ was served and, thus, are not subject to that writ of garnishment (MCL 600.4011[1][b]; MSA 27A.4011[1][b]; MCR 3.101). *Royal York v Coldwell Banker,* 201 Mich App 301.

GIFTS.

TITLE.

1. To constitute a valid gift, the donor must intend to pass title to the donee, there must be actual or constructive delivery, and the donee must accept the gift. *In re Mensinger Estate,* 201 Mich App 290.

GOVERNMENTAL IMMUNITY.

PUBLIC BUILDING EXCEPTION.

1. The public building exception to governmental immunity applies where injury occurs as the result of a dangerous or defective condition of the steps of a public building if the steps constitute a stairway leading into the building, provide the only means of ingress and egress, are not merely adjacent to the building, and are related to the permanent structure or physical integrity of the building (MCL 691.1406; MSA 3.996[106]). *Maurer v Oak Co (On Rem),* 201 Mich App 223.

GRIEVANCES—*See*
LABOR RELATIONS 1

GUARDIAN AND WARD—*See*
EXECUTORS AND ADMINISTRATORS 1

GUILTY PLEAS—*See*
CRIMINAL LAW 11-13, 24

HABITS OF A PERSON—*See*
EVIDENCE 1

HARMLESS ERROR—*See*
CRIMINAL LAW 16

HEARINGS—*See*
ADMINISTRATIVE LAW 3

HEARSAY—*See*
EVIDENCE 2

HOMICIDE.

*See, also,* CRIMINAL LAW 14.

FELONY MURDER.

1. Felony murder consists of the killing of a human being with the intent to kill, to do great bodily harm, or to create a high risk of death or bodily harm with knowledge that death or great bodily harm was the probable result while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. *People v Thew,* 201 Mich App 78.
2. A murder committed while attempting to escape from or prevent detection of a felony is felony murder, but only if committed as part of a continuous transaction with, or is otherwise immediately connected with, the underlying felony. *People v Thew,* 201 Mich App 78.

PREMEDITATED MURDER.

3. Voluntary intoxication is a defense to premeditated murder if it can be shown that the intoxication prevented the defendant from engaging in premeditation and deliberation with respect to the killing. *People v Lavearn,* 201 Mich App 679.

HUSBAND AND WIFE.

ANNULMENT.

1. A circuit court, upon a petition for the annulment of a marriage on the ground of bigamy, must determine whether the marriage is bigamous, and if so, must declare the marriage invalid and grant an annulment; equitable principles of estoppel or clean hands do not prevent a party to a bigamous marriage from seeking and obtaining an annulment (MCL 551.5, 552.1, 552.3; MSA 25.5, 25.81, 25.83). *Harris v Harris,* 201 Mich App 65.

IMPEACHMENT—*See*
CONSTITUTIONAL LAW 2

INDETERMINATE SENTENCES—*See*
SENTENCES 1-3

INDIGENTS—*See*
COURTS 2

INDIVIDUALIZED EDUCATION PROGRAMS—*See*
SCHOOLS 1

INEFFECTIVE ASSISTANCE OF COUNSEL—*See*
CRIMINAL LAW 11, 15

INFERENCES—*See*
CONTROLLED SUBSTANCES 1

INSANITY—*See*
CRIMINAL LAW 16

INSANITY—Cont'd
LIMITATION OF ACTIONS 3

INSPECTION OF LICENSED PREMISES—*See*
CONSTITUTIONAL LAW 5

INSPECTION OF PROPERTY—*See*
EMINENT DOMAIN 2

INSURANCE.
*See, also,* DIVORCE 2.

ACTIONS.
1. *Lee v Auto-Owners Ins,* 201 Mich App 39.

DUAL CAUSATION.
2. *USF&G v Citizens Ins Co,* 201 Mich App 491.

JUDICIAL CONSTRUCTION.
3. Insurance policies are construed in favor of coverage when an ambiguity exists; if the policy fairly admits of but one interpretation, the policy should not be considered ambiguous or fatally unclear. *Heniser v Frankenmuth Mutual,* 201 Mich App 70.

MATERIAL MISREPRESENTATION.
4. An insurer need not prove fraudulent intent in order to cancel an insurance policy where an applicant makes a material misstatement concerning prior medical history. *Legel v Am Comm Mut Ins Co,* 201 Mich App 617.

NO-FAULT.
5. *Lee v Auto-Owners Ins,* 201 Mich App 39.
6. A false representation in an application for no-fault insurance that materially affects the acceptance of the risk entitles the insurer to void or cancel the policy retroactively; the right to rescind ceases to exist once a claim by an innocent third party is involved; public policy requires that an insurer be estopped from asserting rescission once a third party has been injured. *Katinsky v Auto Club,* 201 Mich App 167.
7. The phrase "doing mechanical work," as used in the provision of the no-fault act that disallows no-fault benefits for injury if workers' compensation benefits are available and if injury is sustained while doing mechanical work on a parked vehicle, means engaging in an activity that is normally done by a mechanic for the purpose of maintaining or repairing the vehicle (MCL 500.3106[2][a]; MSA 24.13106[2][a]). *Thompson v TNT Overland,* 201 Mich App 336.
8. Personal protection insurance benefits under the no-fault act are available to a rider of an uninsured motorcycle for accidental bodily injury sustained in an accident involving an insured automobile only if the rider does not hold legal title to the motorcycle (MCL 500.3101[2][c], [e], [g][i], [ii], 500.3113[b]; MSA 24.13101[2][c], [e], [g][i], [ii], 24.13113[b]). *Auto-Owners Ins Co v Hoadley,* 201 Mich App 555.
9. *Verbison v Auto Club,* 201 Mich App 635.

INTEREST.
*See, also,* DIVORCE 3.
CORPORATIONS.
1. A corporation may agree in writing to pay on a debt a rate of interest that exceeds the legal rate; a corporation that so agrees may not raise usury as a defense to an action for collection (MCL 438.61, 450.1275; MSA 19.15[71], 21.200[275]). *Kleanthous v First of Chelsea,* 201 Mich App 440.
SIMPLE INTEREST.
2. In the absence of a statute to the contrary, an explicit agreement of the parties, or some special circumstance dictating otherwise, interest must be calculated on the basis of simple interest rather than compound interest. *Norman v Norman,* 201 Mich App 182.

INTEREST OF JUDGMENTS—*See*
EMINENT DOMAIN 5

INTEREST ON COSTS—*See*
EMINENT DOMAIN 5

INTERFERENCE WITH CONTRACTS—*See*
TORTS 1, 2

INTERPRETATION OF CONTRACTS—*See*
CONTRACTS 1

INTOXICATING LIQUORS.
*See, also,* CONSTITUTIONAL LAW 5; SEARCHES AND SEIZURES 1.
DRAMSHOP ACT.
1. A personal representative of a decedent's estate may bring a wrongful death action based on the dramshop act where the damages sought against the dramshop defendant are those that the decedent could have sought under the dramshop act had the decedent survived (MCL 436.22; MSA 18.993). *Herron v Biggies Wolf Den,* 201 Mich App 599.

INVALID SENTENCES—*See*
SENTENCES 4

INVERSE CONDEMNATION—*See*
EMINENT DOMAIN 1

INVITEES—*See*
LANDLORD AND TENANT 1
NEGLIGENCE 1

JOINT BANK ACCOUNTS—*See*
TAXATION 1

JOINT JURY TRIALS—*See*
CRIMINAL LAW 17

JOINT TORTFEASORS—*See*
JUDGMENTS 1

JOINT TRIALS—*See*
CRIMINAL LAW 18

JUDGMENTS.

*See, also,* DIVORCE 2-4; PRETRIAL PROCEDURE 2.

JOINT TORTFEASORS.

1. Where the conduct of two or more actors proximately causes a single, indivisible injury to a plaintiff, the plaintiff may pursue any or all of the defendants for compensation for the injury, but is entitled to only one satisfaction; where a judgment for the plaintiff is based upon actual litigation of the amount of damages and the judgment is paid in full, the plaintiff has no enforceable claim against any other obligor responsible for the same loss (MCL 600.2925c[5]; MSA 27A.2925[3][5]). *Vermilya v Carter Crompton,* 201 Mich App 467.

OFFERS TO STIPULATE ENTRY OF JUDGMENT.

2. A trial court abuses its discretion by denying a motion for attorney fees as a sanction for the refusal of an offer to stipulate the entry of a judgment where the only reason for the denial is that the rejection of the offer of judgment was reasonable (MCR 2.405[D]). *Butzer v Camelot Hall (Aft Rem),* 201 Mich App 275.

JUDICIAL CONSTRUCTION—*See*
INSURANCE 3

JUDICIAL REVIEW—*See*
ADMINISTRATIVE LAW 1

JURY INSTRUCTIONS—*See*
CRIMINAL LAW 16

JURY TRIALS—*See*
CRIMINAL LAW 19

KNOWN OR OBVIOUS DANGERS—*See*
NEGLIGENCE 1

LABOR RELATIONS.

UNIONS.

1. A union has discretion to decide which grievances will be submitted to arbitration and which will be settled, and must be permitted to assess each grievance to determine its individual merit; the union may consider the good of the general membership and weigh the burden on the contractual grievance machinery, the amount at stake, the likelihood of success, the cost, and the desirability of winning the award against considerations that affect the membership as a whole; the union must act without fraud, bad faith, hostility, discrimination; arbitrari-

LABOR RELATIONS—Cont'd
ness, caprice, gross nonfeasance, collusion, bias, prejudice, wilful, wanton, wrongful and malicious refusal, personal spite, ill will, bad feelings, improper motives, misconduct, overreaching, unreasonable action, or gross abuse of its discretion. *Knoke v E Jackson Sch Dist,* 201 Mich App 480.
2. A member of a labor union, in order to prevail on a claim of unfair representation against the union, must establish a breach of the duty of fair representation and a breach of the collective bargaining agreement. *Knoke v E Jackson Sch Dist,* 201 Mich App 480.

LANDLORD AND TENANT.
TENANT'S SOCIAL GUESTS.
1. The duties owed by a landlord to the social guests of a tenant with regard to the common areas of the property that are under the retained control of the landlord are the duties owed to invitees. *Petraszewsky v Keeth (On Rem),* 201 Mich App 535.

LAND OWNED BY STATE—*See*
ADVERSE POSSESSION 1

LEGAL MALPRACTICE—*See*
ACTIONS 1

LEVIES—*See*
TAXATION 1

LIBEL AND SLANDER.
PRIVATE FIGURES.
1. In an action for libel or slander brought by a private figure, proof that publication of the defamatory falsehood was a result of negligence entitles the plaintiff to recovery of economic damages, including attorney fees, while proof of actual malice in publication entitles the plaintiff to actual damages suffered in property, business, trade, profession, occupation, or feelings (MCL 600.2911[2][a],[7]; MSA 27A.2911[2][a],[7]). *Glazer v Lamkin,* 201 Mich App 432.

LICENSURE OF APPRAISERS—*See*
EMINENT DOMAIN 3

LIFE EXPECTANCY—*See*
SENTENCES 3

LIMITATION OF ACTIONS.
*See, also,* EXECUTORS AND ADMINISTRATORS 1.
MEDICAL MALPRACTICE.
1. *Simmons v Apex Drug Stores,* 201 Mich App 250.
MINORS.
2. An action by an adult for damages resulting from alleged sexual abuse that occurred during childhood, the memory of

LIMITATION OF ACTIONS—Cont'd
which allegedly was repressed, accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its likely cause; evidence corroborating the sexual abuse is not necessary to the application of the delayed-discovery rule. *Lemmerman v Fealk,* 201 Mich App 544.

REPRESSION OF MEMORY.

3. Repression of the memory of childhood sexual abuse is insanity within the meaning of the statute that extends the period of limitation within which to bring an action to one year from the date the disability of insanity is removed (MCL 600.5851; MSA 27A.5851). *Lemmerman v Fealk,* 201 Mich App 544.

LOSS OF BUSINESS VOLUME—*See*
EMINENT DOMAIN 1

MALPRACTICE—*See*
ATTORNEY AND CLIENT 2-4
PHYSICIANS AND SURGEONS 1

MANDATORY CONSECUTIVE SENTENCING—*See*
PRISONS AND PRISONERS 2

MANDATORY SPECIAL EDUCATION ACT—*See*
SCHOOLS 1

MANSLAUGHTER—*See*
CRIMINAL LAW 14

MANUFACTURING COCAINE—*See*
CONTROLLED SUBSTANCES 4

MASTER AND SERVANT.

AT-WILL EMPLOYMENT.

1. Intrinsic in the concept of an at-will employment contract is the mutual understanding between employer and employee that neither party to the agreement has an expectation of continued employment; consequently, damages for mental or emotional distress in an action alleging discharge in retaliation for the filing of a claim of workers' compensation benefits are limited to those damages that arise solely from the retaliatory nature of the discharge. *Phillips v Butterball Inc (On Rem),* 201 Mich App 663.

WRONGFUL DISCHARGE.

2. An action for wrongful discharge alleging retaliation for the filing of a claim for workers' compensation benefits sounds in tort, not contract; damages for mental anguish may be awarded in such an action. *Phillips v Butterball Inc (On Rem),* 201 Mich App 663.

MATERIAL MISREPRESENTATION—*See*
INSURANCE 4

MECHANICAL WORK—*See*
INSURANCE 7

MEDIATION—*See*
PRETRIAL PROCEDURE 2

MEDICAL BENEFITS—*See*
WORKERS' COMPENSATION 3

MEDICAL MALPRACTICE—*See*
LIMITATION OF ACTIONS 1

MENTAL ANGUISH—*See*
MASTER AND SERVANT 1, 2

MENTAL DISABILITIES—*See*
WORKERS' COMPENSATION 7

MINIMUM SENTENCES—*See*
SENTENCES 1

MINIMUM TERMS—*See*
SENTENCES 2

MINORS—*See*
LIMITATION OF ACTIONS 2

MISTRIAL—*See*
CRIMINAL LAW 20

MITIGATION—*See*
ATTORNEY AND CLIENT 3

MIXTURES CONTAINING COCAINE—*See*
CONTROLLED SUBSTANCES 3

MODIFICATION—*See*
DIVORCE 4

MODIFICATION OF CHILD SUPPORT—*See*
PARENT AND CHILD 2

MOTIONS AND ORDERS.
NEW TRIAL.
1. A trial court does not abuse its discretion in granting a new trial where the reasons assigned by the court for its determination are legally recognized and supported by any reasonable interpretation of the record. *Petraszewsky v Keeth (On Rem)*, 201 Mich App 535.

NAMED EXCLUDED DRIVERS—*See*
INSURANCE 9

NEGLIGENCE.

INVITEES.

1. Possessors of land do not have a duty to warn invitees of open and obvious dangers unless the invitor anticipated the harm despite the invitee's knowledge of it; whether a danger is open and obvious depends upon whether it is reasonable to expect that an average user with ordinary intelligence would have discovered the danger upon casual inspection. *Maurer v Oak Co (On Rem),* 201 Mich App 223.

NEW TRIAL—*See*
MOTIONS AND ORDERS 1

NO-FAULT—*See*
INSURANCE 5-9

NONCONFORMING USES—*See*
ZONING 1

NONDISABILITY PENSIONS—*See*
WORKERS' COMPENSATION 8, 10, 12

NONOWNED PROPERTY—*See*
ZONING 1

OBLIGATIONS—*See*
GARNISHMENT 1

OFFENSE VARIABLES—*See*
SENTENCES 7

OFFERS TO STIPULATE ENTRY OF JUDGMENT—*See*
JUDGMENTS 2

180-DAY RULE—*See*
PRISONS AND PRISONERS 1, 2

ONE-YEAR-BACK RULE—*See*
WORKERS' COMPENSATION 9

ORDINANCES—*See*
TOWNSHIPS 1

PARENT AND CHILD.

CHILDREN BORN OUT OF WEDLOCK.

1. Whether a child is an issue of a former marriage need not be adjudicated before the filing of a complaint for an order of filiation; a circuit court in an action brought under the Paternity Act for an order of filiation has subject-matter jurisdiction to determine whether the child was born out of wedlock (MCL 722.711[a]; MSA 25.491[a]). *DSS v Carter,* 201 Mich App 643.

PATERNITY ACTIONS.

2. In a paternity action, an agreement approved by a court for

PARENT AND CHILD—Cont'd
the provision of support to an illegitimate child by its father is not subject to subsequent modification unless the parties provide for such modification in their settlement agreement or the order of support directs payment until further order of the court (MCL 722.713; MSA 25.493). *Crego v Coleman,* 201 Mich App 443.

PARKED VEHICLES—*See*
INSURANCE 7

PATERNITY ACTIONS—*See*
PARENT AND CHILD 1, 2

PATERNITY PROCEEDINGS—*See*
ACTIONS 2
CONSTITUTIONAL LAW 6

PENALTIES—*See*
TOWNSHIPS 1

PENSIONS—*See*
DIVORCE 5

PERSONAL PROTECTION INSURANCE—*See*
INSURANCE 8

PERSONAL REPRESENTATIVES—*See*
INTOXICATING LIQUORS 1

PERVASIVELY REGULATED INDUSTRIES—*See*
ADMINISTRATIVE LAW 4

PETITIONS—*See*
PLEADING 1

PHARMACISTS—*See*
LIMITATION OF ACTIONS 1

PHYSICAL DISABILITIES—*See*
WORKERS' COMPENSATION 7

PHYSICIAN-PATIENT RELATIONSHIP—*See*
PHYSICIANS AND SURGEONS 1

PHYSICIANS AND SURGEONS.
MALPRACTICE.
1. A telephone call made for the purpose of scheduling an appointment with a physician does not establish a physician-patient relationship upon which a claim of malpractice can be based where the caller, or the person on whose behalf the call is made, has no ongoing relationship with the physician and

PHYSICIANS AND SURGEONS—Cont'd
does not seek or obtain medical advice during the conversation. *Weaver v U of M Bd of Regents,* 201 Mich App 239.

PLEADING.
PROBATE COURT.
1. The Revised Probate Code does not require that a claim, as defined in MCL 700.3(4); MSA 27.5003(4), be made only in the form of a "petition" as defined by MCR 5.113. *In re Halbeck,* 201 Mich App 387.

PLEAS—*See*
CRIMINAL LAW 21

POLICE—*See*
STATUTES 1

PONTIAC CORRECTIONAL FACILITY—*See*
PRISONS AND PRISONERS 1

POSSESSION WITH INTENT TO DELIVER—*See*
CONTROLLED SUBSTANCES 2

POSTARREST SILENCE—*See*
CONSTITUTIONAL LAW 2

POSTCONVICTION MOTIONS—*See*
CRIMINAL LAW 12, 13, 21

PREEMPTION OF STATE REGULATION AND COMMON-LAW CLAIMS OF FAILURE TO WARN—*See*
AGRICULTURE 1

PRELIMINARY EXAMINATION—*See*
CRIMINAL LAW 22

PREMEDITATED MURDER—*See*
HOMICIDE 3

PRESUMPTIONS—*See*
WORKERS' COMPENSATION 8

PRETRIAL PROCEDURE.
CIVIL PROCEEDINGS.
1. Parties in civil proceedings may obtain discovery regarding any matter that is not privileged and that is relevant to the subject matter involved in the pending action; after commencement of the action, upon reasonable notice, a party may take the sworn testimony of an opposing party by deposition (MCR 2.302, 2.306, 2.307). *Larrabee v Sachs,* 201 Mich App 107.

MEDIATION.
2. The acceptance of a mediation award is not analogous to a

PRETRIAL PROCEDURE—Cont'd
judgment entered after a trial; a judgment entered pursuant to a mediation award is effective against only those parties who actually participated in the action; a mediation panel's evaluation of a plaintiff's claim may not constitute a determination of the full extent of the plaintiff's damages because the plaintiff's damages are but one of the factors properly considered by the mediators in determining an award (MCR 2.403[M]). *Vermilya v Carter Crompton,* 201 Mich App 467.

PRIMA FACIE CASE—*See*
CIVIL RIGHTS 2

PRISONS AND PRISONERS.
180-DAY RULE.
1. The 180-day rule does not apply to a charge of a criminal offense committed by an inmate of a state correctional facility while incarcerated in the correctional facility; the Pontiac Correctional Facility is a community corrections center under the control of the Department of Corrections and therefore is a state correctional facility within the meaning of the 180-day rule (MCL 780.131[2][a]; MSA 28.969[1][2][a]). *People v McCullum,* 201 Mich App 463.
2. The purpose of the 180-day rule, to give an inmate of a state correctional facility the opportunity to have sentences run concurrently, does not apply in a case where a mandatory consecutive sentence is required upon conviction; the consecutive sentencing statute applies to a crime committed by an inmate of a community corrections center under the control of the Department of Corrections while incarcerated at the center (MCL 768.7a, 780.131[2][a]; MSA 28.1030[1], 28.969[1][2][a]). *People v McCullum,* 201 Mich App 463.

PRIVATE FIGURES—*See*
LIBEL AND SLANDER 1

PRIVILEGE AGAINST SELF-INCRIMINATION—*See*
SENTENCES 6

PRIVILEGED COMMUNICATIONS—*See*
EVIDENCE 3

PROBATE COURT—*See*
PLEADING 1

PROBATION—*See*
CRIMINAL LAW 10
SENTENCES 4

PROCEDURE—*See*
COURTS 1

PRODUCT LABELING AND PACKAGING—*See*
AGRICULTURE 1

PRODUCTS LIABILITY—*See*
VENUE 2

PROMISSORY ESTOPPEL—*See*
CONTRACTS 2, 3

PROPERTY SETTLEMENTS—*See*
DIVORCE 4, 5

PROTECTED PERSONS—*See*
EXECUTORS AND ADMINISTRATORS 1

PUBIC BUILDING EXCEPTION—*See*
GOVERNMENTAL IMMUNITY 1

PUBLIC POLICY—*See*
SENTENCES 3

PUFFERY—*See*
CONTRACTS 3

RAPE.
CRIMINAL SEXUAL CONDUCT.
1. *People v Lucas,* 201 Mich App 717.

RAPE-SHIELD STATUTE—*See*
RAPE 1

REAL ESTATE COMMISSIONS—*See*
GARNISHMENT 1

REAL ESTATE TRANSACTIONS—*See*
CIVIL RIGHTS 1

REALTY—*See*
ATTORNEY AND CLIENT 1

REASONABLE RELIANCE—*See*
CONTRACTS 2

RECEIVING AND CONCEALING STOLEN PROPERTY—*See*
CRIMINAL LAW 8

RECOUPMENT OF BENEFIT OVERPAYMENTS—*See*
WORKERS' COMPENSATION 9

REJECTION—*See*
JUDGMENTS 2

RELEASE—*See*
INSURANCE 5

RELIEF FROM JUDGMENT—*See*
DIVORCE 5

REPRESSION OF MEMORY—*See*
LIMITATION OF ACTIONS 2, 3

RESCISSION OF CONTRACT—*See*
INSURANCE 6

RESENTENCING—*See*
SENTENCES 4, 5

RESTRICTED DRIVER'S LICENSES—*See*
AUTOMOBILES 1

RETALIATORY DISCHARGE—*See*
MASTER AND SERVANT 1, 2

RETIREE PRESUMPTION—*See*
WORKERS' COMPENSATION 10-12

RIGHT TO ALLOCUTION—*See*
SENTENCES 6

RULE-MAKING POWER—*See*
COURTS 1

SCHOOLS.

SPECIAL EDUCATION.

1. A challenge of the provisions of an individualized education program prepared for a disabled public school student pursuant to the Individuals with Disabilities Education Act and the mandatory special education act is subject to the administrative appeals procedure provided by those acts; a challenge may not be made in federal or state court unless such administrative remedies are first exhausted (20 USC 1400 *et seq.*; MCL 380.1701 *et seq.*; MSA 15.41701 *et seq.*). *Jenkins v Carney-Nadeau Sch,* 201 Mich App 142.

SEARCHES AND SEIZURES.

*See, also,* ADMINISTRATIVE LAW 4.

INTOXICATING LIQUORS.

1. Police officers are authorized by statute to search without a warrant the premises of a licensed liquor establishment for the purpose of discovering any violations of the Liquor Control Act or the rules promulgated pursuant to that act by the Liquor Control Commission and to seize any evidence of a violation of the act or the rules (MCL 436.1, 436.7a[2]; MSA 18.971, 18.977[1][2]; 1985 AACS, R 436.1011[1], [5][d]). *People v Thomas,* 201 Mich App 111.

WARRANTS.

2. *People v Powell,* 201 Mich App 516.

SEARCHES WITHOUT A WARRANT—*See*
SEARCHES AND SEIZURES 1

SECOND-DEGREE CHILD ABUSE—*See*
CRIMINAL LAW 23

SECOND-DEGREE MURDER—*See*
CRIMINAL LAW 14

SELF-INCRIMINATION—*See*
CONSTITUTIONAL LAW 6

SENTENCES.

INDETERMINATE SENTENCES.

1. An indeterminate sentence must be one that the defendant has a reasonable prospect of actually serving, as measured by the minimum sentence. *People v LeMarbe (Aft Rem),* 201 Mich App 45.
2. An indeterminate sentence under which a defendant will attain the age of the early nineties before being eligible for parole is one that the defendant reasonably can be expected to serve. *People v LeMarbe (Aft Rem),* 201 Mich App 45.
3. *People v Merriweather,* 201 Mich App 383.

PROBATION.

4. A defendant who has been discharged from an invalid sentence of probation may be resentenced. *People v Lamb (Aft Rem),* 201 Mich App 178.

RESENTENCING.

5. A court's authority to resentence a defendant depends on whether the previously imposed sentence is valid; courts of appeal are without authority to set aside a valid sentence and must find a sentence to be disproportionate, or otherwise invalid, before it can overturn the sentence. *People v Cade (Aft Rem),* 201 Mich App 459.

RIGHT TO ALLOCUTION.

6. A sentencing court may place a defendant under oath before allocution without violating the defendant's right to allocution or privilege against self-incrimination if at the sentencing hearing the defendant does not assert the privilege or otherwise apprise the court that allocution would jeopardize the privilege (US Const, Am V; Const 1963, art 1, § 17; MCR 6.425[D][2][c]). *People v Sean Jones (On Reh),* 201 Mich App 449.

SENTENCING GUIDELINES.

7. A sentencing court must score the sentencing guidelines' Homicide Offense Variable 3 consistent with a jury verdict unless the court has information that was not presented to the jury. *People v LeMarbe (Aft Rem),* 201 Mich App 45.
8. Facts relied on by a sentencing court in computing a sentence pursuant to the sentencing guidelines need not have been found by the trier of fact to be proven beyond a reasonable

SENTENCES—Cont'd
doubt; rather, where such facts are contested by the defendant, the prosecution need only prove them by a preponderance of the evidence to the satisfaction of the sentencing court. *People v Ratkov (Aft Rem),* 201 Mich App 123.

SENTENCING—*See*
CRIMINAL LAW 24

SENTENCING AGREEMENTS—*See*
CRIMINAL LAW 24

SENTENCING GUIDELINES—*See*
SENTENCES 7, 8

SETOFF AGAINST BENEFITS—*See*
WORKERS' COMPENSATION 13

SETTING ASIDE OF CONVICTIONS—*See*
CRIMINAL LAW 7

SEVERANCE—*See*
CRIMINAL LAW 18

SEX DISCRIMINATION—*See*
CIVIL RIGHTS 2

SEXUAL ABUSE—*See*
LIMITATION OF ACTIONS 2

SIMPLE INTEREST—*See*
INTEREST 2

SITUS OF MANUFACTURING OR DESIGN—*See*
VENUE 2

SPECIAL EDUCATION—*See*
SCHOOLS 1

STANDARD OF REVIEW—*See*
WORKERS' COMPENSATION 2

STANDING—*See*
INTOXICATING LIQUORS 1

STATE CORRECTIONAL FACILITIES—*See*
PRISONS AND PRISONERS 1

STATUTES.
VETERANS' PREFERENCE ACT.
1. A veteran employed as a municipal police commander who serves at the pleasure of the chief of police pursuant to city charter is not a temporary employee, but an employee in a

STATUTES—Cont'd
permanent position whose employment is terminable at will; a demotion of a veteran in such a position without the consent of the veteran is governed by the veterans' preference act (MCL 35.402; MSA 4.1222). *Jackson v Detroit Police Chief,* 201 Mich App 173.

STATUTORY RULES OF EVIDENCE—*See*
COURTS 1

SUBJECT-MATTER JURISDICTION—*See*
PARENT AND CHILD 1

SUFFICIENCY OF EVIDENCE—*See*
CRIMINAL LAW 23

SUPPORTING AFFIDAVITS—*See*
SEARCHES AND SEIZURES 2

TAX ABATEMENTS—*See*
CONTRACTS 3

TAXATION.
*See, also,* CONTRACTS 3.
JOINT BANK ACCOUNTS.
1. *Treasury Dep't v Comerica Bank,* 201 Mich App 318.

TELEPHONE CALLS FOR APPOINTMENTS—*See*
PHYSICIANS AND SURGEONS 1

TENANT'S SOCIAL GUESTS—*See*
LANDLORD AND TENANT 1

TERMINATION OF ATTORNEY-CLIENT RELATIONSHIP—*See*
ATTORNEY AND CLIENT 2

TIMELINESS—*See*
CRIMINAL LAW 1

TITLE—*See*
GIFTS 1

TORTS.
INTERFERENCE WITH CONTRACTS.
1. A plaintiff must establish a breach of contract caused by the defendant and that the defendant was a third party to the contract or business relationship in order to maintain a cause of action for tortious interference with a contract. *Reed v Girl Scout Council,* 201 Mich App 10.
2. A corporate agent is not liable for tortious interference with the corporation's contracts unless the agent acted solely for personal benefit with no benefit to the corporation. *Reed v Girl Scout Council,* 201 Mich App 10.

TOWNSHIPS.

CHARTER TOWNSHIP ACT.

1. The provision of the charter township act that limits punishment for criminal violations of township ordinances to fines of no more than $500, imprisonment for no longer than ninety days, or both does not apply to ordinance violations that are civil infractions (MCL 42.21; MSA 5.46[21]). *Huron Twp v City Disposal,* 201 Mich App 210.

TRAINING AND SUPERVISION OF OFFICERS—*See* CIVIL RIGHTS 3

TRIAL.

*See, also,* CRIMINAL LAW 25.

ARGUMENTS BY COUNSEL.

1. In a jury trial of an action for damages against a corporate defendant, comments by the plaintiff's counsel that stress the wealth, power, and insensitivity of the defendant are improper and may constitute a ground for invalidating a verdict in favor of the plaintiff where the comments are part of a deliberate course of conduct aimed at depriving the defendant of a fair and impartial trial and the resultant prejudice to the defendant cannot be obviated with a cautionary instruction to the jury. *Fellows v Superior Products,* 201 Mich App 155.

WITNESSES.

2. Trial courts have discretion to allow parties to testify once a witness list is stricken or barred from being filed; in exercising that discretion, a court should determine whether the party can prove the elements of its position solely on the basis of the parties' testimony and any other documentary evidence; if not, the action should be dismissed. *Grubor Enterprises v Kortidis,* 201 Mich App 625.

UNAMBIGUOUS CONTRACTS—*See* INSURANCE 2

UNDERLYING FELONIES—*See* CONSTITUTIONAL LAW 1

UNEMPLOYMENT COMPENSATION BENEFITS—*See* WORKERS' COMPENSATION 13

UNIFORM CONDEMNATION PROCEDURES ACT—*See* EMINENT DOMAIN 2-5

UNINSURED MOTORCYCLES—*See* INSURANCE 8

UNIONS—*See* LABOR RELATIONS 1, 2

UNLAWFUL BLOOD ALCOHOL LEVEL—*See* CONSTITUTIONAL LAW 3

USURY—*See*
DIVORCE 3
INTEREST 1

VENUE.
APPEAL.
1. The Court of Appeals will reverse a trial court's decision with regard to a motion for a change of venue where there was clear error. *Vermilya v Carter Crompton,* 201 Mich App 467.
PRODUCTS LIABILITY.
2. The provision in MCL 600.1629(1)(a); MSA 27A.1629(1)(a) that an action based on tort may be brought in a county in which all or a part of the cause of action arose properly is interpreted to include a county in which a product was manufactured or designed defectively. *Vermilya v Carter Crompton,* 201 Mich App 467.

VETERANS' PREFERENCE ACT—*See*
STATUTES 1

VIOLATIONS BY POLICY AGENCIES—*See*
CIVIL RIGHTS 3

VOLUNTARY INTOXICATION—*See*
HOMICIDE 3

WAGE CONTINUATION BENEFITS—*See*
WORKERS' COMPENSATION 13

WAIVER OR SUSPENSION OF FEES AND COSTS—*See*
COURTS 2

WARRANTS—*See*
SEARCHES AND SEIZURES 2

WILFUL MALNOURISHMENT—*See*
CRIMINAL LAW 23

WITNESSES—*See*
CONSTITUTIONAL LAW 2
CRIMINAL LAW 25
TRIAL 2

WITNESS LISTS—*See*
TRIAL 2

WORDS AND PHRASES—*See*
CONTROLLED SUBSTANCES 3, 4

WORKERS' COMPENSATION.
*See, also,* INSURANCE 7.

WORKERS' COMPENSATION—Cont'd

APPEAL.

1. The Workers' Compensation Appellate Commission is limited to reviewing only the specific findings and conclusions the parties request to be reviewed (MCL 418.861a[11]; MSA 17.237[861a][11]). *Weems v Chrysler Corp,* 201 Mich App 309.

APPELLATE COMMISSION.

2. The appropriate standard of review by the Workers' Compensation Appellate Commission after October 1, 1986, of a claim for workers' compensation, is competent, material, and substantial evidence on the whole record (MCL 418.861a[3]; MSA 17.237[861a][3]). *Douglas v General Motors,* 201 Mich App 501.
3. The Workers' Compensation Appellate Commission may dismiss an employer's appeal from a magistrate's award of medical benefits where the employer has filed a claim for review regarding the award and has paid some of the benefits, but has disputed and not paid others; the filing of a claim for review does not operate as a stay with regard to the obligation to provide the medical benefits required by the terms of the award (MCL 418.862[2]; MSA 17.237[862][2]). *Garcia v McCord Gasket,* 201 Mich App 697.

DEPENDENTS.

4. A person is partially dependent on the earnings of a deceased employee for the purpose of workers' compensation death benefits where that person has a substantial and regular income source of more than a trifling amount and did not rely totally and completely on the decedent's income (MCL 418.321; MSA 17.237[321]). *Weems v Chrysler Corp,* 201 Mich App 309.
5. The provision fixing the minimum weekly benefit level of workers' compensation death benefits is applicable to benefits paid to partially dependent claimants (MCL 418.356[2]; MSA 17.237[356][2]). *Weems v Chrysler Corp,* 201 Mich App 309.

DUAL EMPLOYMENT PROVISION.

6. *Wertz v Western Golf (On Reh),* 201 Mich App 4.

MENTAL DISABILITIES.

7. Where a mental disability arises out of a disabling physical injury caused by actual events of employment, the employee is entitled to workers' disability compensation benefits for the duration of the mental disability, even if the physical disability ceases to exist (MCL 418.301[2]; MSA 17.237[301][2]). *Douglas v General Motors,* 201 Mich App 501.

PRESUMPTIONS.

8. A retired employee who terminated active employment and is receiving nondisability pension or retirement benefits is presumed to have suffered no loss of earnings or earning capacity as a result of a compensable injury or disease for the purposes of the Workers' Disability Compensation Act; the presumption can be rebutted by demonstrating by a preponderance of the evidence that a work-related impairment precludes performance of any other work for which the retiree is qualified by virtue of prior training or experience and to which the retiree

WORKERS' COMPENSATION—Cont'd

can transfer, adapt, or utilize job skills and knowledge previously acquired (MCL 418.373[1]; MSA 17.237[373][1]). *Mason v Chrysler Corp,* 201 Mich App 17.

RECOUPMENT OF BENEFIT OVERPAYMENTS.

9. An employer who makes a lump sum payment of workers' compensation benefits for a past period extending more than one year and who subsequently discovers that it made an overpayment of benefits may seek full recoupment of its overpayment until one year after the lump sum payment (MCL 418.833[2]; MSA 17.237[833][2]). *Ackerman v Gen Motors,* 201 Mich App 658.

RETIREE PRESUMPTION.

10. Where an employee continues active employment until retirement and receipt of a nondisability pension, the reason for retiring is irrelevant in determining whether the retiree presumption of the Workers' Disability Compensation Act, that such an employee does not have a loss of earnings or earning capacity as the result of a compensable injury or disease, applies to the employee (MCL 418.373[1]; MSA 17.237[373][1]). *McDonald v Holland Motor,* 201 Mich App 285.

11. "Active employment" for purposes of the retiree presumption of the Workers' Disability Compensation Act means actually being engaged in performing work for an employer at the time of retirement, i.e., being actively on the job and performing the customary work of the job (MCL 418.373[1]; MSA 17.237[373][1]). *McDonald v Holland Motor,* 201 Mich App 285.

12. An employee who terminates active employment and receives nondisability pension or retirement benefits under either a private or governmental pension or retirement program that was paid by or on behalf of an employer from whom weekly workers' compensation benefits are sought is presumed not to have a loss of earnings or earning capacity as the result of a compensable injury; this presumption applies whenever the employer from whom weekly benefits are sought has contributed to a program providing the claimant with nondisability pension or retirement benefits, and even if others, including the claimant, have also contributed to the program (MCL 418.373[1]; MSA 17.237[373][1]). *Ridge v Holland Express,* 201 Mich App 505.

SETOFF AGAINST BENEFITS.

13. *Smith v Michigan Bell (On Rem),* 201 Mich App 369.

WORKERS' COMPENSATION APPELLATE COMMISSION—*See* WORKERS' COMPENSATION 1

WRITS OF GARNISHMENT—*See* GARNISHMENT 1

WRONGFUL DEATH—*See* DAMAGES 1

WRONGFUL DEATH ACT—*See*
INTOXICATING LIQUORS 1

WRONGFUL DISCHARGE—*See*
MASTER AND SERVANT 2

ZONING.
NONCONFORMING USES.
1. Permitting the continuation of a nonconforming use is designed to avoid the imposition of hardship upon the owner of property; a person who seeks to continue a nonconforming use on property belonging to another has no property right to be protected. *Gerrish Twp v Esber,* 201 Mich App 532.